- Convention on the Civil Aspects of Child Abduction (The Hague, 1980)
- Article 3 of Chapter 410 of the Laws of Malta
- Council Regulation (EC) No. 2201/2003 known as Brussels II bis
- discretion of the courts of first instance regarding evaluation of the facts not lightly disturbed on appeal

MALTA

Court Of Appeal

Judges

THE HON. MR. JUSTICE LAWRENCE MINTOFF (ACTING PRESIDENT)
THE HON. MR. JUSTICE ANTHONY ABELA
THE HON. MR JUSTICE GRAZIO MERCIECA

Sitting of Monday 5th of November 2018

Number: 1

Application Number: 12/15 JVC

A B née C

v.

D B

The Court:

This is an appeal and cross-appeal from a judgement delivered on the 21st February 2017 by the Family Section of the Court of Magistrates (Gozo) sitting in its Superior Jurisdiction ("the First Court");

The parties contracted marriage by a civil ceremony in Victoria, Gozo on the 27th July 2007. From this matrimonial union a child was born named E who is still a minor. Following the breakdown of the marriage, plaintiff A B requested the Court of first instance:

1. "To pronounce personal separation between her and the defendant for reasons valid at law and for reasons imputable to the defendant as aforesaid;

2. "To award the care and custody of the minor son E to the plaintiff;

3. "To condemn the defendant to pay the plaintiff, for herself and for her minor child E maintenance allowance according to law and to order its reduction from his wages as the case may be;

4. "To declare that the defendant has forfeited his rights according to Articles 48 (1) (a), (b), (d) of the Civil Code;

5. “To dissolve, and liquidate the community of acquests with the application of Articles 48(1) and 51 of the Civil Code;

6. “To assign the matrimonial home as a residence for the plaintiff to the exclusion of defendant according to Article 55A (1) of the Civil Code and according to Article 55A (3) and with the application of Article 3A(2) of the Civil Code with reference to the parties to this law suit;

7. “To order the plaintiff to acquire again her maiden surname”;

Defendant D B resisted his wife’s claims by declaring in his Sworn Application:

1 “That notwithstanding that defendant is not objecting to plaintiff’s request for separation, defendant is vehemently contesting that the couple’s marriage broke down for reasons attributable to defendant as claimed by applicant in her sworn declaration and this as will be shown during the hearing of this case;

2 “That defendant vehemently contests plaintiff’s request that she be granted sole care and custody of E B. Both parties should have joint custody. In addition, there should be established days

and times when defendant can see his child. Besides, access should include stays in England so that the minor child can live with his father for a number of days. This would enable E to see his relatives in the UK including his siblings. This in the eventuality that it is decided that E is to remain living in Gozo and the father's request to have E returned to the UK is turned down by the Maltese Courts;

3 "That defendant does not have any objection in paying maintenance for his minor son E B. The amount of maintenance payable is to be determined taking into account the needs of the minor child as well as defendant's income, bearing in mind also that defendant also has to maintain two other children whom he fathered from a previous relationship. Defendant has already instructed plaintiff to contact the UK Child Suport Agency so that she would start receiving maintenance directly from this Agency, with the amount being then directly deducted by standing order from defendant's funds. Defendant provided plaintiff with all contact details necessary so that she would kick start the whole process. Consequently, defendant should not be made to shoulder any costs in relation to this request;

4 “As regards the remaining part of the third request, defendant is vehemently contesting plaintiff’s request that he be ordered to pay maintenance to her. This for the simple reason that his wife can work and is in effect in gainful employment and getting wages. In fact she is working with an English company directly from Gozo. Moreover she has sufficient income from various sources, which enable her to live a decent life;

5 “That defendant is contesting the fourth request contained in the sworn application since there do not exist sufficient grounds justifying the forfeiture of his rights as contemplated in articles 48(1)(a), (b) and (d) of Chapter 16 of the Laws of Malta and this as will be shown during the hearing of the case;

