

**CIVIL COURT**  
**(FAMILY SECTION)**  
**MADAM JUSTICE**  
**JACQUELINE PADOVANI GRIMA LL.D., LL.M. (IMLI)**

**Hearing of Friday 1<sup>st</sup> November 2019**

**App. No. : 198/2019 JPG**

**Case No. : 24**

**WS**  
**vs**  
**VB**

**The Court,**

Having seen the sworn application filed by WS, dated 16<sup>th</sup> August 2019, a fol 1 et seqq., where in it was held:

1. *That this lawsuit is regarding the custody and the residence of the parties' daughter, who was born on 11<sup>th</sup> August 2013, today she is six years old.*
2. *That the salient facts which gave rise to this lawsuit are the following:-*
  - i) *That plaintiff is a C national whilst defendant is a U national.*
  - ii) *That during the year 2006 parties met in C while defendant was in C playing with the orchestra.*
  - iii) *That plaintiff married defendant in B, C on 18<sup>th</sup> February 2008 (DOC WS 1), after being together for about two (2) years and established their residence in C.*

- iv) *Later on the parties married in a Church in U since defendant wished that he gets married in his country.*
- v) *That from this marriage parties had two children, that is, KB, who was born on X in W, A (DOC WS 2) and WCF (also known as MB) who was born on Y in B, C, still minors.*
- vi) *That a few days after their marriage, parties lived for about three years in Malta and this happened because defendant was offered a job in Malta. It is stated, that defendant's profession is a violin player and during marriage and even before marriage he used to travel because of his job. That a few days after their arrival in Malta, that is on 25<sup>th</sup> September 2008, the parties bought a property in Malta, the property H which property still belongs to the parties.*
- vii) *That during the year 2011, two and a half years after, plaintiff returned back to C because she was in pain and the medicine being prescribed to her were not curing her and for this reason she decided that she should take the necessary care in her country. It is stated that defendant did not make things easy for plaintiff to leave Malta since he hid her passport and credit-cards and were given to her only after she attended the Police Station. A couple of months later, defendant went to C.*
- viii) *That a few months later plaintiff got pregnant but lost her baby.*
- ix) *That towards the end of the year 2012, plaintiff was pregnant again. Defendant expressed his wish that the baby be born in A and convinced plaintiff that this was beneficial for the baby future. When plaintiff was five months pregnant, parties travelled to A. It is stated that parties had no job while in A.*
- x) *That on X KB was born in W A. When the baby was only forty-five (45) days old the parties returned to C. During the few days that parties were in C, plaintiff registered the minor in C and in effect the minor has a C identity card. When the baby was on two months old, parties decided to come to Malta for a short period. Defendant expressed his wish that the baby be baptised in Malta. Plaintiff did not object and the minor was baptised.*
- xi) *That when the girl was eight (8) months old, plaintiff and the minor child returned to C and defendant followed later on but was present for K's first birthday.*
- xii) *That from that day plaintiff and the minor child never returned to Malta whilst*

*defendant used to come to Malta regularly and this because on 6<sup>th</sup> January 2011 he had registered the company V and the address of the company is the parties' property in H.*

- xiii) That defendant always expressed that he was sad with the restrictions he believed he had as a U citizen to the extent that he forced plaintiff – while in advanced pregnancy – to travel with him to the A in order that their daughter K be born there and possesses and A passport that would thereafter allow him to go to A. He had also made everything to obtain rights of residence and work in Malta and he used to explain to plaintiff of the legal needs he had to observe for this purpose.*
- xiv) That on 10<sup>th</sup> July 2017 plaintiff gave birth to the minor WCF (also known as MB) in B, C.*
- xv) That in April 2018 defendant expressed his wish to travel for a holiday alone with the minor KB to Malta. He had to travel for the period between 10<sup>th</sup> July 2018 and 3<sup>rd</sup> August 2018. That parties had also agreed that during this holiday defendant had to attend the C Embassy in Malta to apply and obtain a long term Visa known as "Q" and this in order that it would be possible for the minor to attend an International School in B, C since the minor is an A national. In fact plaintiff had given her consent in order that the Visa is issued in writing.*
- xvi) That defendant and the minor left C to Malta as foreseen on 10<sup>th</sup> July 2018. It is stated that plaintiff managed to speak to her daughter **only** twice during this period and this because defendant started creating all kind of excuse in order that plaintiff has no contact with her daughter.*
- xvii) That on 3<sup>rd</sup> August 2018, which is the day when they had to return to C, defendant did not return to C together with the minor.*
- xviii) That as soon as this happened plaintiff tried to contact her husband to know what happened. This to no avail. Plaintiff made contact with the A Embassy in U and asked them to check whether her daughter was in U. The A Embassy confirmed that her daughter was indeed in U in defendant's parents' residence.*
- xix) Plaintiff tried several times to contact defendant's family but this resulted in the negative except on two occasions and during those two occasions plaintiff learned by startle that she could not communicate with her daughter and this because she had forgotten the C language.*

