

IN THE FAMILY AND JUVENILE COURT 'C' AT THE FORMER COMMERCIAL COURT BUILDING, ACCRA, HELD ON TUESDAY THE 13TH DAY OF DECEMBER 2022 BEFORE HER HONOUR HALIMAH EL-ALAWA ABDUL-BAASIT SITTING AS AN ADDITIONAL MAGISTRATE WITH MADAM VIDA DANQUAH AND MADAM PHILOMENA SACKY AS PANEL MEMBERS.

SUIT NO.: A6/155 /2023

1. EVANS ASANTE
2. BEATRICE OCANSEY
ALL OF AMASAMAN,
ACCRA
APPLICANTS

VS.

ALBERTA OMAN
KANDA 441,
NIMA, ACCRA
RESPONDENT

Parties Present

No legal representation for all parties.

RULING

This is a Ruling on an Application filed on the 5th of October 2021 for Custody and Access of the child in issue.

Applicants' Case

The 1st Applicant in his Affidavit in support deposed to on behalf and jointly with the 2nd Applicant stated that he was in a relationship with the Respondent

resulting in the birth of the child in issue who is now aged Eight (8) years old. He deposed further that when the Respondent was pregnant, he catered adequately for her and upon delivery of the child, the 2nd Applicant cared for her and nursed the baby because the Respondent's mother rejected her and the pregnancy. He stated further that the Respondent's routine was such that she leaves the child with the 2nd Applicant on her way to work in the morning and pick the child up in the evening after work but on one particular day, she failed to come for the child. The 1st Applicant says he was later informed that the Respondent had travelled out of the jurisdiction to Lebanon and at the time, the child in issue was barely Eleven (11) months old. The 1st Applicant stated further that the Respondent returned to Ghana when the child was about Two (2) years old, visited the child once and was not seen or heard of for about Five (5) years. However, sometime in October 2021, the Respondent without the knowledge and consent of the Applicants, clandestinely took the child away and later lodged a complaint at the Social Welfare Department where the 1st Applicant was given access to the child but the Respondent denied him access to the child in issue. The Applicants' therefore pray for the following;

1. An Order by the court for the Respondent to hand over the child to the Applicants to have custody.
2. An Order for the Respondent to be granted limited monthly access to the child in issue.
3. An Order by the Court to restrain the Respondent from relocating the child to any other location or person without the knowledge and consent of the Applicants.
4. Any other Order(s) deemed fit by the court.

The Respondent's Case

The Respondent was ordered to file her Affidavit in Opposition but she failed to do so.

DETERMINATION

In view of all the process so far filed, the issue for determination is **whether or not the Applicants can have custody of the child with reasonable access to the Respondent**. The court in the best interest of the child however ordered for a Social Enquiry Report (SER) to be prepared to guide the court in taking a decision as far as custody to the child is concerned.

The Social Enquiry Report (SER)

The SER as submitted by the Probation Officer, Madam Mavis Gbate on the 29th of November 2022 made certain findings and conclusions including the fact that the 1st Applicant lives at Amasaman with the 2nd Applicant and works by fixing scaffolds on contract basis where he earns between GH¢800.00 and GH¢1,000.00 a month. The Respondent on the other hand occupies a chamber and hall with her husband, a Four (4) years old son and the child in this suit. She works at Promasidor Ghana and earns GH¢1,000.00 as her fixed salary but she sometimes gets more if she makes more sales in a month. The SER gathered that Applicants expressed the desire to have custody of the child and continue taking care of her like they used to because the child have been in their custody since infancy. Indeed information gathered by the Probation Officer from neighbors of the

Applicants is that the Respondent sent the child to the 2nd Applicant when she was less than a year old and it was not until the child was Seven (7) years old when the Respondent went and took her from the Applicants without their consent. The Respondent therefore also expressed her desire to maintain custody of the child because she is the biological mother of the child and she wants to bond with the child.

Analysis

The main issue for determination **whether or not the Applicants should be granted custody of the child in issue with reasonable access to the Respondent.** It was held in case of ASEM VS ASEM [1968] GLR 1146 that *“the court was obliged by statute in deciding a question of custody to have regard to the welfare of the infant as its first and paramount consideration. The crucial question for decision in the instant case was therefore which of the parents was better suited to be entrusted with the upbringing of the child”*. However, in custody cases, there is no prima facie right to the custody of the child in either parent, but the court shall determine solely which parent is for the best interest of the child, and what will best promote its welfare and happiness. At common law, the father was generally entitled as a matter of right to custody of his minor children, but later the law generally gave the mother preference. 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 the Children’s Act, 1998 (Act 560). 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.”*