6 “Defendant does not object to the termination and liquidation of the community of acquests provided that the assets forming part of the community of acquests are duly identified and kept distinct from the paraphernal assets of the respective parties. In addition it must be ascertained the contribution made by each of the parties to the community and this both as regards the assets situated in Malta as well as those in England. This exercise will ensure that each party gets what is due. However, applicant is contesting plaintiff’s request to have articles 48(1)(c) and 51 of the

Civil Code applied to the termination and liquidation of the community of acquests since the requisites established by law justifying the application of those articles do not exist;

7 "That applicant is also contesting plaintiff's sixth request to have the house in Nadur assigned to plaintiff to the exclusion of defendant and this on the basis of articles 55A(1), 55A(3) and 3A(2) of Chapter 16. The house in Nadur is owned jointly by the parties to the case and considering the fact that plaintiff has alternative accomodation, the house should be sold and the proceeds divided equally between the parties;

8 "That defendant does not object to plaintiff's request to revert to her maiden surname;

9 "Saving any other pleas competent to defendant in terms of law;

10 "This sworn reply is being filed without prejudice to the pending appeal bearing reference number 10/2015 in the names *Direttur tad-Dipartiment għall-Istandards fil-Ħarsien tal-Familja vs. A B née C*. This appeal is still pending before the Court of Appeal. In this application, it is being requested that E B be returned to the

United Kingdom since he was illegally retained in Malta without the father's consent;"

The First Court decided that:

"(1) first plea:

"With regards to the plea for this court to pronounce personal separation between plaintiff and the defendant for reasons valid at law and for reasons imputable to the defendant as aforesaid, Court considers that enough evidence has been brought by plaintiff to convince this Court up to the level required by law that the separation between the parties is to be pronounced for reasons imputable solely to the defendant mainly being moral and physical abuse by the husband on the wife as a result also of defendant's alcohol problem resulting in excesses, cruelty, threats and gross insults including moral and physical violence committed by defendant on the wife and child. Court rules however that adultery on behalf of the husband was not proved although the Court has serious doubts as to the genuinity of the various nights spent by the husband away from the matrimonial home allegedly on work meetings.

"Court therefore accedes to plaintiff's first plea and pronounces personal separation between plaintiff and the defendant for the above reasons imputable solely to the defendant.

"(2) and (3) second and third plea:

"The second plea requests this court to award the care and custody of the minor son E to the plaintiff whilst the third plea request this court to condemn the defendant to pay the plaintiff, for herself and for her minor child E maintenance allowance according to law and to order its reduction from his wages as the case may be.

"Due to the fact that the wife has a full-time job Court rejects that part of the third plea requesting the payment of maintenance by the husband to the wife.

"With regards to the issue of care and custody, this Court has already in this judgement given its reasons for being absolutely convinced that it is in the child's best interest that the minor should stay and live with his mother in Gozo. Due to this conclusion reached by this Court, this Court also does not think that a situation wherein care and custody is shared jointly between the parties who live in different countries as being at all a workable solution and certainly not in the best interest of the child.

"Court therfore proceeds to accede to plaintiff's second plea and confirms full care and custody of the minor E exclusively to plaintiff A B née C thus respecting the minor's situation for the last two and half years.

"With regards to the third plea requesting maintenance for the minor child Court confirms her *pendente lite* order dated the 19th of November 2015 ordering the payment of three hundred Euro (€300) monthly payable as maintenance for the minor by the husband to the wife and therefore accedes to plaintiff's plea and orders respondent to pay plaintiff the amount of three hundred Euro (€300) monthly respresenting maintenance due from him to the wife for the minor child and including respondent's share on education and health expenses of the minor. The said amount shall increase at a rate of 5% yearly, at the beginning of every new year on January 1st of each year and shall continue to be due up until the age of 23 if the child remains in full time education according to law.