- xx) *That because K was not in Malta and because WCF was only thirteen months old and was alone in B with plaintiff's mother, plaintiff decided to come to Malta as soon as her daughter K arrived in Malta from U.*
  - xxi) *As soon as plaintiff found out that the minor was in Malta, she made all necessary arrangement to come to Malta and on 11<sup>th</sup> October 2018 she arrived in Malta. Under her lawyer's instructions, she stayed for a week in a Hotel and afterwards went to the parties' home in H to see her daughter.*
  - xxii) *When plaintiff was in Malta, she found out that defendant had given his consent to his sister, NV, to travel together with the minor KB to U from 2<sup>nd</sup> August 2018 to 5<sup>th</sup> September 2018. It is stated that the minor returned to Malta only on 2<sup>nd</sup> October 2018. It is stated as well that the minor never spoke in the U language and neither defendant's sister nor his family know how to speak English but he still sent his daughter on her own with who she can in no way communicate with them.*
  - xxiii) *That plaintiff filed a lawsuit against defendant (Lawsuit number W) by virtue of which she requested that this Honourable Court declares that defendant has stolen/abducted the girl by deceit and by breaching the law including the Convention of the United Nations regarding the Children's Rights;*
  - xxiv) *That plaintiff's requests in that lawsuit were turned down by judgement delivered on 3<sup>rd</sup> July 2019 because the Court abstained from taking cognisance of the requests made by the said plaintiff in that lawsuit;*
  - xxv) *That before that judgement was delivered, namely by decree delivered in the acts of mediation number O in the names in reverse, plaintiff was temporary entrusted with the custody of her daughter with access under supervision to defendant;*
  - xxvi) *That parties had both of them requested and obtained the issue against each other of Prohibitory Injunction in order to stop the minor from travelling from Malta.*
  - xxvii) *That the passport issued by the A to the minor KB was deposited under this Honourable Court's authority in the records of the Prohibitory Injunction numbers Z and Z1 by ordered in the sense of the 16<sup>th</sup> October 2018;*
3. *That is evidence form defendant's behaviour – as well as from the little time he spends with his daughter – that he cannot be entrusted with the upbringing of the*

*child; That it is also evident that the minor's place should be back in B, with her mother, her younger sister and her grandparents;*

- 4. That plaintiff has been duly authorised to file a lawsuit for the care and custody of the minor KB and this in order that she be allowed to travel to and establish her residence and of the minor abroad, that is in C, against defendant by decree in this sense delivered from this Honourable Court on 30<sup>th</sup> July 2019 (DOC WM 3).*
- 5. That this lawsuit is being filed precisely in order that the Court, after it listens to the parties, their witnesses and of the minor, orders that in the supreme interest of the said child, KB, lives with her mother, the said WS and with the other minor child WCF (also known as MB) in B, C.*
- 6. That it is also submitted that in a note entered on the 30<sup>th</sup>. July 2019, in the records of the proceedings in the opposite names number 8/2019, Advocate Malcolm Mifsud as lawyer of defendant, together with Advocate Stephen Thake as plaintiff's advocate, it was accepted that the service of judicial acts on defendant , including the acts commencing this suit, which is being filed by virtue of the decree of closure of mediation and authorisation ordered that day, be served on the said Advocate Mifsud, provided that in the said judicial act, reference is made, as is happening now, to the declaration entered that day;*

*Consequently plaintiff respectfully requests that this Honourable Court, sees fitting and opportune for that states above:-*

