CIVIL COURT

(FAMILY SECTION)

MADAM JUSTICE

JACQUELINE PADOVANI GRIMA LL.D., LL.M. (IMLI)

Hearing of Monday 2nd November 2020

App. No. : 236/2018 JPG

Case No. : 19

TB (B Passport number 513866764)

Vs

By means of a decree dated 16th of October 2018, Dr Yanika Camilleri and PL Davina Sullivan nominated as Curators to represent the absent FB;

By means of a decree dated 6th of March 2019, Dr Christopher Chircop substituted Dr Yanica Camilleri as Curator.

The Court,

Having seen the sworn application filed by TB, dated 7th of September 2018, a fol 1 et seqq., where in it was held:

A. DECLARATION OF FACTS

1. *That the applicant is a B citizen and was married to respondent, a B national, from whom she has been declared legally divorced on the 18th of May 2016.*

2. *That the applicant and respondent have two daughters, Z and A both born in the*

B, on the X and the Y respectively, and consequently both still minor (a copy of the relative birth certificates is being hereby attached and marked as Documents TB1 and TB2(;

3. *That the applicant moved to Malta together with her daughters in October 2016, and the parties' daughters started attending San Andrea School in November that same year;*

4. *That the eldest daughter, Z has since finished her secondary education, and applicant sought to apply for the said minor child to attend St. Martin's College in Malta;*

5. *That upon such application being made, St. Martin's College requested the consent and signature of the respondent;*

6. *That the respondent is refusing to answer the applicant's emails and texts.*

7. *That the applicant has no other means by which to contact respondent because since he was evicted from the former matrimonial home by Court Order on the 11th April 2018, respondent has refused to provide applicant with his current address – indeed, the respondent even refused to give his address to the English Family Court, as is evidenced by the relative Financial Order, a copy of which is hereby attached and marked as Document TB3 – the relative part on pages 3 and 5 is highlighted in yellow, for ease of reference.*

8. *The current impasse of communications with respondent makes it also amply clear that it is absolutely essential, in the minor children's best interests, that applicant be granted sole custody of the two minor children, in order to formalize a situation which was obtained in practice, since the parties separated de facto on June 2015.*

B. REASON FOR APPLICANT'S CLAIMS

Following this Honourable Court's Decree of the 9th July the applicant is

therefore filing these proceedings so that:-

1. *This Honourable Court may assign sole care and custody of the minors Z and A siblings B to the applicant; and*

2. *All the necessary provisions related to the care, custody, access and maintenance of the applicant's minor daughter may be determined.*

C. Applicant's Claims

The applicant, therefore, in view of the above, respectfully requests this Honourable Court to:-

1. *Order that these proceedings be carried out in the English Language in view of the fact that the parties and their children do not understand or speak Maltese, but are English-speaking;*

2. *Grant the applicant sole care and custody of her daughters Z and A, siblings B;*

3. *Order that said minor children shall continue to reside and be domiciled in Malta, being the chosen domicile of the applicant in the best interest of the minor children;*

4. *Order that the minor children shall continue reside with the applicant, their mother and sole carer of the past three years;*

5. *Take all the necessary provisions related to access and maintenance of the applicant's minor daughters, should the Court so deem fit;*

6. *Appoint a child advocate, as to hear the wishes and opinions of the Minors, who are sixteen and nearly thirteen of age respectively, if the Court so deems fit;*

7. *Authorise applicant to register in the public registry the judgment eventually delivered by this Court.*

With costs, comprising those incurred in the mediation proceedings against respondent who is hereby summoned to testify by 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 reply filed by the Curator dated 30th of October 2018, at page 38 wherein it was held:

1. *That the Curator attempted to establish contact with the applicant through a legal letter dated 2th October 2018 were the same was asked to pass on any information which she had with regards to the person that the Curator was appointed to represent in the said proceedings through a Decree of the 16th October 2018. A copy of this letter is hereby attached and marked as Doc. 'YC1';*