The evidence on record, as revealed by the SER shows that the Respondent left the child with the Applicants when the child was about a year old. It was further revealed that the Respondent currently has custody of the child because she forcefully took the child out of the Applicants’ custody sometime in October 2021 when the child was about Seven (7) years old. This act of the Respondent, in the opinion of the court, is tantamount to kidnapping and/or abduction which ought to be condemned. In the case of FINK vs COELHO [1999-2000] 2 GLR 16, the court held as follows; *‘This case ... is a kidnapping case and courts worldwide have always frowned on them. Ghana’s legislature has taken a serious view of what innocent children are suffering as a result of disputes over them by divorcing parents that sometimes lead to their abduction, and made a provision in the recently passed Children’s Acts, 1998 (Act 560) to protect the rights of children against abduction. Indeed, Section 46 of Act 560 provides that: “No person shall unlawfully remove a child from another who has the lawful custody of the child.”*

To determine which parent should have custody of the now Eight (8) year old girl, the court sought to rely on the child’s preference. The Panel Members spoke directly to the child to ascertain her preference, but it was observed that the child had been told what to say and her demeanor showed that she was afraid to speak. In fact, the SER indicated that when the Probation Officer interviewed the child within the court premises, she expressed her desire to be in the custody of

the Respondent. The Probation Officer however noted that it appears the child was influenced because when the child was interviewed at her school, she was independent and was able to express herself freely and indicated her preference which is contrary to what she told the Probation Officer at the Probation Office of the Court. **Section 45 (2) (c) of Act 560** provides that with matters of access or custody, the Family Tribunal shall consider *'the views of the child if the views have been independently given'*. The assumption therefore is that although the child has a preference, it appears she has been influenced, intimidated and manipulated by the Respondent to the extent that she is afraid to indicate her preference. In the case of **Edwards vs. Edwards** 270 Wis. 48, 70 N.W. 2d 22 (1955) the court held that *'the personal preference of the child is very important, although not controlling, it should be followed if the child gives substantial reasons why it would be against her best interest to award custody contrary to such expressed preference'*.

The evidence on record shows that it appears the child has always been happy and very comfortable in the Applicants' custody as she really only got to know her mother sometime in October 2021. The child in issue seem not to have really longed for her mother and it appears that she hardly had a close relation with the mother. Thus, the Respondent abducting the child and forcibly allowing the child to stay with her in her matrimonial home, a totally new environment with persons unknown to the child must have been very traumatising for the child and would have to a large extent been emotionally upsetting for the child. It is important to state that at common law, the father was generally entitled as a matter of right to custody of his minor children but later the law generally gave the mother preference. Many people assume that mothers have greater child custody rights than fathers probably because mothers are perceived as the

primary caretaker of children of the family whilst the father worked outside of the home and provided for the family. It must be emphasized there is no gender preference in custody laws and what the law recognizes is the child's best interest as the determinative factor. Thus, the duty of the court is to make decisions using a case-by-case analysis of the facts surrounding custody and will then determine what sort of arrangement is in the child's best interests. Ultimately, the court will give custody of the child to one parent based on the circumstances surrounding this case and because it is believed will promote their welfare and not because that parent's right to their children is absolute. In the case of **Opoku-Owusu vs. Opoku-Owusu** [1973] 2 GLR 349, Sarkodee J held that *'the Court's duty is to protect the children irrespective of the wishes of the parents.*

Consequently, taking into account all the facts and weighing all the circumstances, the court will take a decision based on the best, primary and paramount interest as well as the welfare of the children in issue. The learned Judge, Azu Crabbe C.J., in the case of **Tackie vs. Baroudi** [1977] DLCA 1432 in granting custody expressed his reasons in the following passage of his judgment; *"In all the circumstances of this case, and bearing all the matters in mind [the children's] best interest will be served... where I have a comfortable feeling that they will be well cared for."* The learned judge then continued, *"Let me hasten to add that the court can always be resorted to when things change. One can readily understand the wisdom and good sense of this approach."*

DECISION:

Upon consideration of the Application, the evidence before the Court, the testimony of both parties and pursuant to the provisions of The Children’s Act (1998) Act 560, the Court is satisfied that it will be in the best interest of the child to grant this instant Application and further orders as follows;

1. The Applicants shall have custody of the child and the Respondent shall have reasonable access to the child during weekends fortnightly and half of school vacations. The Respondent is to pick the child up from the Applicants on Fridays by 5pm and the 1st Applicant is to pick up the child from the Respondent on Sunday by 4pm. The custody order shall take effect from 30th December, 2022.
2. The Respondent is restrained from relocating the child to any other place without the knowledge and consent of the Applicant.

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

I AGREE

I AGREE

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MADAM PHILOMENA SACKEY
DANQUAH
PANEL MEMBER

MADAM VIDA
PANEL MEMBER

