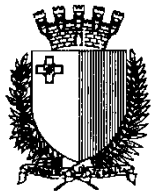

CIVIL COURT

(FAMILY SECTION)

MR. JUSTICE ANTHONY G. VELLA

Sitting of Tuesday 28th January, 2020

SWORN APPLICATION: 200/2019 AGV;

AB (Italian ID : CA76137AU) and CD (Italian ID : AV1440303)

vs.

EB (ID : 177316A) and FG (ID: 535213L)

The Court;

Having seen the sworn application of AB, and CD , dated 22nd August 2019, humbly submit and under oath confirm;

1.0 PRELIMINARY FACTS

1.1 That the applicants are Italian nationals residing in Turin, Italy, who have been married since the year nineteen eighty-one (1981), and from whose marriage were born two children, Silvia and Luca;

1.2 That the respondent EB is the applicants' daughter, while the other respondent FG is her husband, with whom she contracted marriage in two thousand and thirteen (2013), when both respondents still resided in Italy;

1.3 That from the marriage of the respondents EB and FG, was born the minor daughter HG on the twenty-sixth (26) of September two thousand and sixteen (2016), hereinafter referred to as the "Minor Granddaughter";

1.4 That the Minor Granddaughter is, therefore, the maternal granddaughter of the applicants AB and CD;

1.5 That the respondents lived in Turin Italy for a number of years, and it was in Turin that the Minor Granddaughter was born, and she resided there until the year two thousand and seventeen (2017);

1.6 That while the respondents resided in Turin, Italy, the applicants had established a good relationship with the Minor Granddaughter, whom they used to frequently visit;

1.7 That since the respondents relocated to Malta in 2017 together with the Minor Granddaughter, communications between the applicants and the respondents have proven to be difficult;

1.8 That despite attempts to communicate with the respondents, they have not managed to arrange to meet the defendants and the Granddaughter;

1.9 That although the applicant AB personally visited Malta from the twenty-eight (28) of March two thousand and eighteen (2018) until the second (2) April thousand and eighteen (2018) – with the hope of meeting and spending some time with the Minor Granddaughter, despite that the respondents had given him to understand that they would meet and that he would meet also his granddaughter – the respondents did not meet with him at all;

1.10 That the applicants have always proven themselves to be loving grandparents when the Minor Granddaughter still resided in Italy, and the applicants' grandpaternal affection and care towards the Minor Granddaughter is further evidenced by their repeated wish to set up an opportunity that would allow them to visit the Minor Granddaughter;

2.0 LEGAL AND FACTUAL CONSIDERATIONS

2.1 That while the applicants appreciate that parents are ultimately responsible for the care and custody of the Minor Granddaughter, there exists no justifiable reason as to why the applicants should be deprived of the possibility of having an affectionate relationship with their granddaughter;

2.2. That by virtue of a recent decision taken by the European Court of Human Rights ("ECHR") in the names ***NeIil Vacheva vs. Georgios Babanarakis***, decided on the thirty-first (31) of May two thousand and eighteen (2018), the ECHR, when faced with the question as to whether Regulation No.

2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility extended the concepts of "parental responsibility" and "rights of access" to grandparents, held that:

> *"It must be noted that 'rights of access' are defined broadly, encompassing in particular the right to take a child to a place other than that child's habitual residence for a limited period of time.*
>
> *That definition does not impose any limitation in regard to the persons who may benefit from those rights of access."*

It was furthermore noted through this judgment that:

> *"Regulation No. 2201/2003 does not expressly exclude a request made by grandparents for rights of access to their grandchildren from coming within the scope of that regulation."*
>
> ...
>
> *"It follows that the concept of rights of access referred to in Article 1 (2) (a) and in Article 2.7 and 2.10 of Regulation 2201/2003 must be understood as referring not only to the rights of access of parents to their child, but also to the rights of access of other persons <u>with whom it is important for the child to maintain a personal relationship, among others, that child's grandparents, whether or not they are holders of parental responsibility</u>."*[1]

[1] Emphasis added by the applicants.

