

IN THE FAMILY AND JUVENILE COURT 'C' AT THE FORMER COMMERCIAL COURT BUILDING, ACCRA, HELD ON FRIDAY THE 6TH DAY OF JANUARY 2023 BEFORE HER HONOUR HALIMAH EL-ALAWA ABDUL-BAASIT SITTING AS AN ADDITIONAL MAGISTRATE WITH MADAM REGINA TAGOE AND MADAM LOVEGRACE AHLIJAH AS PANEL MEMBERS.

SUIT NO. A6/133/23

MANSAH AGBAGLO
KORLE GONNO, ACCRA

APPLICANT

VS.

MICHAEL QUAYE
EAST LEGON, ACCRA

RESPONDENT

Parties Present

Dora Bawaa Asamoah Esq. for the Applicant

RULING

This is a Ruling on an Application filed on the 20th of September 2022 for the custody and maintenance of the children in issue.

The Applicant's Case

The Applicant deposed in her Affidavit in Support that she is married to the Respondent but they are currently separated. She deposed further that she moved out of the matrimonial home into her business shop partly due to the Respondent's physical abuse but the Respondent later brought the rest of her

belongings. Upon leaving the matrimonial home, the Two (2) children were left in the custody of the Respondent of which he later sent them to his mother at Chorkor where the Applicant visits and sometimes have access to the children. The Applicant deposed further that she subsequently fell ill due to the Respondent's maltreatment and physical abuse but was later treated at the Pantang Hospital. However in 2016, the Respondent took steps to dissolve the marriage and have custody of the children at the Legal Aid Office but was advised to proceed to court. He later told the officials of the Social Welfare Department that the Applicant was mentally ill but failed to show evidence of such even though the Pantang Hospital had issued her with a Medical Report, but the Respondent refused to discuss the custody of the children further. The Applicant therefore prays for the following;

1. An Order to grant custody of the children to the Applicant with reasonable access to the Respondent.
2. An Order for the Respondent to maintain the children at Ghc500.00 a month.
3. An Order for the Respondent to re-enroll the children into a school within the vicinity of the school, pay school fees and anything connected to school.
4. An order for the Respondent to pay medical bills not covered by NHIS and renew same when it expires.
5. Any other orders deemed fit by the court.

The Respondent's Case

The Respondent in his Affidavit in Opposition filed on the 17th of October 2022 confirmed the marriage with the Applicant in 2009 and the birth of the Two (2) children as well as the fact that they currently live separately. He deposed further that the Respondent has frequently physically assaulted him and the matter ended up at the Police Headquarters, Accra and is still pending. He indicated that the Applicant has been receiving treatment at the Pantang Hospital after she was diagnosed of Manic in 2006 and has since been on medication to make her sober. He stated further that the Applicant before deserting the matrimonial home never performed her parental duties and care given roles such as bathing the children, preparing their meals, taking them to school and back, washing their clothes, among others. He indicated again that he and his mother have been responsible for all such duties as the children have always been with him with no problems at all. He stated that the Applicant occasionally directs her aggression towards the children by beating them mercilessly and throwing objects at them at the least provocation. He denied seeking the dissolution of the marriage and insisted that he has been taking good care of the children who are healthy, strong and attend one of the best schools in Accra with good Terminal Reports. He stated that he has never denied the Applicant access to the children but says further that the Applicant is not fit to have custody of the children due to her consistent aggressive behavior and conduct towards the children. The Respondent concluded by saying that the amount of Ghc500.00 as proposed maintenance is less than the expenditure he incurs on the children. He stated further that the children are already in a good school and any change of school will hamper their academic development and growth.

DETERMINATION

In view of the processes before the court, the issues for determination are;

1. Whether or not the Applicant is mentally stable and fit to have parental control over the children.
2. Whether or not the custody of the children should remain with the Respondent.

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 both parties and as such ordered for a Social Enquiry Report (SER).