- i. Orders and declared that in the best interest of the said minor child, parties daughter, KB, that the care and custody of the said minor be entrusted to plaintiff her mother;*
- ii. Authorises plaintiff to, on a date established by this Court in her eventual judgement leaves Malta and takes with her the said minor child KB in order to live with her and with the other minor child WCF (also known as MB) in B, C and this notwithstanding all orders otherwise obtained by the parties or either one of them after the issue of the Prohibitory Injunction to stop a person from taking a minor outside of Malta;*

- iii. *Authorises plaintiff to withdraw the passport issued by the A to the minor KB which was deposited under this Honourable Court's authority in the records of the Prohibitory Injunction numbers Z and Z1 by order in this sense on 16<sup>th</sup> October 2018;*
- iv. *Authorises plaintiff, if such is needed to travel with the minor child KB from Malta to C, as will eventually be ordered as requested in the preceding request, in order that on her own and without the need of defendant's consent or participation, applies for and receives passport, visa or other document of whatever nature that is needed in order that the said minor KB, be able to enter C and lives in C and also in order that the minor KB stops and enters in all countries needed in her journey between Malta and C;*
- v. *Authorises plaintiff, in order that on her own and without the need of defendant's consent or participation, attends the C Embassy in Malta in order to apply and obtain a long term Visa known as "Q" and this in order that it would be possible for the minor, KB, that she attends an International School in B, C.*

*With expenses, including those suffered in the mediation proceedings and those of the Prohibitory Injunction number Z, against the defendant who is from now summoned for reference to his oath;*

Having seen that the application and documents, the decree and notice of hearing have been duly notified in accordance with law;

Having seen the sworn reply filed by VB dated 23<sup>rd</sup> September 2019, wherein it was held:

1. *Whereas preliminarily, the applicant pleads that since the plaintiff is declaring her intention to live abroad, specifically in C, this Honourable Court does not have jurisdiction to grant the first request. This Honourable Court cannot entrust the care and custody of minors to one of the parents if the ordinary residence of the minor will be abroad;*
2. *Whereas, Without prejudice to the above, the Plaintiff's claims lack the essential elements, since the Plaintiff has not requested a personal separation in terms of Article 35(1) seq and Article 56 of the Civil Code (Chapter 16). Therefore, the*

*action is unsustainable.*

3. *Whereas, with respect to the fourth claim, this Honourable Court does not have the jurisdiction to impose upon foreign Authorities, principally C and the A, the receipt of application for the issuance of passports of minors, without the consent of the Defendant;*
4. *Whereas, in respect of the fifth claim, this Honourable Court does not have jurisdiction to order a sovereign country, as in C, to issues a visa without the consent of the Defendant. This is purely within the jurisdiction of the laws of C and se mai, the request should have been made in proceedings in C and not before this Honourable Court;*
5. *Whereas, the applicant is objecting to the second and third request of the plaintiff and this is because the principal residence of the minor is in Malta and there is no reason why this should change. It is not in the best interest of the minor to reside with the mother exclusively and in C, in a completely different environment. The minor would have the advantage of receiving a better education in a country in the European Union and in C she would be kept away from the father;*
6. *Whereas, without prejudice to the foregoing, it is not in the interest of the minor to live in C, that will mean that effectively and in a practical manner she would not be able to access and enjoy her father, since the Defendant would not be able to see or enjoy the minor, due to legal sanctions that he would have to access his two children.*
7. *Whereas, in the witnesses list, there is written the “relatives, friends and work colleagues of the contenders ...” and this goes against Article 156(4) of Chapter 12 of the Laws of Malta, that states: “(4) The plaintiff shall together with the declaration also give the names of the witnesses he intends to produce in evidence stating in respect of each of them the facts and proof he intends to establish by their evidence”. And thus point number 7 shall be expunged.*
8. *Saving further pleas.*

Having seen the counter-claim filed by VB dated 23<sup>rd</sup> September 2019, where in it was held:

*Whereas, the reconvened VB wishes to prevail himself of the right to submit a counter-claim against the reconvener WS;*

*Whereas, the parties are married, and they got married in C on 18<sup>th</sup> February 2008. The marriage celebration was celebrated in U as well. From this marriage KB was born on X, in the A and WCF was born on Y, in C.*