2.3. That by means of this decision, the ECHR crystallised the principle that 'parental responsibility' should extend also to grandparents, who should not be denied a right of access without justification;

2.4. That even through its decision taken on the thirteenth (13) June of the year ninteen seventy-nine (1979) in the names ***Marckx vs. Belgium***, the ECHR had already established the principle that:

> *"In the Court's opinion, "family life", within the meaning of Article 8 (art. 8), includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life."*

2.5. That, furthermore, the preamble to the ***"Convention on Contact Concerning Children"*** signed on the fifteenth (15) October of the year two thousand and three (2003) by the Member States of the Council of Europe and other Signatories thereto immediately highlights:

> *"the <u>need for children to have contact not only with both parents but also with certain other persons having family ties with children and the importance for parents and those other persons to remain in contact with children</u>[2], subject to the best interests of the child."*

2.6. That the tender age of the minor granddaugher further augments the need not to deprive her of the possibility of benefitting from a close and affectionate relationship with her maternal grandparents;

2.7. That it follows that the rights of the applicants to establish a relationship with and have access to the Minor Granddaughter, coupled with the Minor Granddaughter's right to have contact with her maternal grandparents

[2] Emphasis added by the applicants.

should not be construed as a limitation of parental responsibilities. On the other hand, it follows that the behaviour of the respondents to deny the Minor Granddaughter from establishing a relationship with the applicants violates the Minor Granddaughter's right to family life as protected by Article 8 of the European Convention on Human Rights;

2.8. That it is certainly in the best interests of the Minor Granddaughter to experience the love and affection that may be offered by grandparents;

Therefore, for the reasons explained hereabove, and on the basis of the pronouncements of the indicated courts, the applicants humbly request this Honourable Court to:

a) Declare that it is in the best interests of the Minor Granddaughter HG to allow the applicants visitation rights;
b) Give visitation rights to the applicants with the Minor Granddaughter by establishing such days, time and such directives as are deemed by this Honourable Court to be required and which would allow the relationship of the grandparents with the Minor Granddaughter to continue to develop;
c) Give such other directives as this Honourable Court may deem to be adequate and opportune.

The Court having seen the sworn reply of E and F spouses B dated 24th September 2019, humbly state and EB on oath confirms:

Pleas

Defendants hereby respectfully pleads in connection with plaintiff's requests that:-

1) In the first instance, the merits of the case in question have already been decided by a foreign Court namely the Italian Court as the *Tribunale per I Minorenni del Piemonte e Valle D'Aosta* on the 31 January 2019 **(Document A)** and therefore the matter in question has now passed *ingudikat* and is therefore res judicata in light of the concurrence of the *eadem res*, *eadem personae*, and *eadem causa petendi*;

2) In the second instance, and without prejudice to the foregoing, the plaintiffs have no *locus standi* or juridical interest in order to proceed with the present case. Although it may appear, prima facie, that they may have a general and emotional interest, the plaintiff's interest must be recognised at law and the action must be pre-ordained to acquire a remedy protected by law. In the case in question, Maltese law does not contemplate any right of access towards grandparents of minor children and the action is therefore unsustainable and outrightly inpropositional. As taught by Mattirolo, *se l'interesse e` scompagnato dal diritto, non vi ha azione, non giudizio possibile*. Moreover, this point, namely that the grandparents of minor children have no juridical interest in regard to the access of their grandchildren has already been determined by the Civil Court (Constitutional Jurisdiction) in the case in the names of **Joseph sive Giuzeppi Schembri vs Registratur tal-Qorti Superjuri et** in which the Court stated that while it is understandable that grandparents have a big interest in their grandchildren, they do not have juridical interest. Furthermore, it should be pointed out at the outset that the judgment cited by plaintiffs, namely **Nell Vacheva vs Georgios Babanarakis**, is

inapplicable in the present case as will be shown throughout the present suit;

3) Thirdly, plaintiff's requests amount to a (potential) serious threat to Maltese public order. If this Honourable Court were to establish a right of access due to grandparents notwithstanding the above and thereby accord unto grandparents *locus standi*, as well as juridical interest, in regard to access, this will set a dangerous precedent which will have serious ramifications on current and future lawsuits which contemplate minor children as their object or part of their object, including care and custody and separation suits. Moreover, the delay which will inevitably be caused through the introduction of the competing interests of the grandparents will certainly run counter to the best interests of the child;

4) Without prejudice to the foregoing, unless it is proven that parents are unable to exercise their right of parental authority, parents cannot be forced to apply their **absolute** discretion against their will;

5) Without prejudice to the foregoing, it is humbly submitted that it is not in the best interests of the minor children to have access towards their maternal grandparents as already determined by the Italian Court in the aforementioned judgment and as shall be confirmed throughout the present suit.

6) Save all other pleas which may be brought forward at any other stage.

With costs against plaintiffs who are as of now hereby summoned with reference to their oath.

