



**Civil Court  
(Family Section)**

**Mr. Justice Robert G. Mangion LL.D.**  
Dip.Tax (MIT), P.G.Dip. Mediation (Melit.)

**Today the 4<sup>th</sup> May 2017**

Sworn Application No 208 / 16RGM

Number on list: 12

**R L**  
**vs**  
**A P L**

**The Court,**

Having seen the sworn application filed by R L on the 23<sup>rd</sup> September 2016 which reads as follows:-

- 1. Illi minn zwieg bejn il-partijiet twieldu zewgt itfal minuri X li twieldet nhar 22 ta' April 2004 u Y li twieled nhar 7 ta' Dicemrbu 2005;*
- 2. Illi z-zwieg ta' bejn il-partijiet sfaxxa u permezz ta' kuntratt datat 14 ta' Frar 2007 fl-atti tan-Nutar Dottor Patricia Hall, il-partijiet irregolaw il-kura u kustodja, l-access u l-manteniment tal-imsemmija minuri, fost affarjiet ohra;*
- 3. Illi sussegwenti s-separazzjoni taghhom, l-partijiet kellhom wild iehor, V, li twieled nhar it-2 ta' Marzu 2008. Illi l-parlijet qatt ma kien ghamlu ftehim sabiex jirregolaw l-kura u kustodja tal-minuri, izda l-minuri dejjem kien de facto fi-kura u kustodja tal-esponenti;*
- 4. Illi l-konvenut qatt ma kien prezenti b'mod regolari u konsistenti fil-hajja ta' uliedu u di fatti kienet dejjem l-esponenti li wahedha hadet hsieb ghal bzonnijiet taghhom, u dan kif ser jirrizulta mill-provi. Illi di fatti, kien l-konvenut*

*stess illi accetta li l-kura u kustodja ta' uliedu tigi fdata esklussivament f'idejn l-esponenti;*

5. *Illi nhar il-11 ta' April 2013, l-esponenti fethet proceduri kontra l-konvenut ghal bosta arretrati ta' manteniment kif ukoll ghal hlas ta' spejjez ta' sahha u edukazzjoni relatati mal-bzonnijiet tal-minuri, liema proceduri ghadhom ghaddejjin;*

6. *Illi l-konvenut kien ferm urtat bil-proceduri hawn fuq surriferiti u ra kif ghamel sabiex ha l-kura u kustorlja tal-minuri wlied billi vvinta u hammeg l-giegh tal-esponenti tant illi bhala konsegwenza din l-Onorabbli Qorli ordnat illi l-kura u kustodja tal-minuri tigi fdata lill-intimat u ordnat li l-minuri jirrisjedu ma' missierhom bl-istess access ghal ommhom kif kellu l-missier;*

7. *Illi di piu, kif ser jirrizulta mill-provi tal-kawza, l-konvenut ffabbrika stampa tal-esponenti bhala mara irresponsabbli u xxellerata u ezebixxa materjal fil-proceduri ta' medjazzjoni liema materjal, l-esponenti qatt ma kellha access ghalihom, jew inghatat opportunita' tiddefendi ruhha, b'konsegwenza illi l-minuri ttiehdu mill-kura taghha;*

8. *Illi l-esponenti ghandha wild iehor, Z li tweled fit-29 ta' Settembru 2010 u li ghadu jghix mal-esponenti u li kif ser jirrizulta mill-provi tal-kawza, missier l-minuri Z ghandu kull fiducja fil-kapacitajiet tal-esponenti bhala omm;*

9. *Illi l-esponenti giet awtorizzata sabiex tipprocedi b'din il-kawza mill-Qorti Civili (Sezzjoni Familja) permezz ta'digriet datat 25 ta' Lulju 2016;*

*Ghaldaqstant, l-esponenti umilment titlob lil dina l-Onorabbli Qorti sabiex ghar-ragunijiet premissi:*

1. *Tordna l-kura u kustodja tal-minuri X, Y u V esklussivament f' idejn l-esponenti u l-esponenti tkun awtortzata tiehu d-decizjonijiet rigward sahha u edukazzjoni tal-istess minuri, minghajr il-kunsens tal-intimat;*