"Respondent, when in the Maltese Islands, shall have right of access towards the minor every day for four hours starting from 3.00p.m. to 7.00p.m. Should respondent's visit to the Maltese Islands coincide with the minor's holidays, the respondent shall have the right to one full day access towards the child every five days from 10.00 a.m. to 7.00 p.m. to be agreed to between the parties. Respondent shall be obliged to

advise plaintiff of his presence in the Maltese Islands at least a week before his date of arrival so that the wife may make the neccessary arrangemenst for the access to be exercised with the least disruption to the child's normal routine.

"The respondent shall have access through SKYPE (or an equivalent system) once a week for twenty minutes every Friday at 6.00p.m. This in order that the defendant shall have ample time to drive back home from work and also in order that when the child's sisters are visiting their father they may also be present for these sessions. After having seen the footages of the SKYPE session, Court is convinced that having less time on SKYPE will benefit to the mood of the minor when actually speaking to his father making the time spent on SKYPE more enjoyable for the said minor rather than a thing that has to be done which ends up frustrating the same minor.

"Should respondent want the child to travel with him to the United Kingdom or some other place for a holiday he may be allowed to do so at his expense for a maximum period of two weeks yearly during the child's school holidays, but this only after that the necessary application is made to the Family Court or applicable Court and subject that an adequate financial gurantee as ordered by that Court is deposited by respondent guaranteeing the child's return to the Maltese Islands.

“The father shall have the right to be given information regarding the education and health of the child.

“Should any extraordinary decision be needed to be taken concerning the health of the minor child, the father shall also be consulted and his consent shall be needed at least verbally, unless such decision is needed to be taken urgently according to doctor or specialist concerned in the best interest of the child in which case such decision shall be taken by the parent who is present with the child.

(4) fourth plea:

“With regards to plaintiffs’s fourth plea to declare that the defendant has forfeited his rights according to Articles 48 (1) (a) (b), (d) of the Civil Code and the objection thereto by defendant this Court declares that in the circumstances both parties have forfeited their right to inherit each other, that due to the fact that both parties are gainfully employed no party shall have the right to request the payment of maintenance from the other party and otherwise accedes to the rest of the fourth plea as long as it is in line and consistent with the Court’s decision concerning the division and liquidation of the community of acquests.

“(5) and (6) fifth and sixth plea:

“With regards to plaintiff’s fifth and sixth plea, that is, to dissolve, and liquidate the community of acquests with the application of Articles 48(1) and 51 of the Civil Code and the request to assign the matrimonial home as a residence for the plaintiff to the exclusion of defendant according to Article 55A (1) of the Civil Code and according to Article 55A (3) and with the application of Article 3A(2) of the Civil Code, Court accedes to the fifth and sixth plea in accordance with its directions under the title **Dissolution and liquidation of the Community of Acquests** above in this judgement;

“(7) seventh plea:

“Defendant did not object to the seventh plea and therefore Court accedes to plaintiff’s plea to revert to her maiden surname C.

“Finally court rejects respondent’s replies only in so far that these are not inconsistent with its conclusions above.

“In view of the cirumstances of the case, the costs of this case are to be borne equally between the parties.”

Having seen the **Application of Appeal** by the Defendant by means of which, for the reasons therein stated, he asked this Court to:

(1) revoke the rejection of the First Court of Appellant's plea dated 6th October 2015 to suspend the part of the proceedings relating to the care and custody of the child until the request for the return of the child to the UK is decided upon and instead to rule that the issue of the care and custody of the minor child is not to be pronounced until proceedings for return of the child are finalized and revoke the part of the judgement entitled "second and third plea";

(2) revoke the part of the judgement entitled "first plea";

(3) alter various other parts of the judgements should this Court not accept the first ground of appeal;

(4) reform the part of the judgement entitled "fourth plea" by revoking the part stating that appellant had forfeited his rights according to Article 48 of the Civil Code and declaring instead that both parties have forfeited their right to inherit each other and that no party is to request maintenance since both are gainfully employed;