2. *That from the initial application and from the documents attached, it results that FB has an electronic address. In fact the Curator attempted to establish contact with him through an e-mail sent on this address on the 25th October 2018. A copy of the e-mail is hereby attached and marked as Doc. 'YC2';*

3. *That to date the same Curator does not have a reply from the applicant and from FB to file pleas to the applicant's requests and apart from that is not yet informed of the facts of the case;*

4. *That in the eventuality that the Curator receives a reply from the applicant, this Honourable Court will be immediately informed, and if the case may be asks its authority to file the Defendants' pleas.*

5. *This is what the Curator has to submit for this Honourable Courts judgment.*

Having seen this Court's decree dated 6th March 2019 (See page 107);

Having seen this Court's decree dated 13th June 2019 (See Page 120);

Having seen the sworn reply of Dr Christopher Chircop and PL Davina Sullivan as Deputy Curators to represent FB, dated 17th June 2019 (see page 120C et seqq.), wherein it stated:

1. *Preliminary, that in this application curators should not have been appointed and this since B still form part of the European Union and therefore FB should have been notified according to European Regulations.*

2. *Preliminary and without prejudice to the above that the Court is not competent and does not have jurisdiction to decide this application.*

3. *That with regard to the merits of the case the applicants declare that they do not know the facts of the case and therefore they reserve the right to submit other pleas at a later stage if they become aware of any facts in relation to this case*

4. *That it is the Plaintiff that should prove the case and therefore it is up to the Plaintiff to submit the necessary evidence to convince this Honourable Court that the allegations made against the Defendant are true.*

With the right to submit other pleas.

With costs against the Plaintiff, who is summoned so that a reference to her summon be made.

Having seen this Court's judgment in parte dated 3rd of July 2019 (see page 149);

Having seen that the Curator Dr Christopher Chircop declared that he has no evidence to adduce (see note in the record of the proceedings dated 7th October 2020);

Having seen this Court's decree dated 7th October 2020 (see note in the record of the proceedings of the same date);

Having seen the exhibited documents and all the case acts;

Having heard final oral submissions from both parties;

Considers;

TB testified (fol 49 *et seqq*) that the parties were married and from this marriage they had two children, ZB who was born on the X and AB who was born on the X and is a student at San Andrea School. She explained that the parties obtained a divorce on the 18th of March 2016 while they were living in London. She continued that during their marriage, the parties lived in B and she worked full-time while her husband stayed home and looked after the children until their divorce. She continued that when her husband had gone to the A to visit his parents, she had started divorce proceedings and he never went back to the matrimonial home. She continued that due to financial considerations, she had decided to move to Malta with their two children and they came to live here in October 2016, although she could not get in touch with Defendant, adding that they had started talking amicably in March 2017 and he was happy for the children to reside and study in Malta. She explained that she gave him access to the school's online system so that he would have information about everything pertaining to the children's education and encouraged him to attend the elder daughter's graduation from secondary school, although he had failed to attend. She testified that when Z applied for enrolment at St. Martin's College to study for her A-levels, she was told that Defendant's consent was required and that is why she had file these proceedings.

Under cross-examination (fol. 53 *et seqq*) she testified that she had contacted Defendant by various means to inform him about Z's graduation, adding that she has no idea where he might be living. Asked by the Court regarding the last time that Defendant saw his children, she testified that while she encourages their daughters to stay in touch with their father, they refused to communicate with him. She added that in March 2017, she had forced them to go and see him while they were in B and again in July when they went to visit their maternal grandparents, in spite of the fact that they found this very upsetting. Plaintiff added that while Defendant does not speak to Z at all, he does message A who does not reply to her father despite her encouragement. She testified that in these past years he has never tried to intervene or come to Malta himself.

