

IN THE FAMILY AND JUVENILE COURT 'C' AT THE FORMER COMMERCIAL COURT BUILDING, ACCRA HELD ON TUESDAY THE 28TH DAY OF MARCH 2023 BEFORE HER HONOUR HALIMAH EL-ALAWA ABDUL-BAASIT SITTING AS AN ADDITIONAL MAGISTRATE WITH ~~MADAM PHILOMENA SACEY AND MADAM VIDA DANQUAH AS~~ PANEL MEMBERS.

SUIT NO. A6/274/23

ROSEMOND MCKOY
TABORA-ALHAJI, ACCRA

APPLICANT

VS.

JOHN MENSAH MCKOY
TABORA-ALHAJI, ACCRA

RESPONDENT

Parties Present.

No Legal Representation for both Parties.

RULING

**APPLICATION FOR MAINTENANCE AND CUSTODY PURSUANT TO
ORDER 32 OF THE DISTRICT COURT RULES C. I. 59**

Background:

The Applicant filed an Application on the 21st of December 2023 for the maintenance of the children in issue and in her Affidavit in support, she deposed that she was married to the Respondent and they have Three (3) children aged Six (6) years, Four (4) years, and One (1) year respectively. She deposed further that she left the matrimonial home of which the Respondent subsequently informed her family that he is no longer interested in the marriage. She concluded by saying that it appears the Respondent has made up his mind not to continue with the marriage. She therefore prays for the following reliefs.

- a) To maintain the children with an amount of One Thousand Six Hundred Cedis (Ghc1, 600.00) per month.
- b) Pay their school fees, maintenance, clothing and medical bills when the need arises.
- c) To maintain Applicant with a monthly allowance of one Thousand five Hundred Ghana Cedis (GH c 1,500.00) including hospital bill when necessary.
- d) To rent a room for the Applicant and the children.
- e) Cost

The Respondent's Case

The Respondent on the 31st day of January 2023 filed Affidavit in opposition and confirmed that he was married to the Applicant and have Three (3) children with her. The Respondent deposed that the Applicant and her father connived and deceptively took the children to Obuasi to indoctrinate the children against him. He further deposed that the Applicant is not entitled to any reliefs at all because she knows too well that he is not in a position to financially fulfill all that the Applicant seeks, rather she should be made to return the children and work on her emotional imbalances as well as admit her emotional challenges.

DETERMINATION

In view of the processes so far filed as well as the testimony of the parties, the main issue before the court is **whether or not the custody of the children should remain with the Applicant with reasonable access to the Respondent.** It is important to state that 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) 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'*. The onus therefore lies on the court to determine whether granting custody to the Applicant will be in the best interest of the children. In arriving at a conclusion, the court ought to conduct an investigation into the background of all parties, hence the Order for a Social Enquiry Report (SER).

The Social Enquiry Report

The SER as submitted by the Probation Officer, Madam Mavis Gbate on the 7th of March 2023 made certain findings among others. The Applicant occupies a room with the children in a Six (6) bedroom self-contained at Obuasi where she share the compound with her father and younger brother whilst the Respondent occupies Two (2) bedroom self-contained at Tabora-Alhaji with his Fourteen (14) year old child from a different relation as well as a niece and nephew aged Twenty-Three (23) and Twenty-Eight (28) years old respectively. The Applicant used to trade in clothes where she earned about Seven Hundred Ghana Cedis (Ghc700.00) on a monthly basis but the Respondent is an employee of Diamond Capital Bank and earns Two Thousand Five Hundred Ghana Cedis (Ghc2,500.00) monthly. The SER confirmed the marriage and birth of the children in issue as well as the separation of the parties as a couple in December 2022. The Probation Officer further gathered that although the Applicant lives in Obuasi together with the children but it appears she wants to relocate to Accra with the children because of their education.

Analysis

It must be stated that upon the presentation of the SER, the Respondent informed the court that he wants the Applicant back to the matrimonial home with the children. Based on this statement, the court, in the best interest of the children, ordered both the Applicant and the Respondent to come along with their family members to court on the next adjourned date to attempt a resolution of the dispute between the parties. On the next adjourned date however, the Respondent failed to come along with his family members although the Applicant came along with her father and brother. The Respondent further denied that he expressed interest in having the Applicant back to the matrimonial home. It therefore became obvious to the court that the Respondent suffered from indecision, hence the need for the court to take a final decision as far as the children are concerned.

It is trite that 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.”* The learned Judge, Edmund Davies L.J. in Re C. (A) (an Infant); C. v. C. [1970] 1 All E.R. 309 at p. 313, C.A. said that *‘in all cases the paramount consideration is the welfare of the infant and the court must look at the whole background of the infant’s life and at all the circumstances of the case’.*

In considering custody, Section 45(1) of Act 560 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 evidence on record shows that the eldest child is a Six (6) years old, an infant and a pre-schooler. Infants and preschool children are the group most adversely affected by the consequences of separation or divorce. There is therefore the need for them to have a stable, safe and secure attachments to both parents but the law posits that it will be in the best interest of children of that age to be with their mother. 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. In the normal course, the mother should have the care and control of very young children...’*

The SER further gathered that the children prefer to be in the custody of the Applicant as against the Respondent. At this point, the duty of the court is to determine whether to rely on the child’s preference so as to award custody. Generally, the weight to give to the custodial preference of the child depends largely on the child’s capacity to make an informed and intelligent judgment. Unfortunately, the law does not set a specific age at which it will be presumed that the child has such capacity but such capacity will be evaluated individually on the basis of the child’s mental development, maturity and the extent to which the child exhibits intellectual discretion. 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'*.

In spite of the children's preference, the court has a duty to determine whether the Applicant or the Respondent deserves custody of the child. 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"*. The evidence on record shows that the children in issue are indeed very young, aged Six (6) and Four (4) years respectively yet they have made a choice and were able to adduce reasons as to why they prefer to be in the custody of the Applicant but the last child is barely a year old and as such could not appreciate the entire process.

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 child 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 testimony of the parties, the SER and pursuant to the provision of the Children's Act, 1998 (Act 560) the court orders as follows;

- a) The Applicant shall have custody of the children and the Respondent shall have reasonable access as follows;
 - (i) The Respondent shall have access by visiting the children during the last weekend of every month.
 - (ii) The Respondent is at liberty to visit the children as and when he wants to but shall inform the Applicant before such visit of which the Applicant shall not unreasonably withhold consent.
- b) The Respondent shall pay a maintenance sum of Seven Hundred Ghana Cedis (Ghc700.00) towards the upkeep of the children and same is to be paid within the first week of every month with effect from April 2023 via Applicant's NIB bank Account.
- c) The Respondent shall pay the children's school fees and all other incidental fees whilst the Applicant shall provide school sandals and bags.
- d) The Applicant shall register the children under National Health Insurance Scheme (NHIS) and the Respondent shall pay for all medical bills not covered by NHIS.
- e) The Applicant shall pay for an alternative accommodation for the Applicant and the children on or before the 30th of June 2023. The parties are to agree on the suitable accommodation and both should be considerate and reasonable.

- f) The Respondent is to pay the outstanding amount of One Thousand Seven Hundred and Twenty-Nine Ghana Cedis (Ghc1,729.00) being cost of school fees on or before the 30th of April 2023.

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

I AGREE

I AGREE

.....
MADAM PHILOMENA SACKEY
PANEL MEMBER

.....
MADAM VIDA DANQUAH
PANEL MEMBER