(5) revoke the part of the judgement entitled “fifth and sixth plea” and instead liquidate and partition the community of acquests according to his note of submissions before the First Court;

(6) confirm the part of the judgement entitled “seventh plea”;

Having seen the Appeal Reply and the Cross Appeal which stated that the judgement of the First Court is substantially just except for the part relating to the liquidation and partition of the Community of Acquests, which should have been carried out in the manner stated in the Cross Appeal;

Having seen appellant’s Reply to the Cross-Appeal;

Having taken cognizance of the acts of the case;

Having heard the oral submissions by learned counsel representing the parties;

Having considered that:

The first and second ground of appeal is that the First Court should have accepted defendant’s request to suspend its decision on the care

and custody of the minor child until the request for the return of the child to the United Kingdom is decided upon. Briefly put, the reasons submitted in support of this ground are the following:

(i) that part of the judgement of the First Court violates Article 3(1) of Chapter 410 of the Laws of Malta. Brussels II Regulation does not supersede, but merely complements the Hague Convention adopted as part of Maltese law in this Chapter;

(ii) it is changing an order by this Court in its judgement delivered on the 30th October 2015, and constituting a *res judicata,* ordering the return of the minor child to the United Kingdom;

(iii) it encourages the abducting parent to get away with impunity for her actions by delaying tactics;

(iv) it misquoted this Court as saying, in its judgement abovementioned, that appellant had submitted himself to the jurisdiction of the Maltese Courts regarding care and custody of the child;

(v) it acted under the false impression that appellant was acting out of a spirit of vendetta against his wife, and not in the interest of the child.

The substance of **Ms B's reply to the first ground of appeal** is that:

(i) a defendant cannot submit to the jurisdiction of the Court in some aspects of a dispute, but not on others;

(ii) opposition to jurisdiction should be made in the form of a formal plea, not by means of a "without prejudice" clause;

(iii) the proceedings instituted by the Director, in accordance with the Hague Convention, had become irrelevant since defendant had submitted to the jurisdiction of the Court. Article 16 of the Hague Convention would have been applicable had defendant not accepted the jurisdiction.

(iv) Brussels II prevails over the Hague Convention where it departs from it. Article 12 of the Brussels II Regulation provides that if defendant submits to a particular Court, then its provisions relating to jurisdiction no longer apply. Article 12 of the Hague Convention makes an exception to the return of the child where it is settled in the new environment;

(v) the Court of First Instance was correct in stating that the father was acting vindictively.

That the decision of the First Court regarding the jurisdiction of the Maltese Court was based on the following reasons:

(i) that the issue was the return of the minor to the United Kingdom; not its care and custody;

(ii) that this Court decided that the father had submitted to the jurisdiction of the Maltese Courts.

The decision of the Court of First Instance on this point was not based on any other reason; in particular it did not make reference to the Hague Convention or the Brussels II *bis* Regulation, to which both appellant and appealed make extensive reference in the Application of Appeal and the Reply of Appeal respectively; as well as during their oral submissions before this Court.

This Court respectfully disagrees with both reasons on which the decision of the Court of First Instance was based.

Regarding the first reason, the issue was not simply the return of the minor, but as to which Court has jurisdiction regarding the determination of which parent should have the care and custody of the child. The

return of the child was a corollary to the finding of this Court[1] that this jurisdiction lies in the Courts of the United Kingdom. Another corollary was that the Maltese Courts do not have jurisdiction.

Regarding the second reason, this Court made it clear the father "kien qed jikkondizzjona l-aċċettazzjoni tiegħu li l-vertenza tiġi deċiża mill-Qrati Maltin kemm-il darba t-talba tiegħu magħmula preċedentement għar-risposta ġuramentata, dwar ir-ritorn tat-tifel tiġi miċħuda". This Court did not deny the request for the return of the minor, but, on the contrary, accepted it. Consequently the condition made by the father in his sworn application did not occur.

