

**25th November, 1998**

**Judges:-**

**Hon. Joseph Said Pullicino B.A. (Hons.), LL.D. - Chief Justice**

**Hon. Carmel A. Agius B.A., LL.D.**

**Hon. Joseph D. Camilleri LL.D.**

**Sylvia Melfi**

*versus*

**Philip Vassallo**

**Custody - Minor Children - Maintenance - Personal Separation**

*A custody matter: the Court of Appeal awarded custody to plaintiff; in confirming the Judgement of the First Court, the Court of Appeal took into account as a paramount principle the welfare of the child.*

**The Court:-**

The parties are the unmarried natural parents of Danica. In issue is the custody of this six year old child;

Plaintiff is a resident of Perth, Western Australia. She met the defendant, a Maltese national, in July 1891, in Perth, where the latter was following an air pilot trainee course;

At that time plaintiff was separated from her husband, Giovanni Melfi. Their four year old son Rick was living with plaintiff. They were divorced in April 1993;

Plaintiff found out that she was pregnant by the defendant in September 1991. She agreed to come to Malta for the birth of her child. Danica was born here on the 14th May, 1992. Her birth certificate originally showed Giovanni Melfi as her father. However, the defendant recognised Danica as his daughter, by a deed dated 4th November, 1997, enrolled in the records of Notary Doctor Marco Burlò;

The parties lived together with Danica during 1992 to 1994 mainly in Malta. Since December 1994, Danica lived with her mother and her half brother mainly in Australia. The defendant lived in Malta;

*Neither of them were able to live with each other in Malta or Australia and this surely caused a lot of strain to their relationship which ended in 1997;*

In November 1997 the parties met in Portugal. Plaintiff agreed to let Danica go with defendant to England and the latter promised that he would return Danica to the plaintiff on the 19th November, 1997. However, the defendant broke this promise and refused to return Danica to her mother. He came over to Malta and eventually started proceedings before the Second Hall of the Civil Court. He was given provisional custody of Danica by a decree dated 17th February, 1998. This decree was given without prejudice to the plaintiff's right in case the

curators appointed to represent her did not manage to communicate with her. As a matter of fact, plaintiff was not aware of these proceedings, as the defendant gave plaintiff's address in Australia only after the Court's order as made. The present case was instituted by plaintiff on the 21st May, 1998. She is basically asking the Court to grant her custody of Danica and it is obvious that plaintiff wants to take the child with her to Australia;

The defendant is contesting this claim both by a statement of defence and also by a counter claim, whereby he is asking the Court to confirm the said order given by the Second Hall of the Civil Court;

The First Hall of the Civil Court, in its judgement on the 19th August, 1998, decided to allow plaintiff's claim and to dismiss both the defendant's statement of defence and his counter claim. The Court consequently gave plaintiff the care and custody of her minor child during the summer holidays. Plaintiff was furthermore authorised to apply for, on her own (without the intervention of the father) and to keep in her possession the passport of the said minor child. Plaintiff was also authorised to take the said minor child Danica Vassallo outside these islands irrespective of the existence of any impediment of departure that may be *in vigore* in respect to the said minor child. The Court also decided that all costs and expenses were to be paid by defendant;

The Court's judgement starts by reproducing the Maltese text of plaintiff's claim, and defendant's counter claim which need not be repeated here;

In the course of its judgement, the Court said:

**“The relevant resultant facts are the following:**

**In 1986 plaintiff married in Australia one Giovanni Melfi and the following year a child, Rick, was born. In 1989 plaintiff and Melfi decided to live separately and in April of 1993 they divorced. It results that plaintiff has maintained a friendly relationship with her ex-husband for the sake of their son;**

**In July 1991 plaintiff met defendant in Australia. Defendant was in Perth following an air pilot trainee course. Plaintiff and defendant went out together and started a relationship. Plaintiff found out she was pregnant by defendant in September of the same year;**

**Defendant finished his course in February 1992 and returned to Malta. Plaintiff, too, came to Malta with her son Rick, where on the 16th May, 1992, she gave birth to her and defendant's daughter, Danica;**

**Defendant was not registered as being Danica's father. Plaintiff had not yet divorced her husband Giovanni Melfi who was registered in the Maltese Registry as being Danica's father. Indeed in March of 1994 Giovanni Melfi initiated proceedings here in Malta to establish that he was not Danica's father. These proceedings were finally decided in Melfi's favour on the 18th of June, 1997;**

**In Malta the parties at first lived with defendant's mother in Rabat. Shortly after Danica's birth the parties, together with plaintiff's two children, moved to an apartment in the Rabat area;**

**The parties had agreed that plaintiff would give birth to their child here in Malta. When they so agreed they also**

established that for the time being they would live in Malta. Plaintiff's son was very much part of these plans and therefore agreement was reached with Rick's father in the sense that Rick would return to Australia every year for some time. Therefore plaintiff and her two children lived in Malta with defendant from 1992 upto December of 1994. During this period plaintiff and her two children returned to Australia in December of 1992 where they remained up to March of the following year and again returned to Australia in December of 1993 where they stayed up to February of 1994. Plaintiff and her two children returned definitively to Australia in December of 1994. Indeed the parties agreed to live in Australia and also agreed to buy a house there. In January of 1996 the parties acquired such a house, which was suitable to both. Plaintiff and her two children settled in the new house, whilst defendant continued to reside in Malta;