*Whereas, as a result the minor K is an A citizen, but in one way or another it appears that she is also a C citizen, despite the fact that C does not permit dual citizenship;*

*Whereas, with respect to residence, the parties lived in Malta, where the Defendant works as a musician. The parties bought a home in Malta, which was intended to be their matrimonial home and he creates a partnership with the names of V, by which he offered his services;*

*Whereas, the parties went to live in C at the Plaintiff's parents house, but always with the intention of returning to Malta, once they have children, since the Defendant had an established career in Malta, contrary to C, where he had economic difficulties.*

*Whereas, life in C was difficult for the Defendant due to frequent abuse and violence by the Plaintiff and her parents against him and against the minor children. In fact there were several accidents between the Defendant and the Plaintiff and her family where there were threats and even beating him and the minors. Moreover, he had no help from the C authorities to stop these accidents and he had a great fear that recourse to the police would make things go against him since he is a foreigner. Foreigners that are in the situation of the Defendant do not have equal rights with C citizens;*

*Whereas, in April 2018, the parties agreed that the minor K had to come to Malta*



*with the Defendant. The Defendant, in the best interest of the minor, decided not to return to C and remain in Malta so that the minor would have better education opportunities and would no longer live in a violent environment.*

*Whereas, the reconvened knows these facts personally.*

*Therefore, if the Court fails to uphold the first plea of the defendant in his sworn reply, he is pleading this Honourable Court to:*

- 1. Declare the personal separation of the spouses B*
- 2. Order that the care and custody of the minor shall continue to be entrusted in the father, whilst authorising him to take all the decisions concerning the minor, including those related to the health and education of the minor KB;*
- 3. Fix days and times for the Plaintiff to have direct access to the minor and this in the best interest of the minor;*
- 4. To order that the residence of the minor shall be Malta;*
- 5. To liquidate a sum for the payment of maintenance per month for the minor and order the plaintiff to pay the sum of maintenance as liquidated and to contribute to the payment to half the expenses pf health and education of the minor;*
- 6. To confirm the decree of the warrant prohibitory injunction number Z JPG dated 7<sup>th</sup> May 2018 in these names.*
- 7. To declare dissolved, the community of acquests of the Parties and to liquidate the community of acquests in equal portions and to assign the same portions as divided;*
- 8. Assign the dotal and paraphernal property*

9. *Give other provisions that this Honourable Court may deem fit and appropriate in the circumstances.*

*With costs, included the costs of the warrant of prohibitory injunction Z against the Plaintiff that from now is summoned in deposition.*

Having seen the sworn reply filed by WS for the counter-claim, dated 3<sup>rd</sup> October 2019, wherein it was stated:

1. *That defendant was not authorised to file judicial proceedings for separation and neither for demands related to a demand for separation. The only authorization defendant possesses is that granted by this Honourable Court of the 24<sup>th</sup> of July 2019 upon closure of mediation proceedings filed by the plaintiff against defendant (number 01) and relating exclusively to the country of residence of their child, to the travel of the said child and as well as regarding the custody of the minor child KB. This decree is attached to plaintiff's sworn application. In terms of Legal Notice 397 of the year 2003 and according to the regulations 4(1) and 7(1), this Honourable Court's authorization is required in order that one is able to file a separation suit. That on these grounds, all demands made in his counter-claim, saving those numbered two (2), three (3), four (4) and six (6), are null and void and this since the law prohibits that same be demanded primarily in the absence of the required authorization. The sixth (6<sup>th</sup>) demand forms the subject matter of another lawsuit already filed by plaintiff and thus in accordance in accordance to law and jurisprudence it is null and not required.*
2. *That in terms of law and jurisprudence even where authorization required was delivered, the lawsuit for separation is not connected with a suit for care and custody in the manner contemplated by law and jurisprudence and is therefore null.*
3. *That in any event with regard to the said demands, plaintiff responds as follows:*
  - a. *That plaintiff did not make a demand for separation. The breakdown of the parties' marriage was brought about by defendant's desertion, and adultery,*

*which includes that of becoming a father to a child from a third party in Malta as well as the abduction of the parties' elder child KB.*

