

30th July, 1998

Judge:-

Onor. Gino Camilleri LL.D.

A

versus

B

**Letters of Request - Evidence which is Indispensable for the
Determination of Any Case - Paramount Consideration of
Child's Welfare**

In a case relating to the care and custody of the parties' common child the overall consideration which guides the court is that the interests of the child are always safeguarded. The length of court proceedings may also impinge on these interests.

Therefore a request for the tendering of evidence which, in the circumstances of this case, was deemed not to be indispensable for the determination of the lawsuit, was turned down.

The Court:-

Having seen defendant's request as recorded in the sitting of the 21st of July, 1998, to the effect that Giovanni Melfi, who at present resides in Australia, be examined by means of letters of request for the purpose of obtaining information on incidents that took place in Australia and information regarding plaintiff, who is his former wife;

Having seen that plaintiff, during the same sitting of the 21st July, 1998, in respect of this request, submitted that this is a delaying tactic since it was intended that all evidence would be concluded in that sitting. Plaintiff also has reason to believe that Giovanni Melfi, despite being on very friendly terms with plaintiff and her family, would not like to get involved with these proceedings;

During the same sitting plaintiff reserved to make further oral submissions after examining the questions which defendant proposes to put to the witness in question;

Having seen the list of questions, which the defendant proposes to put to Giovanni Melfi (p. 331 and 332);

Having seen the summons of the sitting of the 27th July,

1998, from which it results that plaintiff further submitted that: (1) the majority of the questions are not relevant, if not all of them; (2) the request will delay these proceedings unduly; (3) Giovanni Melfi is not a willing witness and he has refused to testify on both parties' request; (4) these proceedings are being heard with urgency; and (5) if defendant wanted to force Giovanni Melfi to testify he should have returned the child as agreed and filed custody proceedings in Australia;

Having seen that during the same sitting of the 27th July, 1998, defendant submitted that the questions are important for these proceedings because they throw a light on the plaintiff's credibility in these proceedings and, more importantly may give the Court a better opportunity to further examine what is the ultimate interest of the minor child in question. In no way is the defendant attempting to unnecessarily prolong these proceedings. With regard to the reluctance or otherwise of Giovanni Melfi giving evidence in these proceedings, *the defendant submits that such evidence will be given through a court order and Giovanni Melfi would have to testify as any other witness has been subpoenaed;*

Plaintiff made reference to defendant's evidence of the 19th June, 1998, particularly p. 19 and 21 where reference is made to Giovanni Melfi;

Having heard all oral submissions made by the parties in respect to the request that Giovanni Melfi be heard as a witness in Australia through letters of request;

Having seen the minutes of the sitting of the 27th July, 1998;

Having considered that:

This decision refers to defendant's request that Giovanni Melfi, who is the ex-husband of plaintiff and who at present resides in Australia, be heard as a witness in the country of his residence, through letters of request;

Article 613 of the Code of Organisation and Civil Procedure (Chapter 12) provides amongst other things that: "Where it is made to appear to the satisfaction of any of the superior courts ... that the evidence of any person, who is absent from Malta, is indispensable for the determination of any cause ... it shall be lawful for the court to make an order declaring the examination of such witness to be necessary ...";

In terms of these provisions therefore, the Court must not only be satisfied that the evidence of the person abroad is important or necessary but that it is "indispensable" for the determination of the case. In other words without the evidence of the person who is absent the particular case cannot be decided or determined;

Indeed the Maltese text of the law provides that the evidence of the person who resides outside Malta is "*indispensabbli ghad-deċizjoni ta' kawza*". It is obvious that such should be the case because the hearing of a witness abroad entails a rather lengthy procedure, will inevitably delay and prolong the hearing of the case for months if not years;

In order to determine whether a witness is "indispensable" or not, one has to examine the questions intended to be put to him in the context of the question which has to be decided in the particular case. The person in question is the ex-husband of the plaintiff, who has lived with plaintiff for some time and therefore can testify as to the character of plaintiff, her way of life and her aspirations. He can also testify as to some facts or

episodes which are to his knowledge;

Defendant, however, has also lived with plaintiff for some time and therefore also he can testify as to plaintiff's character, her life-style and her ambitions. The parties have lived together for some time in Malta, in close contact with defendant's family. Therefore members of defendant's family have also come to know plaintiff and they too can throw light on her character. Indeed various members of defendant's family have taken the witness stand in this case;

This case relates to the care and custody of the parties' common minor child. Therefore plaintiff's marriage with the person living abroad and the subsequent divorce are not strictly relevant. Likewise irrelevant is the question relating to the care and custody of the child that plaintiff had from the person whose evidence is being sought by defendant;

The question as to the alleged abortion, which plaintiff is supposed to have had, strictly speaking is not pertinent to the case and it is certainly not a question which is "indispensable" for the determination of this case;

It has to be noted that defendant himself, whilst giving evidence in these proceedings, expressed doubts as to whether *Giovanni Melfi always says the truth* (*vide defendant's evidence given in the course of the sitting of the 19th June, 1998*);

In this case the primary and overall consideration which *guides the court is that the interests of the parties' minor child* are always safeguarded. It will not be in the interest of the child that this case be unnecessarily prolonged. In view of the particular circumstances, this case should be decided as soon as possible;

In view of the above therefore it does not result that the evidence of Giovanni Melfi is indispensable for the determination of this case. Consequently, defendant's request for Melfi to be heard in Australia should be turned down;

For all these reasons;

Decides on defendant's request as recorded in the sitting of the 21st July, 1998, to the effect that Giovanni Melfi, who at present resides in Australia, be heard as a witness, by overruling such a request.