In 1995, 1996 and 1997 defendant made regular short visits to Australia whilst in August/September of 1995 plaintiff and her two children came to Malta for a short holiday and here they lived with defendant;

In February 1997 defendant, whilst on one of his short visits in Australia, sought to get his daughter alone, that is without the mother for a holiday in Malta. The parties however did not agree about this. Indeed, from this time onwards, there seemed to be a serious crisis in the parties' relationship. As time passed their attitude towards each other seemed to be continually deteriorating. They did try to make it up or to patch things up but with no success;

In September 1997 plaintiff and her daughter Danica met defendant in Heathrow Airport in London and together they proceeded to Lisbon, Portugal. Plaintiff planned to spend some

time in Portugal to be able to visit family and also in connection with her aspirations for a singing career. In Portugal the parties seem to have understood that their relationship was inevitably and definitely over. In Portugal plaintiff agreed to let defendant *take their daughter Danica to Malta for a holiday*. At first plaintiff was not sure about this, however at the end she agreed, *irrespective of the contrary advise coming from both her mother and her sister who were with her in Portugal*. She said her relatives feared that defendant would not return the child to her, however at the end plaintiff agreed both because she wanted defendant to build a healthy relationship of father and daughter with Danica and also in view of the fact that defendant promised her and the child that he would return the child to her in Portugal;

*In September 1997 defendant arrived in Malta with his daughter*. In October of the same year defendant informed plaintiff that he will return the child to her only if she signs over to him her share of the house in Australia and only if she agrees to blood tests being carried out to verify the paternity of the child. Plaintiff agrees. She came to Malta and indeed she signed over to defendant her share of the Australian house;

In November 1997, defendant acknowledges Danica as his daughter by means of a public deed. Shortly afterwards he agrees with plaintiff that he should take Danica for a short holiday in the UK, where her father resides. Defendant promises plaintiff to return the child to her in Portugal on the 19th November, 1997. Plaintiff therefore leaves Malta to return to Portugal, whilst as agreed, defendant and his daughter go to the UK;

On the 19th November, 1997, defendant failed to keep his promise and did not return the child to her mother in Portugal

Instead he informed plaintiff in Portugal by phone that he had decided not to return the child to her. Contrary to plaintiff's wishes, defendant returned to Malta with his daughter;

On several occasions defendant refused to let plaintiff speak to her daughter on the phone. Plaintiff phoned both from Portugal and also from Australia after she returned there, hoping to speak to her daughter. Defendant also gave instructions to his mother when he was away on work not to let plaintiff speak to her daughter on the phone. Defendant's mother, in fact, obeyed these instructions and on several occasions refused to let plaintiff speak to her daughter on the phone. Defendant kept on insisting that if plaintiff wanted to speak again to her daughter she should first vacate the house;

In December of 1997, defendant applied to the Second Hall of this Court to obtain the care and the custody of his daughter. At first he gave as plaintiff's address the one in Portugal, when it results that he was fully aware that she was back in Australia. It is only after the decree that he gave the Australia address. Before the decree plaintiff was therefore not made aware in time of these proceedings. On the 17th of February, 1998, the said Court granted defendant provisional custody of his daughter. Plaintiff was not made aware of these proceedings before this decree was given;

Plaintiff performed certain judicial acts in Australia in respect of her share in the house. Eventually the parties, by mutual agreement, sold the house to third parties and the proceeds were equally shared between them;

In the meantime plaintiff did manage to speak on occasions to her daughter on the phone. Telephone conversations were the only way for plaintiff to keep in touch

and in contact with her daughter;

#### Considerations of fact:

##### Marriage:

The question of marriage was a rather tricky one for the parties. The defendant wanted to marry plaintiff and he did ask her on a number of occasions to marry him. The plaintiff however was not ready for such a step. She had just divorced her husband and therefore she had just come out from what perhaps was an unfortunate and an unhappy situation. However in their minds both parties wished that their relationship could last as long as possible. They planned their lives according to the existing circumstances. They wanted their daughter to be born in Malta and after her birth they lived here for some time. It seems that however they both wanted eventually to settle permanently in Australia. They actually bought a house there with the intention of residing in it together as a family;

##### Pregnancy:

It was only a short while after the parties started dating and going out with each other that plaintiff became pregnant. This event was not expected and therefore it was a shock for both parties. It seems that plaintiff from the very beginning wanted the baby, whilst defendant was a bit hesitant and he discussed with plaintiff all the options. He himself admits to having asked plaintiff whether she was also considering abortion;

##### The parents' love for their daughter:

Eventually, Danica was born. There is no question about



both parents' love for the child. It is evident that both want to have Danica by their side and they both want to look after the child. They both want the opportunity to see the child grow and to see to her needs and her education. Inevitably, however, the relationship between the parties has now degenerated to such extremes that no patching up can be done. Plaintiff resides in Australia whilst defendant is Maltese and resides in these islands. Unfortunately, this seems to have been at the root of the problems between the parties as at a given moment in time neither party seemed ready to live in the other's place of residence;