*b. That the second, third and fourth demands should be rejected by this Honourable Court since the parties' daughter, KB, should reside with her mother in C as she did before she was illegally abducted by defendant her father. For the record, the plaintiff reminds defendant that they have another child, by the name MB (or WCF) now aged two (2) years and who does not appear to be included within the merits of this demand.*

*c. Plaintiff does not work – defendant does. These proceedings have destroyed plaintiff's ability to generate an income since she had to abandon her home to come to Malta and fight expensive judicial proceedings in order to be able to take her child back to C.*

*4. The seventh demand should be rejected since there is no community of acquests existing between the parties since parties married in C and resided in Malta for only two and a half (2½) years. Both parties own in common a property in H. Plaintiff does not possess any property belonging to the defendant.*

*Save other pleas.*

Having seen the exhibited documents and all the case acts;

Having heard final oral submissions from both parties;

**Deliberates;**

This a partial judgement on the preliminary pleas raised by Defendant in his Sworn Reply to Plaintiff's Application, and the preliminary pleas raised by Plaintiff to Defendant's Counter-Claim.

Briefly, the facts of the case are as follows: Plaintiff is a C citizen, whereas Defendant is a U citizen. They were married in C, and subsequently in the U, and from this marriage two children

were born. The elder child, K, was born in the A and has A citizenship, whereas the younger child, M, was born in C and has C citizenship. K is currently present in Malta, whereas M is in C. Plaintiff is alleging that Defendant is wrongly retaining K in Malta, and is seeking to have the child returned to C, claiming that the child's habitual residence is in C, whereas Defendant is claiming that the child's primary residence is in Malta and is objecting to her return to C. Both parties have filed separate cases in which they're demanding the sole care and custody of the child, and for a declaration regarding the child's ordinary domicile.

In his Sworn Reply Defendant raised the plea of jurisdiction, claiming that this Court does not have jurisdiction regarding Plaintiff's first demand, because she has made her intention to live abroad clear, and this Court does not have jurisdiction to entrust the care and custody of a child to a parent if the ordinary residence of the minor will be abroad. Defendant also raised the plea of jurisdiction with regards to Plaintiff's fourth and fifth demand, claiming that this Court does not have jurisdiction to impose on foreign States that they issued a passport and visa without his consent.

During submissions Defendant argued that this case cannot be decided before there is a decision on the habitual residence of the child, arguing that if the Court decides that the child is not to stay in Malta then it would not have jurisdiction because the judgement would be unenforceable since C is not a party to the Hague Convention. On her part, Plaintiff argued that this Court does indeed have jurisdiction to determine this case, and this stems from at least four of the paragraphs of article 742 of the Chapter 12 of the Laws of Malta, whereas the basis for jurisdiction cited by Defendant is a subsidiary one.

Regarding the fourth and fifth Demand, Defendant argued that the Court is being asked to impose on the A and on C that the father's signature is not requested for them to issue a passport and visa for the child and therefore the judgement would be unenforceable and merely declaratory. Plaintiff countered this argument by submitting that these requests are for her to be allowed to execute formalities where they are required. She submitted that the A and C are not defendants in this case and that no part of the judgement is intended to be enforced against them.

The Court notes that according to Article 742 (1) of Chapter 12 of the Laws of Malta, unless otherwise expressly provided by law, the Civil Courts of Malta have jurisdiction to take

cognisance of cases brought before them in the circumstances indicated in the same article. From the manner in which this article is drafted, it is clear that the conditions indicated in the different paragraphs need not be satisfied cumulatively. Rather, once the conditions in one paragraph are satisfied, the Court will be seized of jurisdiction to determine the case, at which point, as rightfully argued by Plaintiff, the Court cannot decline to hear and determine the case.

According to Article 742 (1) (b) of Chapter 12, the Maltese courts have jurisdiction over “**any person as long as he is either domiciled or resident or present in Malta.**” The Court notes that jurisprudence has interpreted the term “*any person*” in this sub-article as referring to the Defendant in the case, by application of the principles *actor sequitur forum rei u tal-massima ubi te invenio, ibi te convenio*.<sup>1</sup> The Court notes also that in cases relating to minors, the presence of the minor in the country is also of paramount importance.<sup>2</sup> In the case at hand, both parties as well as the minor child are present in Malta, and have been so present for over a year. Therefore, the Court considers that it has jurisdiction to hear and determine this case under this paragraph.