2. *Taghti dawk il-provedimenti xierqa u opportuni li jikkoncernaw il-minuri X, Y u V, fosthom izda mhux limitatament dwar kif ghandu jigi regolat, l-attendenza tal-minuri ghall-iskola u attivitajiet edukattivi ohra u extra-kurrikulari, u dan kollu taht kull provediment xieraq u opportun li joghgobha taghti din Onorabbli Qorti;*

3. *Taghti access ghall-konvenut taht dawk il-kundizzjonijiet li joghgobha taghti din l-Onorabbli Qorti.*

*Bl-ispejjez u imghaxijiet kollha kontra l-konvenut li huwa minn issa ngunt ghas-subizzjoni.*

Having seen the sworn reply filed by A P L on the 20<sup>th</sup> December 2016 which reads as follows:-

1. During the hearing of the 1<sup>st</sup> December 2016, during which hearing defendant was duly notified with plaintiff's sworn application, this Honourable Court decreed that the proceedings of the suit be carried out in the English language.

2. It is preliminary. submitted that plaintiff's sworn application of the 23<sup>rd</sup> September 2016 is null and void on account of the fact that she was never authorised by Court to present the said act and this as required by Law through the dispositions of Legal Notice 379 of 1003. In the decree of this Honourable Court, differently presided, of the 25<sup>th</sup> July 2016, upon which plaintiff based her suit, the said Court did not in fact grant authorisation to the parties to proceed and simply stated that the mediation was to be closed. The Court did not proceed to grant authorisation and, in fact, defendant, who likewise wished to institute proceedings, requested, by means of an application of the 9 September 2016, that the Court grant authorisation allowing parties to proceed with their respective suits. The latter application was decided by means of another decree of the 20<sup>th</sup> October 2015 which stated that the mediation in question was effectively closed, without, however, granting the necessary authorisation to proceed which, naturally had been specifically requested. Following yet another application by defendant of the 28<sup>th</sup> October 2016, in which defendant requested authorisation to proceed once more, the Court handed down a decree of the 31<sup>st</sup> October 2016 in which it did not grant authorisation, but rather held that the parties were to file fresh mediation proceedings. Defendant subsequently filed new proceedings; as ordered by Court;

3. Without prejudice to the above, with regards to both plaintiff's first and second requests, it is humbly submitted that it is absolutely not in the best interests of the parties' minor children, X, Y and V, for custody to be entrusted to their mother. As outlined hereunder, while previously in the custody of their mother the said minor children were exposed to immature and scandalous behaviour. This was; confirmed by the minor children themselves during their meeting with the child advocate, Stephanie Galea, who reproduced her findings and her conclusions in her report of the 13<sup>st</sup> July 2016 in which she recommended that the minor children be placed in the custody of their father;

4. Plaintiff's third request is naturally opposed for the same reasons outlined above.

During the hearing of the 22<sup>nd</sup> March 2017 legal counsel to the parties made verbal submissions in respect of the preliminary plea raised by defendant marked number 2.

Having seen the note of references filed jointly by the parties on the 29<sup>th</sup> March 2017.

Having seen that the case was adjourned for a decision regarding said preliminary plea;

Having seen all the acts of the case;

Makes the following considerations.

The acts clearly show that when this Court as differently presided issued a decree on the 25<sup>th</sup> July 2016 in the mediation proceedings bearing number 865/16, the Court closed the mediation proceedings but did not make any pronouncement regarding the request to proceed to file the court case.

In this particular case it results that the mediation proceedings were instituted by means of a letter filed in the Family Court Registry by A P L on the 3<sup>rd</sup> June 2016 requesting the court's permission to file a court case regarding the care and custody of the three minor children following a mediation process. Together with the letter A P L filed an application requesting that the three minor children reside with him and also requested the appointment of the Child's Advocate. Following the filing of the report by the Child's Advocate, the court decreed on the 14<sup>th</sup> July 2016 that the children reside with the father.

On the 15<sup>th</sup> July 2016 R L filed a note informing the Court as differently presided that a court case was pending before this Court as presided regarding the minor child V L. Following that note the Court closed mediation proceedings by decree of the 25<sup>th</sup> July 2016. The Court did not make any pronouncement regarding the authorisation to proceed.