#### Relationship is over:

Plaintiff feels that her relationship with defendant was over in February, 1997, whilst for defendant it was over in the Summer of 1997. It seems that it was plaintiff who really wanted to terminate this relationship. At first she said that this was because of plaintiff's negative attitude towards her and her son Rick. She claims that the relationship indeed was badly effecting her but especially Rick. It must be said that these claims in respect of Rick, however, were never confirmed by other evidence. Indeed, it seems that defendant had a good relationship with Rick and he treated him as his son. Defendant considered Rick as being part of the family;

#### Shortcomings:

*Both parties are normal people having their respective good points and their defects. The defendant did care for plaintiff and when she was in Australia he did send her money not only for the purchase of the house. It does seem however that the defendant loses his calm more easily and more often. This might also have added to plaintiff's resolve to terminate*

the relationship. As time passed the defendant acted towards plaintiff more and more aggressively. He was abusive and on occasions, fortunately rare, also violent. Defendant also suspected that plaintiff was having affairs with other men. He was also thinking that he was not Danica's father. It was however conclusively established that the defendant is indeed the father. Furthermore the plaintiff always denied having affairs with other men;

The defendant can also be said to be somewhat demanding and domineering. He used to tell plaintiff what to wear and how to wear her hair. He wanted to be the boss and show that he is the boss. There were also occasions when, for futile reasons, he broke a glass pane, a car windscreen and a baby's chair. There was one occasion when he was so angry at Danica and he pulled her by her arm so hard that he dislocated her shoulder. A similar incident happened again more recently when Danica's elbow was dislocated. The defendant claims that Danica's elbow gets easily dislocated. This is a good reason why the defendant should be more careful;

#### Reasons why defendant refused to return the child:

At first the defendant told plaintiff that he was refusing to return the child to her because he did not want to have to go to Australia every time he wanted to see his daughter. It also results that before this refusal the defendant never alleged that plaintiff was not capable of bringing up the child properly. Now however, the defendant is claiming that he does not like the way his daughter and her brother are being raised by the plaintiff. His reasons for saying this are that plaintiff's house was always in a mess. He also claims that there is no routine in the way the children are being brought up. He says that Danica's and Rick's attendance at ballet and piano lessons respectively is irregular.

It does not satisfactorily result that plaintiff is untidy and keeps her house badly. It has to be noted that since Danica has been living with defendant, he has omitted to send Danica to ballet or to singing lessons;

Defendant claims that he made up his mind not to return the child to plaintiff because of some episodes which occurred when Danica was living alone with him in Malta. Indeed he claims that the child refused to get out of her bed during night time and this made him think that the mother imposed on the child not to get out of bed at night time because she had male visitors with her. The child mentioned the name of a male friend of her mother on several occasions and said that this man would eventually be her new father. The child said that she was given some American dollars by some sailors who were at her mother's house. He also complains that at five years and a half, Danica could not read and could only write her name. He also complains about the fact that his daughter in Australia went over with her friend to see a bush fire not far away from the house. This worried him because she was unsupervised and her friend was nine (9) years old;

Defendant further submits that plaintiff did not sufficiently look after her daughter's health. He mentions and produced proof in respect to an alleged defect in Danica's eyes and in her teeth. Witnesses produced by defendant did confirm that there is no defect at all with the child's eyes and that the teeth decay could not be attributed solely to neglect, but could also be due to a high sugar diet, genetic reasons or factors and to lack of oral hygiene. Defendant in this respect complains that in any case plaintiff neglected these problems;

In this respect plaintiff confirms that on various occasions she took the child to be examined by a dentist and an eye-

specialist. She spoke about this to defendant who confirmed that the child could be seen by the relevant specialists in Malta. She therefore decided not to do anything further in Australia until the child was in Malta. She was assured by the specialist in Australia that both conditions could wait. No neglect therefore results on the part of plaintiff;

*Plaintiff gives a plausible justification for all these complaints.* She says that the fire in question was a small one. Her daughter went over to see what was happening not alone with her nine year old friend but with her and other members of the family. Indeed all the neighbours went to see what was happening. She says that she is very strict on Danica's bedtime as she believes that she should enjoy her video at evening time without being interrupted and without having to look after the children. She said that she never told her daughter not to get out of bed because she had some visitors or something of this sort. She admits that there was one occasion when there were two sailors in her house. She says however that these were friends of her sister and they only waited for ten minutes for her sister to get changed. *She rightly says that the system of education in both countries in question is different as is confirmed by Danica's teacher in Malta.* She also confirms that she has not been with other men since she got to know defendant;

The reasons brought by defendant why he acted the way he acted when he did not return the child to the mother can never be considered as good enough and sufficient reasons. The defendant broke a solemn promise made to both the plaintiff and especially to his daughter. In any case he should have first discussed these matters with plaintiff;

, Threats:

The defendant threatened plaintiff and told her that she could not see her daughter again if she did not transfer over to him her share in the house. This is definitely unbecoming behaviour on the part of defendant. In this respect the defendant at first claims that it was plaintiff who offered to sign over the house to him. He later claims that in Portugal they had agreed on various matters about the house including that plaintiff would transfer her share over to him. In view of this the defendant is not credible;

Strange occurrences:

There are other resulting instances when one could say that defendant acted rather strangely in the circumstances. He did not let plaintiff talk to her daughter on the telephone for a rather long period after he had refused to return the daughter to her mother. He insisted that the plaintiff should vacate the house before she could speak on the phone to her daughter. Indeed, he acted as if he wanted to show that he alone was in control of the situation. Only he could decide when the child could speak to her mother or to her brother. He also controlled his own mother who did exactly what he wanted and on occasions refused to let plaintiff talk to her child on the phone;

Defendant acted oddly in that he recorded a video tape of Danica in Christmas but he refused to give it to plaintiff because he insisted that plaintiff was upsetting him. Also, after listening to audio tapes sent to the child by the mother, he refused to give one of them to his daughter;

The way the defendant acted in the proceedings before the Second Hall of this Court is very strange indeed. He gave the address of plaintiff in Portugal when he knew that she had already returned to Australia:

**Capability of parents to bring up Danica:**

The defendant is a First Officer with Air Malta and it seems that in his work he is well up to standard. He has a good salary and can improve his position and therefore could also improve his income. He contends that he could bring up the child in a better way than plaintiff. He says that the child would be brought up in an environment were he is a pilot, his brothers are respectively a police inspector and an insurance claims adjuster, whilst his mother is involved in voluntary work. Defendant is living with his mother in a big house in Rabat and when he is working and away from the island it is his mother that looks after the child;

The Court is however not satisfied that plaintiff is not able to bring up the child in a proper and reasonable way. It is true that plaintiff's income comes mainly from the "Single Parent Child" benefit she receives from the Australian Government. She has other income as well as she receives money from her ex-husband and she also works part-time with her parents. In all she takes a decent monthly income. One of her sisters is reading law whilst her other sister is studying psychology. It seems that her parents have a thriving business. Indeed defendant himself has admitted that when he merely received Lm100 a month because he was on a cadetship, plaintiff's pension was of great use. There is no question about the ability of plaintiff to raise her daughter. Furthermore plaintiff now rents a three bedroomed house in Australia and one bedroom is intended for Danica. Plaintiff has also set up a games room which seems to be fully equipped;

**Plaintiff's son in Malta:**

One point that has been emphasised by defendant is the

fact that plaintiff's son has been in Malta since the beginning of these proceedings. Defendant seems to be implying that plaintiff is neglecting her son's studies and education. It has to be noted in this context that plaintiff is in Malta not because it is her capricious wish to be here. Indeed the fact that plaintiff is here is due to defendant's irregular action when he decided not to return the child to her mother. Furthermore plaintiff confirms that she has been trying to provide some sort of tuition for her son, who it seems, also refuses to go back to Australia. One wonders what would defendant have said had plaintiff left her son in Australia, possibly with "strangers";

#### Singing career:

Another point which has to be made is that there is nothing wrong in plaintiff's aspirations as to her singing career. There is nothing wrong in that plaintiff did try to achieve something as far as her singing is concerned. However it also results that plaintiff has been quite realistic about her singing talent;

#### Religion:

The question of religion is a very delicate subject. When the parties got together they knew that they were coming from different countries, with different traditions and different ways of lives. In this situation it is important that one completely respects the thoughts and beliefs of the other. Defendant has produced various witnesses who have declared that Danica at one point or another did tell them that her mother (plaintiff) says that God does not exist or words to that effect. Plaintiff denies ever saying this;

The Court feels that for some reason or other another defendant is giving undue importance to this matter. He

emphasises that the child now is attending a private catholic school and is also attending catechism classes. The child is now six years old and when she allegedly said those words she was four or five. We have therefore a child of 4 or 5 who is speaking about God. Defendant claims that when the child was born he wanted her to be baptized. Plaintiff's reaction to this was that when the child was older she could decide for herself;

One must understand that plaintiff is not used to the local mentality and to local traditions. Perhaps somebody of a different religion and coming from a foreign country could be understood when he or she reasons in this way. As a matter of fact plaintiff has declared that she believes in God. Indeed one witness has said that it was defendant who said that plaintiff was not cultured enough to make statements about God and that it was indeed the defendant who declared that it is very difficult to prove the existence of God;

In this case this should not be treated as an issue. As a matter of fact it was never alleged that plaintiff's other son does not believe in God. Indeed in Australia he goes to a catholic school and in Malta he is attending catechism classes;

#### *Ex Parte Experts:*

Both parties produced *ex parte* medical experts. Defendant produced a consultant psychiatrist with a special interest in children. Dr. Peter Muscat said that he found the child to be a bright child. She was very talkative and talked in a very animated way. There was no sign of anxiety or depression. His assessment was that she was making a good adjustment to her new circumstances. The expert did not notice any upheaval in the child's emotions because of the fact that her mother had returned to Malta. The child however expressed her wish that



her parents would live together again. The expert however subsequently noticed that the child was becoming selfish, and becoming rather possessive of her father. When the child was asked about her mother she was evasive and changed the subject. The child said that she was happy, that she had seen her brother again. She also said that she was missing her dog in Australia. The child refused to say with whom she wanted to be with, either her father or her mother. The child also said that when the "man in the court" decides with whom she had to go then she will go with this parent. Danica never spoke badly about either of her parents;