The Social Enquiry Report (SER)

The SER as submitted by the Probation Officer, Mr. Joseph Nii Ayikwei Attoh dated 25th of November, 2022 made certain findings and conclusions including the fact that the Applicant lives at Korle Gonno in a single room and works as a seamstress where she earns about One Thousand Ghana Cedis (Ghc1, 000.00) monthly. The Respondent lives at both Dawhenya and Chorkor, is a teacher at the Presbyterian Senior High School, Legon and also a Pastor at a church in Dansoman. The SER gathered that the parties were indeed married and birthed the children in issue who have been staying with their paternal grandmother for the past Four (4) years, yet the Applicant visits the children to perform basic

chores such as bathing and washing their clothes. The SER also gathered that the Applicant has been sending food to the children in school every day because the Respondent's mother does not give the children enough money to take to school.

Analysis

The first issue for determination is **whether or not the Applicant is mentally stable and fit to have parental control over the children**. The evidence on record shows that the Applicant herein suffered a mental illness at a point in time. In fact, it is the Respondent's case that in view of the history of the mental state of the Applicant, she is unfit and incapable of having custody of the children. It must be stated again that the primary factor considered by a Family Court is always the well-being of the child, so that when mental illness of a parent is added into the list of factors, then child custody decisions become even more complicated. The effects of mental illness makes it difficult for a parent to care properly for their children, meaning their well-being can suffer. Thus, if a parent has a history of mental illness, and the other parent accuses them of being an unfit parent, then Court will have to review many different factors such as parent's current ability to function; provide a safe environment; hygiene and overall well-being; employment stability; medical documentation; treatment and medication history; as well as the nature of mental illness; among others. Courts will always act in the best interests of the child, but it does not mean the parent with mental health issues will be denied child custody, yet family courts are not likely to grant a parent custody of a child if they are not capable of maintaining a stable living situation, or currently displaying signs of mental instability; or not making proper life decisions due to issues with mental health.

To convince the court that she is mentally stable, the Applicant produced a Medical Report from the Pantang Hospital, which was a Report written in response to a request by the Ablekuma Central Municipal Assembly. Apparently, the Applicant had made efforts at having custody of her children but the Respondent raised the issue of mental instability, hence the request for the Report. The said Report, dated 5th March 2021 and signed by Dr. Bernice Addo, a Specialist Psychiatrist at the Pantang Hospital stated, among others that the Applicant was first seen at the Facility on the 15th of February 2006, was diagnosed as being manic and started treatment. After scheduled reviews and compliant in treatment, she was taken off medication and discharged in 2014. The Report further stated that the Applicant was back at the Facility in 2016 with complaints of verbal and physical abuse from the Respondent that affected her mood and ability to sleep, but concluded the Report by stating that the Applicant is currently fit to go about her normal duties.

The court observes that the SER prepared by the Probation Officer on the 25th November 2022, never raised issues to the effect that the Applicant is currently mentally unstable. The court observes also that other persons interviewed by the Probation Officer never raised issues to the effect that the Applicant is mentally unstable, neither did he Probation Officer indicate in the Report that he observed that the Applicant was mentally unstable. Thus, the evidence gathered by the Probation Officer and per the SER shows that the Applicant is not currently displaying any signs of mental instability. The SER further revealed that the Applicant is self-employed, capable of maintaining a stable living situation and also capable of making proper life decisions. However, for the court to really satisfy itself that the Applicant is mentally stable, the Court on the 30th of November 2022, ordered the Applicant to submit herself at the Accra Psychiatric

Hospital for a medical examination and a Report submitted to the court. Consequently, a Report from the Accra Psychiatric Hospital dated 22nd December 2022 and signed by Dr. Naa Adoley Botchway, a Specialist Psychiatrist for Dr. Pinaman Appau, a Consultant Psychiatrist indicated among others that on examination of her mental state, the Applicant had no abnormal movement, her speech was spontaneous, coherent and relevant with a normal tone, volume and rate. The Report indicated further that the Applicant's thought process was normal with no delusions and no hallucinations. Her abstract thinking was preserved and her memory, attention, concentration and judgment were all good. The Report concluded by stating that current assessment reveals that the Applicant has a stable mental state and is functioning optimally. Thus, based on the expert opinion of the Doctors as stated in the Report, the court is satisfied can safely state that the Applicant is currently mentally stable and therefore fit to have parental control over her children.