On the 9<sup>th</sup> September 2016 A P L filed an application before the Court seized with the application in the mediation proceedings specifically requesting the Court to close the mediation proceedings and to authorise him to proceed with the filing of a court case. By decree of the 20<sup>th</sup> October 2016 the Court declared that the mediation "effettivamente inghalqet".

On the 28<sup>th</sup> October 2016 A P L filed another application in the same mediation proceedings requesting the Court to decree the authorisation in terms of Regulation 10 *et seq* of Legal Notice 397 of the year 2003. By decree of the 31<sup>st</sup> October 2016 the Court directed the parties to file fresh mediation proceedings in

view of the fact that the mediation proceedings were terminated on the 25<sup>th</sup> July 2016.

On the 23<sup>rd</sup> September 2016 R L filed the present case quoting the decree of the 25<sup>th</sup> July 2016 as the decree authorising her to proceed to file the court case.

On the 4<sup>th</sup> November 2016 A P L filed fresh mediation proceedings bearing number 1702/16 which are still pending.

By decree given by this Court during the hearing of the 1<sup>st</sup> December 2016 the parties were authorised to file notes of submissions in respect of the preliminary plea raised by defendant and the Court heard final oral submissions on this plea during the hearing of the 22<sup>nd</sup> March 2017 when the case was adjourned for judgment on the preliminary plea.

Plaintiff filed her note of submissions on the 16<sup>th</sup> January 2017 and defendant filed his note of submissions on the 3<sup>rd</sup> February 2017.

On the 29<sup>th</sup> March 2017 the parties filed a joint note of reference to three (3) court judgments.

### **Preliminary Plea.**

In his preliminary plea defendant claims that the sworn application is null and void since the decree of the 25<sup>th</sup> July 2016 did not authorise plaintiff to proceed with the filing of a court case.

The decree of the 25<sup>th</sup> July 2016 pronounced in the mediation proceedings between the parties reads as follows:

*Regghet rat ir-rikors tat-3 ta' Gunju 2016;*  
*Rat in-Nota ta' R P L tal-15 ta' Lulju 2016;*  
*Filwaqt li tastjeni milli tiehu konjizzjoni ulterjuri ta' dan ir-rikors;*  
*Tordna li din il-medjazzjoni ghandha tinghalaq.*

Plaintiff submits that the absence of the Court's authorisation to proceed in its decree of the 25<sup>th</sup> July 2016 is the result of an "oversight". She also submits that hers was an oversight when she referred to that decree as the one authorising her to proceed. She however contends that these proceedings should not be declared null and void since the circumstances of this case do not fall under any one of the circumstances contemplated under **Article 789 of Chapter 12** of the Laws of Malta. Plaintiff claims that the closure of the mediation proceedings implies authorisation to proceed and that the lack of specific authorisation to proceed prejudiced none of the parties.

On his part defendant submits that according to regulation 4 of Legal Notice 279 of 2003, unless the law provides otherwise, no case may be filed before the Civil Court (Family Section) unless court authorisation is first obtained. Defendant further submits that although the regulations do not refer to the nullity of the proceedings in case of lack of authorisation, the defect in form should lead to the nullity of the sworn application. Referring to article 789 (1) defendant contends that if the act is defective in any of the essential particulars expressly prescribed by law, the plea of nullity of judicial acts is admissible.

### **Considerations of this Court.**

When mediation proceedings are brought to an end, the Court is not bound to automatically order the parties to file the court case. There may be instances when the particular circumstances of the case do not warrant that the parties receive such an authorisation. The most classical example is when none of the parties attend the mediation sittings without any justification. Otherwise the spirit of the law governing court annexed family mediation might be easily circumvented if both parties agree not to attend the mediation sittings.