On her part plaintiff produced a clinical psychologist, whose area of expertise is child and family psychology. Dr. Angela Abela said she asked the child to speak from her heart and not to think about hurting her mother or her father. At this the child had a film of tears in her eyes and this showed that this whole situation was very painful for the child. The child told her that she wanted to live in Australia with her mother and that her mother would take her to see her father. The child spoke of her room in her house in Australia and this showed that she still had memories of her life in Australia. The child said that both her parents were good. However she also said that her mother never lied to her. The child also expressed her worry that her father would take her again and not give her back to her mother. This expert concluded that a girl of Danica's age should live with her mother if her mother is indeed able to look after the child. The expert said that her feeling was that the child was saying the truth;

Having considered at length what these two expert witnesses have said, the Court feels that it should give weight to what has been said by the expert witness produced by plaintiff. The Court feels that Danica was truthful when she said she wanted to live with her mother in Australia. Indeed, what was

said by the child to Dr. Muscat does not contrast with what she told Dr. Abela. It is possible that the child did not talk to Dr. Muscat about her father because she thought that Dr. Muscat was her father's friend and therefore he would tell her father what she had said. For the same reason she refused to tell Dr. Muscat with whom she wanted to be;

In actual fact defendant himself admits that his daughter says that she is missing her mother. The Court moreover gives importance to what was said by a witness who seems to be neutral as far as the parties are concerned, Janet Vassallo, who is related by marriage to defendant's father. She confirmed that Danica tells her that she looks forward to going back to her mother;

In this respect it must also be noted that since Danica was born she always lived with her mother either in Malta or in Australia and this until her father decided not to return the child to her mother. It is true that the father only acknowledged Danica as his child in November 1997. The fact however remains that *de facto* the child was in the care and custody of plaintiff and undoubtedly this was the position when defendant decided not to return Danica to her mother. The parties had agreed that the child would live in Australia with her mother;

#### Considerations of law:

In this case the Court must seek to do what is in the sole interest of the minor child. In its decision whether the care and custody of the child should be given to one parent or the other the Court must solely be guided by what is most beneficial to the child;

The Court refers to a judgement of the Honourable Court

of Appeal in the case in the names **Leslie Anne Pace vs Joseph Pace**, decided on the 27th March, 1998. This case was very similar to the present one and in the light of this judgement the following considerations can be made;

It is important for both parents to strictly follow and adhere to their agreement as to who of them is to have the care and custody of their minor child. *Eventually such agreement can only be changed either by their mutual agreement or by order of the competent authority.* This is more so if the parties have already acted in accordance with their original agreement. It is clearly not in the interests of the child that same child be the object of some illegal, violent and abusive behaviour of one of the parents. When one parent decides, on his own, to go contrary to that agreement and dispossesses the other parent of the child, in such a case the child will inevitably become the centre of a controversy between the parents. This is surely counter productive to the supreme interests of the child and the same child will be at the very centre of a controversy between violence and what is right. Good sense and also the law dictate that the care and custody of the child should be immediately restored to the dispossessed parent;

The Court should at all times seek the best interests of the child irrespective of the allegations, true or false, made against each other by the parties. Such allegations often serve to distance oneself from the truth and serve to render almost impossible the search of the Court for the truth. This is why it is the duty of the Court to always look for the interests of the child. Exaggerated controversies between the parties often make one wonder how much the parents have at heart the interest of their children. Sometimes parents are only interested at getting at each other and all they want is to pay back the other party through their minor child. Therefore the principle *ante omnia restituendum* must be always applied, not only as a deterrent but

in the supreme interest of the child;

**Conclusions:**

In view of all the above it results that it is in the interest of the minor child in question that the care and custody of the same child should be given to plaintiff that is the mother. The father should have a right of access to his minor child and this in the place of residence of the minor child for one week during both Christmas and Easter holidays and for one month during the summer holidays;

**For these reasons:**

Decides in the first place by overruling all defendant's requests as contained in his counter-claim and in the second place by acceding to all plaintiff's requests as contained in her writ of summons and consequently gives to plaintiff the care and custody of her minor child Danica Vassallo. The father should have a right of access to his minor child and this in the place of residence of the minor child for one week during both Christmas and Easter holidays and for one month during the summer holidays. Plaintiff is hereby authorised to apply for, on her own (without the intervention of the father) and to keep in her possession the passport of her said minor child. Plaintiff is also authorised to take the said minor child Danica Vassallo outside these islands irrespective of the existence of any impediment of departure that may be *in vigore* in respect to the said minor child;

**All costs and expenses to be paid by defendant”;**

The defendant felt aggrieved by this judgement and appealed therefrom to this Court. He also appealed from the two

interlocutory decrees given on the 28th May, 1998, and on the 30th July, 1998. These two minor appeals will be dealt with in the first place:

The Decree given on the 28th May, 1998, (folio 42) allowed respondent's request that the present case be heard with urgency. Appellant opposed respondent's application before the First Court and is now requesting this Court to overturn this decree and to reject respondent's original request. He argues that there was no allegation "that Danica Vassallo was in any particular danger" and that urgency was only accorded to accommodate respondent's needs, as she came to Malta on limited budget;