FACTS

1) Defendants moved to Malta on 25 October 2017 from Italy, having already registered their Marriage in Malta in August 2017;

2) The minor child, H, is the daughter of defendants and the granddaughter of plaintiffs. She has duel Maltese and Italian citizenship;

3) The relationship between the defendant, EB, and the plaintiffs was never a healthy one due to the overbearing and intrusive nature of the upbringing which had long-term effects on the defendant;

4) For the duration of defendants' engagement and subsequent marriage, plaintiffs, particularly AB have had an intrusive and negative influence on the defendants and their marriage. Following the birth of the minor child, H, this was unfortunately extended in regard to the minor child such that the relationship between the plaintiffs and their granddaughter was unhealthy from the beginning;

5) By virtue of a judgment of the 31 January 2019 an Italian Court stated in unequivocal terms, following psychological consideration, that it was not in the best interests of the minor child, H, for plaintiffs to have access to the said minor.

CONSIDERATIONS

The Defendants raised four preliminary pleas to the case filed by Plaintiffs. This Honourable Court shall be analysing each plea individually hereunder:-

1. RES JUDICATA

Defendants insist that the merits of this case have already been decided by the Italian court, precisely the Tribunale per I minorenni del Piemonte e Valle D'Aosta on the 31st January, 2019[3] in the names and therefore the case is res judicata in the light of the concurrence *eadem res*, *eadem personae* and *eadem causa petendi.*

The said decision given by the Italian courts, essentially, never decided the merits of the case and it very clearly dismissed the case on the grounds of lack of jurisdiction. In the Courts very own words ***"In via preliminare il Collegio, composto da un relatore subentrato nella titolarita' del fascicolo, ritiene che il TM adito non abbia giurisdizione per decidere sull' istanza dei nonni materni.***

Invero, e' pacifico in cause che la vita della minore e della sua famiglia sia ormai radicata, da svariati mesi, a Malta, dove la famiglia vive, i genitori lavorano e Chloe va al nido.; a fronte di tale circostanza, ha poco rilievo il dato formale del momento del cambio di residenza….a maggior ragione atteso che in materia minorile in principio della perpetuatio iurisdictionis di cui all'art.5 cpc deve essere contemperato con il c.d. principio di prossimita' di cui all'art.5 della convenzione Aja 1961."

[3] Fol. 30 of the acts

Thus, the Italian Court rejected jurisdiction as a result of the fact that the minor child had, together with the defendants, moved to Malta and therefore the Maltese Courts where the courts vested with jurisdiction.

In this respect, the first preliminary plea of res judicata is to be rejected.

2. JURIDICAL INTEREST AND LOCUS STANDI

Defendants plead that Plaintiffs as grandparents, *prima facie*, might appear to have an emotional and general interest in seeing their granddaughter, but for them to have a juridical interest and a locus standi, this requires that their interest arises from the law and is protected by the said law. They argue that this is not the case under Maltese law, which at no point in time, grants any access rights to grandparents and therefore Plaintiff's case is unsustainable.

They go on to state that "***It is clear therefore, that in order for someone to have an interest that person must have a basis at law. In the present case, the applicants made no attempt to outline which article of the law they filed the suit under and infact framed their suit more like a constitutional suit in pursuit of a remedy then as that appropriate to the current court. "***

Plaintiffs insist that grandparents have a legal right and a legal standing to seek the protection of the right of the child to continue to develop his/her relationship with the grandparents and of the grandparents to ensure and safeguard the welfare of such niece, citing foreign case-law under the European Convention of Human Rights and Regulation 2201/2003.

This issue is by far and large an untouched area of our law and jurisprudence and in itself represents a "grey area|" that requires great thought and adapting to the lines of thought at an international level.

> ***"At the sociocultural level, equally profound transformations are affecting the way of life of citizens. The phenomenon of families whose members (parents and children) have dual or different nationalities (which is closely linked to the free movement of persons and, more generally, to globalisation), the diversity of forms of union and cohabitation, besides marriage, in particular the civil partnership…..are just a few examples. The diversification of family structures is therefore a reality of contemporary society…Those economic and sociocultural changes, whose multiple effects on the lives of citizens are being felt at a steady pace, require in some cases a reconsideration of the assumptions underlying legal systems and the substance of their rules, and necessitate an adaptation of the law and in particular EU law (including private international law)….***
>
> ***However, despite the efforts of the EU legislature to adapt the legislation in matters of parental responsibility to developments in society, those developments are proceeding to a much faster pace than the process of legislative adaptation and it is clear that there remain some "grey areas," for which the legislation does not provide an explicit response. The case in the main proceedings is an illustration of those grey areas created by developments in society, in particular with regard to a child's contact with other persons to whom the child has "family" ties based on law or on fact (such as the former spouse of one of the parents, the child's***

siblings, grandparents…). Those grey areas may give rise to, sometimes paradoxical, uncertainties concerning the existence of rights of access by persons other than the parents, in this case grandparents.