This Court disagrees with the submission of the appealed that jurisdiction cannot be accepted in certain matters, but not in others. Indeed the appealed failed to cite any law or authority - apart from its very own – in support of its claim. Nor can this Court accept the contention of the appealed that the way in which the plea of lack of jurisdiction was put by the defendant – now the appellant – is null and void. As has been famously said, nullity pertains to the infancy of the law. Moreover, there is no sacramental formula for the drafting of pleas;

[1] In re: *Direttur tad-Dipartiment għall-Istandards fil-Ħarsien Soċjali vs. A B née C* delivered on the 18th February 2016. A demand for Retrial of this judgement was rejected by this Court by another judgement of the 17th May 2016. A complaint concerning the Hague Convention Proceedings, and the alleged Constitutional Court's failure to assess the applicants' situation at the relevant time was rejected by the European Court of Human Rights (*Applications by A B against Malta and E B against Malta*) by judgement of the 28th June, 2018.

they are admissible as long as they are clear and unequivocal. If the Court were to accept the line of argument of the appealed, it could well mean, that in the circumstances, a respondent is to refrain from entering an answer to the writ on other matters not related to the question of custody and strictly speaking remain in default, out of fear of compromising his plea of jurisdiction of the Court as regards custody.

Malta is a signatory to and has ratified the Convention on the Civil Aspects of Child Abduction promulgated at The Hague in 1980 and which by virtue of Article 3 of Chapter 410 of the Laws of Malta has the force of law in Malta. As a Member State of the European Union, Council Regulation (EC) No. 2201/2003 known as Brussels II *bis* applies directly in Malta. Both these international instruments deal with child abduction. It is expressly stated in Brussels II *bis* that in cases of child abduction, The Hague Convention "**would continue to apply as complemented by the provisions of this Regulation**, in particular Article 11.[2] Both the appellant and the appealed have in the acts of these Appeal proceedings discussed the applicability of these provisions to the present dispute. However this matter has already been definitely settled by the judgement of this court of the 30th October 2015, **which has ordered the return of the child to the United**

[2] Which orders that a decision be reached within six weeks of commencement of proceedings.

Kingdom. In this regard, article 16 of the Convention acquires importance in that it lays down that:

> *"After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained* ***shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention***[3] *or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.*

This meaning, that if the Courts are restrained not to decide on the merits of rights of custody until it has been determined that the child is not to be returned under the Convention, it logically follows, that they are more forcefully restrained when the matter has already been decided by the Court of Appeal in the sense that the child should be returned, appositely for the matter of custody to be decided by the Courts were the child last resided before he was removed to Malta.

This Court therefore agrees with appellant that according to article 16 of the Hague Convention, after receiving notice of a wrongful removal of a

[3] Emphasis of the Court.

child, the judicial authorities to which the child has been removed "shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention." Thus the Court of First Instance was, independently and irrespectively of the proceedings leading to the judgement of this Court of the 30th October, 2015, precluded by the Hague Convention from proceeding to make a decision on the care and custody of the child unless and until there is a decision that the child is not to be returned under the Convention.

The appealed emphasizes that both the Hague Convention and the Brussels Regulation II *bis* put the best interest of the child as the overriding consideration, and that, the child having now integrated with Maltese relations and friends, it would not be in his interest to be relocated to the United Kingdom. This might well be the case, however this matter has to be decided by the competent courts, which are those in the United Kingdom. The judgement of this Court of the 30th October, 2015 does **not** entail that the care and custody be given to the father but simply to send the child to the United Kingdom so that the competent courts can decide upon this issue. Furthermore, if the Court were to accept this line of thought, it would be turning logic on its head, since the strategic prolongation of procedures before the Courts of the State where the child was removed with the purpose of creating a *fait accompli*, would bring to naught the intended effects of the Convention.