Furthermore, according to paragraph (g) of the same article, this Court also has jurisdiction to hear this case if the parties “*expressly or tacitly, voluntarily submits or has agreed to submit to the jurisdiction of the court.*” The Court notes that Defendant not only filed a Sworn Reply to Plaintiff’s Sworn Application, but he also filed a Counter-Claim. Apart from filing such Counter-Claim, Defendant has also filed other proceedings before this Court (Appl. 8/2019 JPG) in which he is demanding, *inter alia*, that the Court declares and confirms that it has jurisdiction to determine the case and regarding the care and custody and access of KB. In view of this, the Court considers that there is sufficient evidence that Defendant has tacitly submitted to the jurisdiction of the court, and can longer claim that this Court lacks jurisdiction to hear and determine this case.

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<sup>1</sup> See for instance, Angelo Cutajar & Sons Limited vs Dr Anthony Cremona et, First Hall of the Civil Court, decided on the 16<sup>th</sup> of October 2003;

<sup>2</sup> **Rosmarie Sixt vs Jurgen Sixt**, Court of Appeal, decided on the 14<sup>th</sup> of February 2000; **Catharina Harvey vs Dr. Peter Caruana Galizia noe**, Court of Appeal, decided on the 8<sup>th</sup> of February 2003; **Dorothy Del Negro pro et noe vs Ciro Del Negro**, First Hall of the Civil Court, decided on the 27<sup>th</sup> of January 2005; **A B vs Avukat Dr. Mark Mifsud Cutajar noe et**, Family Court, decided on the 10<sup>th</sup> of May 2018.

Therefore, once this Court's jurisdiction has been confirmed on the basis of the aforementioned paragraphs, Defendant's arguments lose relevance. Accordingly, the Court rejects Defendant's first, third and fourth preliminary pleas.

**Deliberates;**

In his second plea, Defendant also argued that Plaintiff's Sworn Application lacks the essential elements of the case since she has not requested personal separation in terms of Article 35 (1) *seqq* and Article 56 of the Civil Code, rendering the action unsustainable.

Defendant argued during submissions that since the parties are married, a dispute relating to the care and custody of their child cannot be determined without there being a request for separation. According to Defendant, since the parties are married the Court may only decide for the parties on particular issues if there is lack of agreement between them, but it cannot entrust the care and custody of the child to either one of them outside of the context of a case for personal separation. He also questioned what would happen if different decisions regarding the case and custody of the child are given in the eventual separation case.

Plaintiff countered the plea ought to be rejected since there is clearly no need for Plaintiff to ask for personal separation in order to ask to be awarded the care and custody of the parties' child. Indeed, one does not even need to be married in order for a judgement on care and custody to be given. Plaintiff argues that care and custody is a standalone decision, that does not require to be given in the context of a personal separation and that therefore her action is not defective.

The Court observes that Regulation 10 (1) of Subsidiary Legislation 12.20 provides expressly that standalone proceedings relating to the care and custody of a child may be initiated by married persons. In paragraph (a) it makes reference to "*disputes between parties, whether married or otherwise, concerning the custody and maintenance of, or visitation rights to their children.*" Regulations 10 and 11 provide that in such disputes, the party shall begin the proceedings by filing for mediation, and may subsequently file litigious proceedings upon authorisation by the Court if the parties fail to reach an agreement on the disputed matter.

It is clear therefore that Defendant's second plea is manifestly unfounded, and is therefore being rejected.

**Deliberates;**

Defendant also argued in his seventh plea that the witnesses indicated in the seventh paragraph of Plaintiff's list of witnesses should be expunged since Plaintiff failed to indicate precisely who these witnesses are and the reason for which they will be summoned to testify.

According to Article 156 (4) of the COCP, together with a Sworn Application the Applicant shall also "*...give the names of the witnesses he intends to produce in evidence stating in respect of each of them the facts and proof he intends to establish by their evidence.*"

The Court notes that in the seventh paragraph of her list of witnesses Plaintiff indicated that she intends to summon family members, friends and colleagues of the parties in order to testify about Defendant's behaviour and Plaintiff's grievances, as well as the parties' means and needs the needs of their daughter.

