

IN THE FAMILY AND JUVENILE COURT 'C' AT THE FORMER COMMERCIAL COURT BUILDING, ACCRA, HELD ON WEDNESDAY THE 4<sup>TH</sup> DAY OF JANUARY 2023 BEFORE HER HONOUR HALIMAH EL-ALAWA ABDUL-BAASIT SITTING AS AN ADDITIONAL MAGISTRATE WITH MADAM FELICIA COFIE AND MR. WISDOM ATIASE AS PANEL MEMBERS.

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SUIT NO. A6/199/23

EUGENIA WONGKYEZENG  
KUMASI, ASHANTI REGION

APPLICANT

VS.

NANA KWAME OFOSUHENE  
SPINTEX, ACCRA

RESPONDENT

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**Parties present**

**Doe Agbenu Esq. for the Applicant.**

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### RULING

This is a Ruling on an Application filed on the 2<sup>nd</sup> of November 2022 for the custody and maintenance of the child in issue.

#### *The Applicant's Case*

The Applicant deposed in her Affidavit in support that she was in a relationship with the Respondent resulting in the birth of a son who is now Eight (8) years old. She stated that when the child was about Two (2) years old, the Respondent requested for the child to stay with him or else he will not honour the child's school fees, compelling her to comply with his request. She deposed further that the child has been with the Respondent for the past Six (6) years and during the

period, the child has changed schools Four (4) times all due to the non-payment of school fees even though she has been assisting in the payment of the child's school fees. She continued that the frequent change of schools has affected the child's education to the extent that the child who is now Eight (8) years is still in Kindergarten 2. She further deposed that all efforts at getting access to her child have been futile even after involving both sides of the family to discuss the issue. She therefore prays for the following;

1. An Order for the Respondent to hand over the child to the Applicant for her to get custody of same.
2. An order to maintain the child at Ghc1, 500.00 monthly, pay school fees and anything connected to school.
3. An Order to pay medical bills not covered by NHIS and to register the child with the Scheme and renew same when it expires.
4. Any other Orders deemed fit by the Court.

### *The Respondent's Case*

The Respondent in his Affidavit in Opposition filed on the 14<sup>th</sup> of November 2022 confirmed the relationship with the Applicant and the birth of the child but stated further that his intention was to marry the Applicant but her family opposed that. He indicated that after the birth of the child, the Applicant was always commuting between Kumasi and Accra in search for job and as such brought the child to him at the tender age of Two (2) and he has been taking good care of the child till date. He deposed further that he changed the child's school due to the school's lack of attention and proper supervision but has currently engaged the services of a private teacher to help improve the child's

performance. He continued by stating that he takes very good care of the child but only caused him to repeat his class based on the advice of the teachers and upon securing the services of a private teacher, he has been assured that if the child's performance improved, he will be jumped over to the next level. He therefore prays for the Application to be dismissed and also sought for the following reliefs;

1. An Order for custody of the child to remain with the Respondent.
2. An Order for the Applicant to pay part of the maintenance of the child.
3. An Order for the Applicant to pay for the cost incidental to the suit.

#### **DETERMINATION**

In view of the processes before the court, the main issue for determination is whether or not the custody of the child 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) 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, Madam Janet Dzata dated 21<sup>st</sup> of December, 2022 made certain findings and conclusions including the fact that the Applicant is self-employed and works online from home where she earns about GHC1,000.00 every month. She lives with her parents live in a Seven (7) bedroom self-contain at Barekese a suburb of Kumasi where she occupies one bedroom with her one year old son from another relationship. The Respondent, on the other hand, also lives with his parents, his two younger sisters and the child in a Four (4) bedroom self-contain at Manet Cottage at Batsona on the Spintex road. He is gainfully employed and earns about GHC4,000.00 every month. The SER revealed that the child was born in Kumasi but when he was about Four (4) months old, the Applicant moved to Accra and lived with her elder sister at Roman Ridge until the child was Two (2) years old. The SER further revealed that when the child was 2 years old, the Respondent told the Applicant to look for school in her area at Roman Ridge in order to enroll the child in school but the schools at Roman Ridge were expensive for the Respondent so he asked the Applicant to give the child to him so that he would be part of the child's education and the Applicant obliged. The Probation Officer observed that it appears the Respondent did not pay attention to the child's education and this has affected the child's academic performance but rather keeps blaming the child's former schools for the child's poor performance. However, the information obtained by the Probation Officer during investigation revealed that the child was moving from one school to another as a result of the non-payment of school fees. The Probation Officer further observed that the child was enrolled in Eastern Heroes Montessori from 2017 to 2018 and moved to Lovely Arms in January, 2020 academic year, thus revealing that the child did not indeed attend school throughout 2019. The SER again gathered that it appears that the Respondent is struggling to pay the child's school fees even though the

Applicant sometimes supports him in paying the school fees. It was further gathered that the Applicant has been part of the child's life since the Respondent had custody of the child and she has access on vacations but it appears since April 2022, the Respondent has denied her access to the child.