The Court of First Instance gave detailed reasons on which it based its decision to deal with the case with urgency, including the possible prejudice that Danica might sustain if the case were not treated with urgency. This Court completely agrees with the First Court because by hearing the case with urgency, it certainly did not infringe on any of the appellant's rights. However, had the First Court not granted urgency, then, respondent's rights, and more importantly, Danica's best interests, would have been seriously placed at risk;

It is evident from the records of the case that appellant was retaining Danica in Malta in breach of any express agreement he had with the respondent to return the child to her on the 19th November, 1997. *Prima facie* this was wrongful retention and the decree of the Second Hall of Civil Court granting provisional custody to appellant, did not help appellant's case much as this decree was obtained in a dubious way without respondent's views being placed before the Court;

In these circumstances the appealed decree is being

confirmed;

Appellant also appealed from the decree given on the 30th July, 1998 (folio 377) whereby the Court of first instance rejected his request to hear Giovanni Melfi, who at present resides in Australia, by means of letters of request. Appellant is asking this Court to overturn this decree and to allow the said witness to be heard in these proceedings by means of letters of request. This Court has examined the questions that appellant wants to put to Giovanni Melfi, and has also examined the First Court's reason for rejecting appellant's request. Moreover, this Court has noted the reasons brought forward by appellant on which he is basing his appeal. It has also noted that appellant wishes to have Giovanni Melfi's testimony because this witness:

“would certainly throw light on the plaintiff's credibility or otherwise and on her ability to be a good and caring mother and whether it was in the child's better interests to be with her mother during her formative years”;

However this Court cannot accede to appellant's request for, as the First Court rightly said, appellant's request does not meet the criteria established in Section 613 of the Code of Organisation and Civil Procedure (Chapter 12 of the Revised Edition of the Laws of Malta) for such a request to be admitted, namely that the requested evidence is “indispensable for the determination of the issue before the Court”. Besides, the unnecessary prolongation of the case is surely against the interest of the minor. The Court, therefore, dismisses appellant's request for the revocation of the said decree given on the 30th July, 1998;

Appellant felt aggrieved by the judgement given on the

19th August, 1998, which gave custody of Danica to respondent with right of access to appellant;

Very briefly stated, the grievances can be thus listed:

That the judgement mentions "facts" that are not derived from the record of the proceedings and in fact are contrary to what actually took place;

That the First Court has wrongly decided that respondent was more credible than appellant;

That when the judgement considered the reasons brought forward by the appellant to justify his decision not to return Danica to her mother, the First Court mentioned that he "broke a solemn promise" and failed to appreciate that this was done in the best interests of the minor;

That the parts of the judgement with the subheadings "Threats" and "Strange occurrences" do not do justice to appellant as the incidents were totally taken out of context and his version of the events was ignored;

That the First Court did not appreciate correctly the fact that Danica has not been, as yet, baptized and the fact that she expressed disbelief in God. The Court was wrong to attribute these aspects of religion to the fact:

"that plaintiff is not used to the local mentality and to local traditions";

Appellant states that it is a universal belief that ideally a child should be baptized when very young and should be taught

the basic tenets of religion from a tender age;

That the First Court did not appreciate correctly the evidence of the *ex parte* witnesses, by wrongly giving more weight to Dr. Angela A. Abela's evidence than to Dr. Peter Muscat's evidence;

That the First Court's judgement gives the impression that the evidence produced by appellant was not even considered, because no reference was made in the judgement to such evidence as that of Sister Adele Camilleri, Candida Azzopardi, Des Fayl amongst others;

That the First Court presented no "legal argumentation" on various legal points and on the consideration of whether the appellant may in actual fact offer a better upbringing of the minor child;

That the judgement allowed access to the appellant in the place of residence of the minor instead of in Malta. Apart from the hardship to appellant, by so doing, the Maltese Court abrogated its jurisdiction to enforce such access if this was denied to the appellant;

Having raised these grievances, appellant is requesting this Court to:

"overturn the appealed judgement whereby care and custody of Danica Melfi was awarded to the plaintiff, thereby awarding care and custody of Danica Melfi to appellant and furthermore to accede to appellant's other requests, as outlined in his counter claim, and therefore, reject all the plaintiff's requests in her writ of summons while condemning plaintiff to pay all expenses before both the Court of First Instance and



before this Court”;

In her reply, the respondent emphasised our Civil Law rule that the authority over a child is exercised “by the common accord of both parents” and that in default of such accord, then the Courts step in. Although Malta has not ratified, as yet the Hague Convention on Child Abduction, the basic principle of the Convention namely *ante omnia restituendo* was applied by the Court of Appeal in the case **Leslie Anne Pace vs Joseph Pace**, decided on the 27th May, 1998. The respondent further submitted that:

“The ultimate conclusion was that where the parents agree on custody, that agreement should not be unilaterally disturbed by the forceful abduction or retention of the child by one parent. In the absence of an agreement or any cogent or extreme circumstances, then, the child’s best interests dictate that the situation be reversed. The Courts of the child’s original residence would then be able to determine any particular issues which any parent may then wish to raise;

The Court of First Instance went into all the factual issues raised by appellant and came to its own conclusions. It concluded that none of the issues raised by appellant warranted a change to what the parents had previously agreed to. The First Court had the opportunity to hear all the evidence *viva voce* and evaluate the demeanour of the witnesses whilst on the stand;