It is established jurisprudence that pleas about nullity of judicial acts are upheld if there is no possibility that the acts be saved. In the case in the names “**Omar Aquilina vs Direttur Regjistru Pubbliku et.**” (citaz 78/16RGM) decided on the 30<sup>th</sup> March 2017 it was held that:-

*“Jirrizulta pacifiku fil-gurisprudenza patria illi att gudizzjarju ghandu kemm jista` jkun jigi salvat, u li l-Qorti ghandha twarrab att biss jekk jirrizultaw ragunijiet serji u insanabbli ghall-prosegwiment tal-kawza. Il-Qorti ghandha taghmel dak kollu li hu fis-setgha taghha sabiex tipprezerva l-kawza.”*

Fis-sentenza fl-ismijiet **Taylor Edyta Marie Tereza vs Dudley Ward Roger** deciza mill-Prim'Awla tal-Qorti Civili fit-28 ta' Jannar 2016, inghad:

*“Anke effett tal-emendi ghall-Kap 12 li dahlu bl-Att XXIV tal-1995, in-nullita` ta` l-atti gudizzjali llum hija meqjusa bhala sanzjoni estrema li l-ligi trid li tigi mposta biss meta n-nuqqas (formali jew sostanzjali) fl-att ma jistax jigi assolutament tollerat minghajr hsara ghal xi principju ta` gustizzja procedurali. Ghalhekk rikors guramentat ghandu jitwaqqa` jew jigi annullat biss ghal ragunijiet gravi (Qorti tal-Appell : 28 ta` Frar 1997 : “Charles Fino vs Alfred Fabri noe”). Sakemm ma tkunx nullita` li tkun tirrizulta espressament mil-ligi, li mhuiwix il-kaz tal-lum, eccezzjoni ta` nullita` minhabba inosservanza ta` formalita`, bhal ma hija fis-sostanza t-tieni eccezzjoni tal-konvenut, m`ghandhiex tintlaqa` sakemm ma jirrizultax li l-konvenut ikun sejjer isofri pregudizzju*

*rreparabbli (Appell Civili' "Albert Portelli vs Dr Riccardo Farrugia" : Vol. LXXXII.II.1305)."*

Reference is also made to the judgment delivered by the Civil Court (Family Section) on the 27<sup>th</sup> September 2016 in the names "**David Jaccarini vs Rita sive Marguerite Jaccarini**" (citaz 87/16RGM). One of the pleas raised by defendant in that case claimed that the proceedings were null since the mediation proceedings only referred for authorisation to proceed for divorce whilst plaintiff's claims in the sworn application were much wider. The Court held that:-

*"In tema legali ssir referenza ghas-sentenza ta' din il-Qorti A B vs C B deciza fis-7 ta' Dicembru 2010, fejn in mertu ta' medjazzjoni mandatorja, l-Qorti ghamlet is-segwenti osservazzjonijiet:*

*'In propozitu l-Qorti tosserva li r-regolament [9] ta' l-imsemmi Avviz Legali jirrendi applikabbli l-proceduri ta' medjazzjoni wkoll ghal diversi kazijiet ohra, apparti milli biex tintalab is-separazzjoni personali. Inkluz fost dawn il-kazijiet hemm nuqqas ta' qbil dwar il-kura u kustodja, access u manteniment, kif ukoll "[c] bidliet f' kull haga regolata minn sentenza ta' firda personali jew minn kuntratt ta' firda personali." [Reg.9[1][c]], u fl-istess subinciz ikompli jghid li l-parti ghandha "tipprezenta ittra fir-registru tal-Qorti fejn tghid x' inhi t-talba taghha."<sup>1</sup>*

*Illi r-ratio legis ta' din il-parti tal-ligi huwa car, u cioe' li meta tinqala' kwistjoni bejn il-partijiet dwar haga, li tidhol fl-ambitu tal-kazijiet indikati fir-regolament 9, ghandha tinfetah medjazzjoni, qabel ma ssir il-kawza, bl-iskop li l-medjatur jipprova jwassal lill-partijiet ghal ftehim dwar dik il-kwistjoni ndikata fl-istess ittra. Dan ifisser li l-medjazzjoni tkun saret fuq dik il-kwistjoni biss; u ghalhekk, fin-nuqqas ta' provi li juru l-kuntrarju, il-prezunzjoni hi li dak li gie diskuss fil-medjazzjoni hija l-kwistjoni li tkun giet indikata fl-ittra, sakemm il-kwistjoni ma tkunx indikata b' mod generalu bhala wahda ta' firda personali fejn allura jigu diskussi l-effetti konsegwenzjali kollha tas-separazzjoni; izda meta bhal fil-kaz prezenti l-ittra tkun limitata ghal haga wahda biss, f' dan il-kaz l-access favur il-missier, u l-medjazzjoni tkun inghalqet minghajr success u l-parti tkun allura giet awtorizzata tipprocedi bil-kawza, din l-awtorizzazzjoni tkun valida biss ghall-kwistjoni ndikata fl-ittra.'*