With regard to grandparents specifically, is not that uncertainty disconcerting considering that, in principle and subject to the best interests of the child, contact between grandparents and their grandchildren, in particular in an ever-changing society, remains an essential source of stability for children and an important factor in the intergenerational bond which undoubtedly contributes to building their personal identity?"[4]

The consideration of this legal point at issue has been dealt with in depth at an international level. The European Court of Human Rights has confirmed through a number of its judgements that the concept of "family life" extends to beyond the relationships between children and their parents and as enunciated in the judgement in the names **Marcks vs Belgium** decided on the 13th June, 1979, "family life" "***includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life."*** All subsequent European Human Right case law has followed this interpretation.

Plaintiffs also referred to another landmark judgement by the European Court of Human Rights **Manuello and Nevi vs Italy** decided on the 20th January, 2015 wherein it was stated that "***the ties between grandparents and their grandchildren fell within the scope of family ties for the***

[4] Curia.europa.eu judgment Valcheva vs Babanarakis decided 31/5/2018.

purposes of Article 8 and that measures severing the ties between a child and his or her family could only be applied in exceptional circumstances."

That said, it is clear that Article 8 of the European Convention of Human Rights that provides "***Everyone has the right to respect for his private and family life, his home and his correspondence***," extends to include within its interpretation *de facto* family relationships, such as relationships between grandparents and children. The Convention itself has been part and parcel of Maltese law, precisely Chapter 319 of the Laws of Malta and in practice today, Maltese Courts have always followed established human rights case law, provided it does not conflict with clear provisions of the law. Considering that there is no conflict with the domestic law, it is the Convention that prevails.

The same trend has been followed in the Court of Justice of the European Court when interpreting Regulation No.2201/2003 better known as Brussels IIa Regulation. In a recent judgement **Neil Valcheva vs Georgios Babanarkis** decided on the 31st May, 2018, the European Court, wherein it had to determine whether access rights extended to grandparents, it had the following to say:-

> ***"It must be noted that the "rights of access" are defined broadly, encompassing in particular the right to take a child to a place other than that child's habitual residence for a limited period of time.***
>
> ***That definition does not impose any limitation in regard to the persons who may benefit from these rights of access."***

It added,

> ***"Regulation No.2201/2203 does not expressly exclude a request made by grandparents for rights of access to their grandchildren from coming within the scope of that regulation.***
>
> **…**
>
> ***It follows that the concept of rights of access referred to in Article 1 (2) (a) and in Article 2.7 and 2.10 of Regulation 2201/2003 must be understood as referring not only to the rights of access of parents to their child, but also to the the rights of access of other persons with whom it is important for the child to maintain a personal relationship, among others, that child's grandparents, whether or not they are holders of parental responsibility."***

The Court of Justice of the European Court in its press release had the following to say:-

> ***"In today's judgment, the Court of Justice begins by stating that the notion of 'rights of access' within the meaning of the Brussels IIa Regulation must be interpreted autonomously. After pointing out that that regulation covers all decisions on parental responsibility and that rights of access are identified as a priority, the Court notes that the EU legislature chose not to provide for any limitation of the range of persons who may exercise parental responsibility or hold rights of access. Thus, according to the Court, the notion of rights of access refers not only to the rights***

of access of parents to their child, but also to the rights of access of other persons with whom it is important for the child to maintain a personal relationship, among others, the child's grandparents.

The Court also points out that, in order to avoid the adoption of conflicting measures by different courts, and in the best interests of the child, the same court — as a general rule, the court of the child's habitual residence — should rule on rights of access." [5]

In the same judgement the Court justified and summed up the reason for its decision in the following terms:-

"..if applications for rights of access by persons other than parents are to be excluded from the scope of Regulation No.2201/2003, jurisdiction in respect of these applications will be determined by non-harmonised rules. The risk that a child might be involved in a dispute before a court with which that child has no close link and the likelihood of parallel proceedings and irreconcilable decisions would increase, contrary to the purpose of Regulation 2201/2003, which aims to lay down uniform rules of jurisdiction in accordance with the principle of proximity in judicial proceedings."

Thus, a wide interpretation of the provisions of Regulation No.2201/2003 in the sense that it includes within its parameters an application for rights of access by a grandparent, does not run counter to the objective pursued by the EU legislature in the context of that Regulation.