It is clear therefore that while it is true that Plaintiff has not indicated these witnesses by their name, she has clearly indicated the reason for which she intends to summon them to testify. However, as stated by Defendant himself, since the persons indicated in this paragraph as the family members, friends and colleagues of the parties, their names are certainly known to the parties. The Court considers therefore that it is not necessary to expunge this paragraph from Plaintiff's list since Defendant has suffered no prejudice that may only be remedied by having this paragraph expunged. Instead, the Court considers that Plaintiff should be granted time to file before this Court an explanatory note detailing the names of the family members, friends and colleagues that she intends to summon as witnesses in these proceedings.

**Deliberates;**

In her Sworn Reply to Defendant's Counter-Claim, Plaintiff argues that all demands made in the Counter-Claim apart from those numbered (2), (3), (4) and (6) are null and void since the parties were not authorised to file separation proceedings. On his part, Defendant argues that he

did not need to obtain authorisation to make demands related to personal separation since the matters are related to the issue of care and custody.

The Court observes that according to Regulation 7 of Subsidiary Legislation 12.20, parties may proceed with a suit for personal separation or divorce when they have been so authorised by the Court, after having attempted to reach an amicable settlement during mediation proceedings. The Court observes further that the parties may file those suits that have been authorised by the Court in the relative decree, and in this regard reference must be made to the mediation letter filed by the parties in order to determine what suit they have been authorised to file.

From an examination of the acts of this case it is clear that the parties do not have authorisation to proceed with a suit for personal separation. Contrary to Defendant's argument, this flaw is fatal to those demands in his Counter-Claim that relate to personal separation, since Court authorisation is required *ad validitatem* according to the law.

In this regard the Court notes that there have been instances where the Courts showed clemency to the parties and instead of declaring the proceedings null, gave the parties time to institute mediation proceedings and obtain the required authorisation, before continuing to hear the case. This is left at the discretion of the Court, if it considers that it is in the interests of justice to do so. In this particular case however, it is in this Court's opinion that it is not desirable for the Court to exercise such discretion. This case primarily concerns the care and custody and habitual residence of a young child, who, according to Plaintiff, is being wrongfully retained in Malta by Defendant and should be returned to C where she has lived for the vast majority of her life. Therefore it is in the best interests of the child that the case is not stultified in order to give Defendant time to rectify his error.

The Court therefore declares that since the parties were not authorised to file separation proceedings as required by law, and in view of the circumstances of the present case, Defendant's demands numbered (1), (7) and (8) are null and void.

**Deliberates;**

Plaintiff is also pleading that the sixth demand in Defendant's Counter Claim is null and void because it already forms part of the matter of another lawsuit filed by Defendant.



The Court notes that in fact Defendant has indeed already demanded that the decree of prohibitory injunction with the reference number Z JPG delivered on the 7<sup>th</sup> of May 2018 be confirmed in the lawsuit filed by him on the 14<sup>th</sup> of January 2019 with the reference number 8/2019 JPG.

However, the Court is of the opinion that this is not render the demand null and void as pleaded by Plaintiff. There is nothing in the law which renders this demand null, and it does not result that it is causing Plaintiff to suffer any irremediable prejudice. Therefore, this plea is being rejected.

**For these reasons, the Court:**

- 1. Rejects pleas number (1), (3) and (4) contained in Defendant's Sworn Reply and confirms that it has jurisdiction to hear and determine these proceedings;**
- 2. Rejects plea number (2) contained in Defendant's Sworn Reply;**
- 3. Partially accepts Plaintiff's first preliminary plea contained in her Sworn Reply to Defendant's Counter-Claim, and declares null and void the demands numbered (1), (7) and (8) in Defendant's Counter Claim and consequently abstains from taking cognisance of them, while rejecting that part of this plea relating to demand number (6) in the same Counter Claim;**
- 4. Rejects Defendant's 7<sup>th</sup> Plea and orders Plaintiff to file a note within a week of this judgement indicating the name and surname of the family members, friends and colleagues she intends to summon as witnesses according to paragraph (7) of her list of witnesses;**
- 5. Orders that these proceedings continue for the determination of the merits.**

**Expenses reserved until final judgement.**

**Read.**

**Mdm. Justice Jacqueline Padovani Grima LL.D. LL.M. (IMLI)**

**Lorraine Dalli  
Deputy Registrar**