When evaluating the evidence the First Court correctly concluded that it should give more credibility to the evidence as tendered by respondent and her witnesses and it is therefore submitted that this exercise should not be unduly disturbed”;

The respondent went on to reply in detail to all the various

grievances raised by the appellant and concluded by stating that the First Court's decision was wise and correct in all aspects and thus the judgement and all decrees therein contained, including the ones appealed from, should be confirmed with costs against appellant;

Respondent has asked the Court to award her custody of her six year old daughter Danica and that she be allowed to take Danica with her to her place of habitual residence namely Western Australia. On the other hand, appellant who is Maltese and lives in Malta, is contesting respondent's claim and is insisting that custody of Danica be awarded to him. Both of them are arguing that it is in the child's best interests that their request be granted;

It is clear that in a custody issue like the present one, the paramount consideration is the welfare of Danica. Both parents have been anxious to do what they consider as being best for the child. It is unfortunate that the present disagreement was not resolved amicably as it is the Court's opinion that such a solution would probably have been best both for Danica and the parties themselves;

It is to be stated at the outset that respondent has the burden of proving satisfactorily on the basis of a preponderance of probabilities that it is in the child's best interests that custody be awarded to her. In other words, to win such custody, respondent has to satisfy the Court, on the basis of the whole body of evidence submitted, that what she is asserting (namely that she will be able to guarantee the welfare of Danica better than appellant) *is more probable to occur than not*;

In the present case, appellant, besides filing a statement of defence, has also filed a counter claim. Thus, he has also the

same burden of proof as plaintiff to discharge. However, it must not be forgotten that, in the appellant's case, it has resulted that he had failed to abide by a promise he made to respondent and her daughter, namely, that he was to return the child to her mother on the 19th November, 1997;

It has been shown that by appellant's unilateral decision, Danica's family life and education were substantially disrupted. Appellant's burden of proof, in justifying such a drastic course of action, must also be discharged on a basis of a balance of probabilities but subject to the requirement that the evidence adduced must be of a cogent nature proportionate to the gravity of the effect on the child that such course of action entailed;

The already strained relationship between the parties deteriorated rapidly and gravely after appellant decided to retain Danica in Malta. By so doing he broke the express agreement he had reached with the respondent. In fact, the appellant states that before he left for London with Danica:

"I confirmed both to plaintiff and to my daughter that I would return my daughter to plaintiff on our return from London" (folio 197);

A further complication ensued when the appellant obtained provisional custody of Danica (after making serious allegations against respondent) by means of a provisional decree of the Second Hall of the Civil Court;

It is a fact that when this decree was pronounced, respondent was not even aware that appellant had began court proceedings in Malta. Respondent rightly alleges that this decree was obtained *unfairly because appellant furnished the Court and the official curators appointed to represent the*

absentee respondent with the Portugal address when he knew that respondent was not living there. This latter fact is confirmed by appellant's testimony (vide folio 199) where he states that on the 24th November, 1997, he knew that plaintiff had left Portugal and was back in Australia. He divulged her habitual address, namely the one in Australia, only after the decree of the Second Hall was given;

Appellant contends that his decision to retain Danica in Malta was taken in the child's best interests and mainly in consideration of her welfare. He did not fail to present in Court evidence (see especially his testimony given on the 19th June, 1998 (folio 171 *et seq*), which he hoped would convince the Court that the course of action unilaterally chosen by him was indeed in the child's interest. However the Court of First Instance was not convinced of appellant's contention, and indeed that Court deemed it in the child's best interest to award custody to the respondent, with access to appellant;

The majority of the grievances raised by the appellant against this decision of the Court of First Instance are based on the contention that it did not weigh correctly and satisfactorily the relevant facts as appearing from the records of the case and thereby came to the wrong conclusion;

This court has consistently held that it would not normally disturb the appreciation of the facts made by the Courts of First Instance, unless it is morally convinced that the appreciation made by them was so faulted that a manifest injustice would undoubtedly result. The reason for this is obvious. Unlike this Court, the Court of First Instance had the opportunity to hear and assess witnesses *viva voce* and so was in a good position to observe the way they gave their evidence, including their general demeanour, their frankness, evasiveness or their other

reactions to questions put to them, and similar aspects which normally assist the Court to assess the evidence produced. Thus, the Court of First Instance was much better equipped than this Court to form an objective and correct opinion regarding the credibility or otherwise of these witnesses, the value of their evidence and the weight to be given thereto;

This Court has carefully examined the records of the case and considered all the grievances adduced by the appellant, but finds that the Court of First Instance came substantially to the right conclusion as to the main issue involved;

In this Court's judgement, appellant's unilateral decision to dislocate Danica from her mother, who was her habitual carer and from her habitual residence and environment, was surely not taken in the best interests of the child. Danica suffered a lot of pain because the appellant decided to disrupt her usual family life and to transplant her in an unfamiliar environment;

The reasons which appellant gives for taking such a momentous decision do not convince the Court and certainly did not justify such a drastic action, which the Court is convinced affected Danica very badly at that time;

Indeed, there is almost nothing or very little in the various grievances raised by appellant in his appeal to this Court. The Court of First Instance was substantially correct in all its conclusions and thus this Court rejects appellant's arguments that it would be in Danica's best interests for her to remain here in Malta in appellant's care and custody;

This Court recognises that appellant went through a lot of effort to ensure Danica's welfare during her stay in Malta. Danica, in fact, seems to have eventually settled here quite well.