[5] Curia.europa.eu - The notion of "rights of access" includes the rights of access of grandparents to their grandchildren.

Furthermore, for the purposes of Maltese law, the said Regulation takes precedence over domestic law and therefore even though our law does not contemplate access rights for grandparents, the application of Regulation 2201/2003 and the interpretation of its articles through its jurisprudence is to prevail, especially when one considers that the Italian court didn't deny the right of access to the grandparents, but just denied jurisdiction, because Malta was the habitual residence of the minor and this for the sake of uniformity and stability in the child's life.

Having considered the above and for the above reasons, therefore, Defendants' plea on lack of juridical interest and locus standi is to be rejected.

a. <u>PUBLIC ORDER</u>

Defendants believe that if the said Honourable Court had to confirm the right of access due to grandparents acknowledging their juridical interest and locus standi, this would threaten the very essence and stability of family life and family cases. Plaintiff begs to differ.

As has already been stated above, the European Convention of Human Rights is enshrined within our domestic law and its jurisprudence on the interpretation of Article 8 of the said Convention, like any other jurisprudence interpreting the European Convention of Human Rights, today forms part of our rich collection of case-law. Likewise, Regulation 2201/2003 has become a predominant feature in Maltese law and jurisprudence. In the light of all this, it is inevitable to conclude that to keep in line with international legal interpretations that are more in keeping with the realities of contemporary society, grandparents are entitled to file a case asking to be granted rights of access. Nevertheless, this in itself is a

procedural determination and in terms of the international law cited, it cannot be denied, but it does not bring an automatic application of this doctrine. The right of access is subject to the overriding principle that the best interests of the children prevail. Every case must be examined on the merits, and if grave factual reasons against the grandparents or grave prejudice to the children result, then the ultimate interest of the children prevails. This alone is not tantamount to a disruption of public order.

Understandably defendants' plea are their concerns of a public threat, but in matters concerning childrens rights, it has always been of paramount importance that whatever decisions are made, they are always made in the best interests of the child. This line of thought has been expressed in various Conventions as quoted by Plaintiff, namely Article 5(1) of the Convention on Contact concerning Children of the Council of Europe provides that "***subject to his or her best interests, contact may be established between the child and persons other than his or parents having family ties with the child.***

Article 3(1) of the Convention on the Rights of the Child provides that ***"in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."***

So even Article 8 under Regulation 2201/2003, albeit granting the right to ask for access rights to grandparents, whether this will be exercised or not is a substantive matter, that can only be decided by the Courts once it has collected all the evidence and has assured itself that its decision is taken in the best interests of the child. This is the overriding principle.

In conjunction with all this is Article 149 of the Civil Code (Chapter 16 of the Laws of Malta) that states ***"Notwithstanding any other provision of this Code, the Court may upon good cause being shown, give such directions as regards the person or the property of a minor as it may deem appropriate in the best interests of the child.***

Having considered all this, since the grandparents' rights to demand access is not an automatic and an absolute right, but subject to the best interests of the child test, then safeguarding a child in this way leaves no place for threat to the public order. In this respect, once again, defendants' plea stands no ground.

b. PARENTAL AUTHORITY

Defendants are insisting that by the said action filed by the grandparents, they are attempting to forfeit the rights of parental authority over the said minor and until this can done it first has to be proved that they are unfit parents.

As has already been reiterated by this Honourable Court, the decision as to whether there should be visitation rights between the grandparents and the grandchild depends upon whether, after having assessed the whole case, it deems it in the best interests of that child and this in itself entails a decision on the merits of the case. This Honourable Court is not momentarily dealing with this matter in this decision, before it resolves the procedural issues raised in this case.

The parental authority remains vested within the parents of the minor child and essentially granting visitation rights to grandparents can never be

construed as a limitation of parental authority. Ultimately, it is always the best interests of the child that are to prevail. As Plaintiff submitted, Article 3(1) of the Convention on the Rights of the Child and Article 24(2) of the Charter of Fundamental Rights of the European Union, ensures that at all times, even when the child's best interests are in conflict with the parents' needs, the child's interests are to prevail, both in short and long term. These are the determining factors that can lead this Honourable Court to reach a decision.

Thus said, the plea raised by Defendants on parental authority is too to be rejected.

DECIDE

In view of the above, all four of defendants' pleas are rejected and the said proceedings are to be continued for a decision on its merits.

Costs are to be borne by defendants.

Hon. Mr. Justice Anthony. J. Vella

Judge

Concetta Gauci

Deputy Registrar