Reference is made to a partial court judgment in the names **Jason Camilleri vs Karen Camilleri Spiteri** (304/12RGM) delivered on the 30<sup>th</sup> January 2014 where the court made the following considerations:

*"... l-Avukati tal-partijiet ghamlu referenza ghal sentenza moghtija minn din il-Qorti fil-11 ta' Lulju 2013 fl-ismijiet "**Louis Arpa vs Mary Arpa**" fejn giet*

---

1 Sottolinear tal-Qorti

*iccitata b'approvazzjoni sentenza ohra moghtija minn din il-Qorti diversament preseduta:*

*“Regolament numru 9 in dizamina jirreferi ghal “bidliet f’kull haga regolata...minn kuntratt ta’ firda personali”. Fil-fehma tal-Qorti il-manteniment pattwit bejn il-partijiet fuq il-kuntratt ta’ separazzjoni konsenswali jaqa’ fid-definizzjoni ta’ materja regolata minn kuntratt ta’ separazzjoni ta’ firda personali. Il-kelma “ghandha” ma thalli l-ebda lok ghal incertezza. Il-htiega tal-ittra sabiex jigu inizzjati l-proceduri ta’ medjazzjoni ma hiex fakoltativa izda mandatorja.*

*Kif irriteniet din il-Qorti diversament preseduta fis-sentenza in parte moghtija fis-7 ta’ Dicembru 2010 fil-kawza **AB vs BC**<sup>2</sup> (Citaz nru 501/2007NC):-*

*“In propozitu l-Qorti tosserva li r-regolament [9] ta’ l-imsemmi Avviz Legali jirrendi applikabbli l-proceduri ta’ medjazzjoni wkoll ghal diversi kazijiet ohra, apparti milli biex tintalab is-separazzjoni personali. Inkluz fost dawn il-kazijiet hemm nuqqas ta’ qbil dwar il-kura u kustodja, access u manteniment, kif ukoll “[c] bidliet f’ kull haga regolata minn sentenza ta’ firda personali jew minn kuntratt ta’ firda personali.” [Reg.9[1][c]], u fl-istess subinciz ikompli jghid li l-parti ghandha “tipprezenta ittra fir-registru tal-Qorti fejn tghid x’ inhi t-talba taghha..”*

*Illi r-ratio legis ta’ din il-parti tal-ligi huwa car, u cioe’ li meta tinqala’ kwistjoni bejn il-partijiet dwar haga, li tidhol fl-ambitu tal-kazijiet indikati fir-regolament 9, ghandha tinfetah medjazzjoni, qabel ma ssir il-kawza, bl-iskop li l-medjatur jipprova jwassal lill-partijiet ghal ftehim dwar dik il-kwistjoni ndikata fl-istess ittra. Dan ifisser li l-medjazzjoni tkun saret fuq dik il-kwistjoni biss; u ghalhekk, fin-nuqqas ta’ provi li juru l-kuntrarju, il-prezunzjoni hi li dak li gie diskuss fil-medjazzjoni hija l-kwistjoni li tkun giet indikata fl-ittra, sakemm il-kwistjoni ma tkunx indikata b’ mod generalu bhala wahda ta’ firda personali fejn allura jigu diskussi l-effetti konsegwenzjali kollha tas-separazzjoni; izda meta bhal fil-kaz prezenti l-ittra tkun limitata ghal haga wahda biss, f’ dan il-kaz l-access favur il-missier, u l-medjazzjoni tkun inghalqet minghajr success u l-parti tkun allura giet awtorizzata tipprocedi bil-kawza, din l-awtorizzazzjoni tkun valida biss ghall-kwistjoni ndikata fl-ittra.”*

*Fiz-zewg kawzi citati il-Qorti, filwaqt li ddikjarat li li l-medjazzjoni f’cirkostanzi simili kienet mandatorja, irreferiet lill-partijiet ghall-medjazzjoni u issoprasjediet sakemm il-medjazzjoni tigi konkluziva. In sostenn ta’ din il-linja ta’ hsieb fid-decizjoni odjerna issir referenza ghal dak li kien gie dikjarat mill-Qorti tal-Appell*