She managed to adapt herself to her new surroundings making good progress at school and establishing a good relationship both with friends at school and with appellant's family and friends. These facts clearly emerge from the testimony of various witnesses produced by the appellant including the testimony of Danica's teacher at folio 210 *et seq.*, and that of Dr. Peter Muscat, at folio 221 *et seq.*;

However, this fact by itself, should not incline this Court to accept the argument that if Danica is returned to her mother in Australia, Danica's life would be unnecessarily disrupted and uprooted once again. This Court is satisfied that since Danica seems to have adapted herself to life in Malta quite well, her movement to Australia would not be disruptive or at all damaging to her. In fact, this Court thinks that she would find it much easier to return and settle well again in the company of her half brother Rick, of her habitual carer (namely the respondent) and in a neighbourhood and environment in which she was raised and where she has spent the greater part of her life. Indeed, Danica has expressed her wish to return to her mother in Australia in no uncertain words, as the testimony of Dr. Angela Abela clearly proves;

Accordingly, this Court will affirm the decision of the Court of First Instance to award custody of Danica to her mother;

The Court of First Instance gave the appellant a right of access to Danica in her place of residence for one week during both Christmas and Easter holidays and for one month during the summer holidays;

The appellant has raised two main grievances regarding the modality of access awarded by the First Court, one

regarding the place and another the time when the access is to be exercised. As regards the place of access, appellant submitted that:

*"apart from the fact that the Maltese Court has abrogated its jurisdiction to enforce such access if denied to the appellant, it would mean that the appellant would not be able to bring to Malta the minor child until she attains the age of eighteen years of age and would not be able to visit her country and the Maltese family members, a fact which is certainly not in the best interest of the child";*

What is paramount here is Danica's welfare and the affirmation or the abrogation of the Maltese Court's jurisdiction is of marginal importance. Once the Court has reached the conclusion that it is in the best interests of the child that custody be awarded to the mother, the jurisdiction of the Courts in the mother and child's country of residence, not only cannot be excluded but indeed is very relevant. This is especially so in the present case, where it has been shown that appellant had wrongfully detained the child in Malta, in clear breach of an express agreement he had previously reached with the respondent and with Danica herself. The fact that the appellant betrayed the trust placed in him by the respondent is a point which cannot be ignored by this Court, at least for the present time;

This fact however should not overshadow the other important consideration that it is also in the best interests of Danica that she be given the opportunity to strengthen and further develop the good relationship she obviously has with her father. This is undoubtedly necessary for her normal and healthy development. In the present case, fortunately for the parties concerned, appellant is a resourceful and capable young man,

whose occupation as an airline pilot perhaps will facilitate the exercise of his right of access. This is because he can probably arrange to share periods of quality time with his daughter and it is possible for him to travel, comparatively cheaply, across continents;

The appellant has also criticised the First Court in that access was awarded during holiday time. Appellant remarked that this was the busiest time of the year for him, in his capacity as an airline pilot. This consideration seems to rule out the possibility of Danica spending appropriate periods of her school holidays with her father. However, the appellant failed to indicate to this Court an alternative period of time for access to be exercised in a mutually convenient way;

This Court understands that the respondent is fully aware that Danica's access to her father is of great benefit to her, as it will contribute to her healthy growth and development. Respondent has even testified (*vide folio 124 of the record*) that if there is a Court Order she would bring Danica to Malta herself to spend a part of her holidays with her father in Malta. The Court does not believe that the respondent will try to deny reasonable access to the appellant. In actual fact her counsel stated to this Court during oral submissions that the respondent was willing to give "open and unlimited access" to appellant. In case she unjustly chooses to deny or to impede appellant's access to his daughter, then the Courts, which would normally be competent to adjudicate this matter, would surely provide the appellant with the proper remedy;

The Court agrees that access for a period of one and a half months spread over each year is reasonable and appropriate in the present circumstances. Since appellant has raised the difficulty of access during holiday time and since his working



schedule is very irregular and also because he has not suggested any alternative period of time, this Court prefers to leave the actual dates of access to be agreed between the parties from time to time after the necessary safeguards are taken;

*If the parties fail to reach an amicable agreement on this issue the modality of this access is best reserved to be determined by the competent courts;*

This Court has therefore arrived at these conclusions:

That Danica's welfare would best be promoted by giving her care and custody to the respondent who is to be allowed to take Danica back with her to Australia;

That considering all the relevant circumstances, Danica's return to Australia would not entail any significant disruption of her present life. Indeed such a move would be in her best interests;

That any future order regarding the long term issues of custody, access and maintenance are best left to be determined by a binding amicable settlement between the parties themselves, and in default, these issues would be adjudicated and determined by the competent courts, in the best interests of the minor;

For these reasons, saving what has been provided regarding access, *the appeal, in relation both to the decrees given on the 28th May, 1998, and 30th July, 1998, and also in relation to the judgement given on the 19th August, 1998, is dismissed with all costs against the appellant.*