Christopher Schembri testified (fol 96 *et seqq)* that he is the Assistant Head of the Senior

Sector at San Andrea School, explaining that the parties' elder daughter Z used to attend the school, while the younger daughter, A, still attends the same school. He testified that the school communicates with parents primarily via the Klikks programme. In fact parents may obtain any information relating to their child from this programme. He testified that he has never seen Defendant, adding that to his knowledge it is the mother who pays for the children's tuition fee. He continued that Defendant had phoned the school out of the blue sometime the previous year, asking whether the girls were attending the school and was informed that he could find all the information he wanted from Klikk. Schembri added that Defendant had phoned on some other occasions, always asking whether the children were attending school, with the last phone call being made on the day that Schembri was to testify in Court. He declared also that Defendant was invited to Z' Year 12 graduation but had not attended, despite having initially insisted on attending.

AO testified (fol. 105A *et seqq*) that she is Plaintiff's sister and has an excellent relationship with her and her daughters, while she has no relationship with Plaintiff's husband who has no contact with his children and does not involve himself in their life.

Deliberates:

This is a judgement following proceedings instituted by Plaintiff who is demanding to be granted sole care and custody of the parties' daughters and that the Court orders that the two daughters reside with their mother and remain domiciled in Malta. The Court has seen that since Plaintiff filed these proceedings the parties' elder daughter, ZB, became of age, and therefore is no longer subject to her parents' care and custody. This judgement therefore will be limited to Plaintiff's requests with regard to AB, who is still a minor.

The Court has seen that Defendant's Curator pleaded the lack of jurisdiction of this Court, and therefore this matter should be addressed first.

The Court recognises that according to article 8 (1) of the Brussels II *bis* Regulation matters relating to parental responsibility of children fall under the jurisdiction of the Courts of the Member State where the child was habitually resident at the time when the Court is seized of the case. The term habitual residence is not defined in the Regulation and is considered to be an autonomous concept which is not linked to definitions in national law so as not to hinder the

free movement of judgements. From this jurisprudence of the CJEU on the matter it is clear that the term habitual residence is a flexible concept which must be determined on the basis of the individual circumstances of the case at hand and always in light of the best interests of the child.[1] According to the CJEU, the term habitual residence

> **'*corresponds to the place which reflects some degree of integration by the child in a social and family environment*"[2]**

and in its judgement it has laid down a number of non-exhaustive criteria that should be taken into consideration when determining the habitual residence of a child, which include:

> **"*the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State*."[3]**

From the evidence produced before this Court, it is evident that Plaintiff's decision to move the parties' children to Malta was taken unilaterally and Defendant only came to know of this move after it happened, consequently giving it the character of a wrongful removal. The rule in such cases is that the Courts of the Member State where the child was habitually resident before such wrongful removal, retain their jurisdiction and this according to article 10 of the Brussels II *bis* Regulations. However, there are **two exceptions** to this general rule. The jurisdiction of the Member State where the child was habitually resident before the removal will lose their jurisdiction when the child acquires a habitual residence in another Member State and the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:

> **"*(a) each person, institution or other body having rights of custody has acquiesced in the removal or retention;***

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[1] See Case C-523/07 A [2009] ECR I-2805.
[2] *Ibid*, par. 44
[3] *Idem.*

or

(b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:

(i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;
(ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);
(iii) a case before the Court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);
***(iv) a judgment on custody that does not entail the return of the child has been issued by the Courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.*"**[4]

Having examined this article, in light of the facts of this case, the Court considers that it does indeed have jurisdiction to determine this case, and this for the following reasons:

i. From the evidence produced before this Court, it appears that the child A has been attending school in Malta since 2016 and is preparing to sit for her O'levels and is therefore at a critical stage in her education;

ii. Plaintiff brought the children to Malta in October 2016, **almost two years before** these proceedings were initiated. While there is no doubt that Defendant did not know about

[4] Article 10 of Brussels II *bis* Regulation.