---

<sup>2</sup> Jason Cassar vs Karen Cassar (501/07NC)



fil-kawza “**Emmanuel Bonello et vs Edward Percy Larchin**” deciza fil-15 ta’ Dicembru 1945:

*“Id-dover tal-gudikant huwa mhux semplicement dak li japplika l-ligi, imma anke dak li jara, minhabba c-cirkostanzi specjali tal-kaz, x’inhija l-probabli intenzjoni tal-legislatur f’dawk ic-cirkostanzi, u li japplika l-ligi u jinterpretaha b’mod li jista’ jikkonciljaha mal-ligijiet l-ohra, biex l-applikazzjoni taghha ma tigiex ingusta.”*

*Ghal dawn il-motivi tiddisponi mit-tieni eccezzjoni tal-konvenuta billi tiddikjara illi kien mehtieg li l-kawza odjerna tkun preceduta minn procedura ta’ medjazzjoni specifikatament fuq l-allegazzjoni tal-attur li l-konvenuta ikkommittiet adulterju u li minhabba f’hekk qed jitlob it-terminazzjoni tal-manteniment.*

*Ghaldaqstant tissospendi l-proceduri odjerni; tordna lill-attur sabiex fi zmien ghaxart (10) ijiem millum jistitwixxi l-proceduri ta’ medjazzjoni fir-rigward tat-talbiet attrici.”*

*Bl-istess mod, u bil-konfort ta’ rassenja ta’ giurisprudenza nostrana a favur li rikorsi guramentati, safejn hu possibbli, ghandhom jigu sanati, din il-Qorti sejra tiddisponi mill-ewwel eccezzjoni tal-konvenut billi tissospendi l-proceduri odjerni; u tordna lill-attrici sabiex fi zmien ghaxart (10) ijiem millum tistitwixxi l-proceduri ta’ medjazzjoni fir-rigward tat-talbiet taghha rigwardanti l-manteniment ta’ uliedha.”*

The Court notes that between the parties there is still a pending mediation procedure bearing number 1702/1 in the names “A P L vs R L”. The Court examined the acts of those mediation proceedings filed by A P L on the 4<sup>th</sup> November 2016 where he requests authorisation to proceed with a court case “*sabiex il-kura u kustodja tat-tfal minuri taghhom .....tigi fdata lill-esponent missierhom fl-ahjar interess ta’ l-istess minuri; sabiex jigu ffissati granet u hinijiet ta’ access u sabiex isir likwidazzjoni u hlas ta’ manteniment lejn il-htigijiet u l-bzonnijiet tal-imsemmija tfal minuri.*” On the other hand the present court case was filed by R L requesting the Court to “*Tordna l-kura u kustodja tal-minuri X, Y u V esklussivament f’idejn l-esponenti u l-esponenti tkun awtorizzata tiehu d-decizjonijiet rigward sahha u edukazzjoni tal-istess minuri, minghajr il-kunsens tal-intimat.*” It is the opinion of this Court that the merits of the pending mediation proceedings number 1702/16 cover the merits of the present case. However, in order to eliminate any doubt about whether the merits of the pending mediation proceedings cover the merits of the present case, the Court shall follow established jurisprudence, shall suspend these proceedings and accord plaintiff a short time limit to file fresh mediation proceedings on merits identical to the merits of the present case.

**Decide.**

For these reasons the Court decides the preliminary plea by declaring that the decree terminating the mediation proceedings did not automatically authorise the parties to file a court case. However the lack of a decree specifically authorising the parties to proceed does not bring about the nullity of plaintiff's sworn application and that the judicial proceedings may be saved by granting plaintiff a short time limit to file fresh mediation proceedings.

Therefore, the Court suspends the proceedings of the present court case and grants plaintiff ten (10) working days to file fresh mediation proceedings on merits identical to those of the present court case.

The Court shall continue to consider the merits of this court case after the mediation proceedings are concluded and judicial authorisation to proceed obtained.

With costs of this partial judgment against plaintiff.

**Judge**

**Deputy Registrar**