During the course of the hearing of the appeal, the appealed filed an application asking this Court for the issue of a passport for the child to enable it to be sent to the United Kingdom to fulfill the order of this Court of the 30th October 2015. This Court granted permission under certain conditions which were not adhered to by the appealed. The child was whisked from one airport to another and within about twelve hours the child was back in Gozo. The appealed then appeared before this Court claiming that during the child's twelve hour stay in Great Britain, no notification was received from any British court and so the appellant can be deemed to have renounced to his claim to have the issue of care and custody decided by a British Court. The appealed and the competent authorities in the United Kingdom had no real opportunity to institute proceedings from their end during the extremely short stay of the child about whose whereabouts they were uninformed or misinformed. It is hardly necessary for this Court to point out that adherence to court judgements must be made in good faith.

Thus the first and second grounds of appeal deserve to be upheld.

Having considered that:

This Court is not taking cognizance of the third ground of appeal in view of its decision regarding the first and second grounds.

Having considered that:

The first part of the fourth ground of appeal is being rejected since the judgement of the First Court made no decision as therein stated; the second part is correct and therefore the relevant part of the judgement is being upheld;.

Having considered that:

Both the fifth ground of appeal and the Cross-Appeal query the manner in which the First Court liquidated and divided the Community of Acquests.

According to the appellant (the husband), the First court did not consider that he should benefit from the renting business even though he had put considerable input to it. Also, Court did not consider that community funds were used to settle the loan for paraphernal property of wife. He wants owelty to be calculated together with additional sum catering for rental income after 2013, proceeds resulting from the sale of land rover as well as the equity of the rental business.

According to the appealed (the wife) as she states in her cross-appeal, *inter alia*:

(i) any financial contribution to the property in Birmingham made by her and her parents should not be repayable as compensation for rental income;

(ii) she should keep her wedding ring;

(iii) the sum which she contributed to the Birmingham house should be refunded to her;

(iv) the Gozo property together with loan should be assigned to her whilst husband keeps the property in UK.

It is a well-established principle that this Court opts to disturb the factual assessments of a Court of First instance only for the most serious reasons to correct a manifest error which if not corrected would clearly cause an injustice.[4] Neither the Appellant nor the Appealed has shown any such manifest error in the judgement. Their respective grounds of appeal and cross-appeal merely consist of a reconstruction of the evidence based upon their personal re-elaboration – which is

[4] *Vella v. Tabone* decided by this Court on the 22nd October 2002.

inadmissible as a ground of appeal.[5] Consequently the fifth ground of appeal and the cross-appeal are both being rejected.

Decide:

For these reasons, the Court:

(1) upholds the first and second grounds of appeal, and rejects the other grounds as well as those of the cross-appeal in so far as they are inconsistent with this judgement;

(2) revokes the part of the judgement of the First Court delivered on the 21st February 2017 which rejected the plea of defendant D B filed on the 6th October 2015 to suspend the part of the proceedings relating to the care and custody of the child until the request for the return of the child to the UK is decided upon[6];

(3) revokes the part of the judgement dealing with the second plea of the plaintiff, which awarded the care and custody of the child to her, and instead holds that the Maltese Courts have no jurisdiction regarding the issue of the care and custody of the minor child until proceedings for return of the child are finalized and consequently revokes the part of

[5] *Diana Abdilla v Frank Mifsud*, Court of Appeal, 13.06.2007.
[6] Last paragraph of page 13 of the judgement of the First Court.

the judgement dealing with the second plea of the plaintiff and refrains from taking cognizance thereof;

(3) revokes the part of the judgement dealing with the third plea in so far as it deals with the maintenance and right of access of the father to the child;

(4) confirms the judgement in so far as not inconsistent with the above.

Costs of the case at first instance and those of the principal appeal are to be borne equally between the parties; those of the cross-appeal are to be borne by A B.

Lawrence Mintoff
(Acting President)

Anthony Abela
Judge

Grazio Mercieca
Judge

Deputy Registrar
mb