The next issue for determination is **whether or not the custody of the children should remain with the Respondent**. 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 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 determining which of the parents is best suited to have custody of the children, the court relies on the case of **Attu vs. Attu** [1984-86] 2 GLR 743, where the learned Judge was of the opinion that *‘...in considering matters affecting the welfare of the infant, the court must look at the facts from every angle and give due weight to every relevant material’*. 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. Section 45(1) of Act 560 which provides 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’*. The children in issue are aged Nine (9) and Seven (7) years respectively and it may be argued that they are still young and ought to be in the custody of their mother. These children are girls and it is again argued that it will be in the best interest of children who are still young and are girls to be with their mothers. Indeed, in the case of **Bentsi-Enchill vs. Bentsi-Enchill** [1976] 2 GLR, the court held that *‘the primary concern of the court is to ensure that there are appropriate safeguards for a child’s general welfare, irrespective of the interests of the parents... Normally the mother should have the care and control of young or sickly children (particularly girls) or those who for some other reason need a mother’s care’*.

Additionally, **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'. 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 court had the opportunity to speak to the children in order to ascertain their preference but the court observed that the children were afraid to say their preference. It appears the children had been intimidated and manipulated by the Respondent to the extent that they were afraid to talk. This is supported by the observations of the Probation Officer who also indicated in the SER that it appears the Respondent has polluted the children's mind that they expressed their desire to stay with him. The court is therefore unable to rely on the children's preference as it is safely assumed that such preference was not independently given by the children.

The evidence on record again shows that the children at all material times live with the Respondent's mother whose aged is difficult to ascertain as her age has been stated as 90 years in the SER, but the Respondent stated in open court that his mother ages between 74 and 75 years. Be that as it may, the children's paternal grandmother is too old to be responsible for the upkeep of the children. It is therefore not surprising that the SER gathered that the Applicant assists in the upkeep of the children by visiting them and performing basic chores of bathing the children and washing their clothes. It was further gathered that the Applicant sends food to the children in school every day because the Respondent's mother does not give the children enough money to take to school. The Respondent however rejects this assertion and per his Supplementary Affidavit in Opposition filed on the 20th of December 2022, he informed the court that he has now relocated the children to live permanently with him at

Dawhenya. The evidence on record however shows that when the children to are with him at Dawhenya, he leaves the children with someone who lives close to them when going to work. It therefore presupposes that the Respondent has to depend on others for the upkeep of the children but at the same time does not want the Applicant, who is the children's biological mother to have anything to do with their upkeep. In the case of **Aikins vs. Aikins** [1979] GLR 223, the learned Judge held as follows; '*... I do not think I should give custody to a parent whose purpose is to deliver the children to another.*' It is important to state that 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. 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.*"

Additionally, it is important to note that the Probation Officer, who at best, is an Independent Investigator 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 Applicant with reasonable access to the Respondent and the court finds it extremely difficult to depart from the recommendation of the Probation Officer.

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 is satisfied in the best interest of the child orders as follows;

1. The Applicant shall have custody of the children and the Respondent shall have reasonable access to the children during school vacations. The Respondent shall return the children back to the Applicant on the last weekend prior to resumption of schools.
2. The parties are to look for a decent school within the vicinity of the Applicant and enroll the children immediately as a new academic year has just begun. The Respondent shall be responsible for the payment of school fees and all incidental school fees including text books, exercise books and feeding fees. The Applicant shall be responsible for the school uniforms, school bags and school sandals of the children.
3. The Respondent shall pay the maintenance sum of Five Hundred Ghana Cedis (Ghc500.00) monthly and same is to be paid via the Respondent's Mobile Money Account within the first week of every month with effect from January 2023.

4. The Applicant shall register the children under the National Health Insurance Scheme (NHIS) and renew same when it expires. The Respondent shall pay for all medical bills not covered by NHIS.
5. The Applicant shall attend the Six (6) monthly reviews for assessment of her mental state as recommended by the Specialist Psychiatrist at the Accra Psychiatric Hospital.

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

I AGREE

I AGREE

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MADAM PHILOMENA SACKEY
PANEL MEMBER

MADAM LOVEGRACE AHLIJAH
PANEL MEMBER