### Analysis

The main issue for determination is **whether or not the custody of the child should remain with the Respondent**. It must be stated 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."*

In considering which parent should have custody of the child, 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'. Similarly, in **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 ... or those who for some other reason need a mother's care'. Again, in the case of **Attu vs. Attu** [1984-86] 2 GLR 743, 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'. Thus, that the welfare of the infant is the first, primary or paramount consideration is therefore indisputable. But as Harman LJ put it in **In re O (An Infant)** [1965] 1 Ch 23 at 29, C.A. "What you look at is the whole background of the child's life and the first consideration you have to take into account when you are looking at his welfare is: who are his parents and are they ready to do their duty?"*

The evidence on record shows that the child has been with the Respondent for the past Six (6) years and the basis for the Applicant's Application is that the child's education has not made much progression because at the age of Eight (8), the boy is still in the Kindergarten class and attributes this to the Respondent's lack of supervision. Indeed, the SER gathered that there has been frequent change of schools due to the lack of payment of school fees as well as the fact that it appears the child misses school frequently. It must be stressed that attending school is vital to the education and growth of a child because not only do they study important life skills, like math and reading, but also they learn how to socialize, handle problems with others, and much more. When school attendance becomes a problem, it can be extremely damaging to your child's immediate well-being and future as disruptions in regular school attendance tend to deprive

the child of important school lessons. It is therefore the responsibility of every parent to ensure that a child receives a proper education and this means the need to make sure your child misses as little school as possible. So that if the custodial parent demonstrates issues with their child's school attendance or if the child is failing classes or is in danger of being held back a class, or there is evidence that this is a long-standing issue, the court is much more likely to take immediate action. Often, this means modifying the custody arrangement to award the other parent with custody of the child or increased time with them.

However, the evidence shows that the Applicant willingly allowed the Respondent to have custody of the child at the age of Two (2) years and the court wonders why she took such a decision. It is trite that children as young as Two (2) years are assumed to be too young to be separated from their mothers. The Applicant however stated that her reason for giving the child to the Respondent was because of his threat not to honour his school fees and the court finds that reason quite thought-provoking. Additionally, it appears to the court that the Applicant has not been stable over the years as she travels often and often relies on her sister to take care of the child. As such, the court wonders whether the child's educational outlook will be better with Applicant, who is his mother. The court at this point, per the evidence on record, is trying to figure out what will be in the best interests of the child. Since education is very important to children and performance in school can factor into their further educational opportunities and career opportunities, it is thought of as a relevant factor when determining where a child should live. The SER revealed that the Applicant has always been in the life of the child and has often paid the child's school fees, a fact the Respondent never denied. This implies that she has made efforts towards the welfare and upkeep of the child, so that her instant approach to the Court for a

determination of custody on a basis that the child's education has been staggered, is consistent with a genuine desire for the welfare of the child as well as custody. It was held in **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"*.

It must be stressed that no one parent should feel or think that s/he has a higher right or responsibility of the child as against the other parents, both parents have equal rights and responsibilities over their children. 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 children'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 **Attu vs. Attu** [1984-86] 2 GLR 743, 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'*.

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.”*

The court is therefore of the opinion that there will be the need to place the child in an environment where his education will be monitored and particular attention will be paid to the child’s performance in school. The evidence on record shows that the Applicant, to an extent, has demonstrated her commitment to address the child’s education henceforth. Additionally, 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 child 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 evidence before the Court, the testimony of both parties, the Social Enquiry Report and pursuant to the provisions of the Children’s Act (1998) Act 560, the Court is satisfied it will be in the best interest of the child to grant this Application and orders as follows;

1. The Applicant shall have custody of the child and the Respondent shall have reasonable access during the child’s school holidays. The Respondent shall pick the child up on the first weekend of vacation and

the Applicant shall pick the child up from the Respondent on the last weekend prior to the resumption of school.

- 2. The Respondent shall pay the maintenance sum of Five Hundred Ghana Cedis (Ghc500.00) monthly and same is to be paid via the Applicant's Bank Account with the following details; Eugenia Dubonoba Wongkyezeng, 2100406291116, Fidelity Bank, Dzorwulu; within the first week of every month with effect from January 2023.
- 3. The Applicant shall register the child under the National Health Insurance Scheme (NHIS) and renew same when it expires. The Respondent shall pay all medical expenses not covered by the NHIS.
- 4. The Respondent shall pay the child's school fees as well as all incidental school expenses of textbooks and exercise books whilst the Applicant shall pay for the child's feeding fees, school uniforms and school bags.
- 5. There shall be no orders as to costs.

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

**I AGREE**

**I AGREE**

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**MADAM FELICIA COFFIE**  
**PANEL MEMBER**

**MR. WISDOM ATIASE**  
**PANEL MEMBER**