this before it happened, it is clear from the evidence submitted, that he became aware that the children had been moved to Malta prior to the institution of these proceedings. An email sent by Plaintiff to Defendant on the 31st of March 2018 (vide fol 159) makes reference to an offer made by her to Defendant to come to Malta in April 2017, stay with them and try to find a job and remain here, indicating that Defendant knew at least as from April 2017 that the children were in Malta. No objection as to the authenticity or reliability of this email was made by Defendant. It further appears that Defendant was in touch with the school that the children were attending in Malta at least as from January 2018 (vide fol. 161). Indeed according to the testimony of Christopher Schembri, Assistant Head of the Senior School at San Andrea School, Defendant had phoned the school in 2018 to confirm that they were attending the school and was even expected to be present at the elder daughter's Year 12 graduation, which occurred in 2018, but he never showed up;

iii. Despite the fact that Defendant informed his curator in these proceedings that the children were abducted and that he would start proceedings to this effect in the B, no evidence has been produced before this Court that Defendant ever filed a request for the return of the children at any point, within the time period specified in article 10 (b) (i).

In light of the above it is the Court's considered opinion that Defendant's plea of lack of jurisdiction of this Court is unfounded at law and is therefore being rejected.

Deliberates:

The Court recalls that according to the jurisprudence of the Maltese Courts, the care and custody of children is regulated by the principle of the best interests of the child, and the best utility and best advantage to the interests of the child.[5]

According to the judgement in the names of **AB vs CD** decided on the 23rd of February 2018, the Court has the power to entrust the care and custody of a minor solely in the hands of one of

[5] **Maria Dolores sive Doris Scicluna vs Anthony Scicluna,** First Hall of the Civili Court, decided 27 November 2003: "*Apparti l-ħsieb ta' ordni morali u dak ta' ordni legali, li għandhom setgħa fil-materja ta' kura u kustodja tat-tfal in ġenerali, il-prinċipju dominanti 'in subjecta materia', li jiddetermina normalment u ġeneralment il-kwistjonijiet bħal din insorta f'dina l-kawża, huwa dak tal-aktar utilita' u dak tal-aqwa vantaġġ u nteress tal-istess minuri fl-isfond taċ-ċirkostanzi personali u 'de facto' li jkunu jirriżultaw mill-provi tal-każ li jrid jiġi riżolut...*"

the parents when this is the minor's best interests, in accordance with Article 56 of the Civil Code, and that while the parents' rights are a relevant consideration, the child's best interests are the Court's primary consideration.[6]

The Court has seen that despite being informed of these proceedings by his curators, and despite their repeated requests to provide a residential address, as well as his affidavit and any other evidence that he wishes to produce in these proceedings, Defendant chose to barely participate in these proceedings. Despite claiming that the children had been wrongfully removed from the B he never made a request for their return, and never produced any evidence in these proceedings. In fact, his participation was mostly limited to contesting an application filed by Plaintiff for the Court to authorise their daughter to attend a school trip to SA without ever articulating his objections to this educational trip. The Court has also seen that despite having access to information about the child's schooling through the school's online portal, he never involves himself in her education, and had even failed to attend the Year 12 graduation of the older child, despite having been invited and having claimed that he would attend. The Court has also seen that it is Plaintiff who takes care of paying the child's tuition fee as well as all other expenses related to the child, without any help from Defendant. In view of all this, the Court considers that it is in the best interests of the child AB that Plaintiff is awarded exclusive or sole care and custody of the child, and that A continues to reside with her mother in Malta.

Regarding maintenance, the Court has seen that in the minutes of the sitting held on the 26th of February 2020 (fol 191-192), Plaintiff withdrew her demand for maintenance to be paid by Defendant. The Court will therefore take no further cognisance of Plaintiff's fifth demand.

Regarding Plaintiff's request for authorisation to register this judgement in the Public Registry, the Court notes that judgements regarding care and custody are not subject to registration in the Public Registry, and therefore this request is being denied.

For these reasons the Court, while rejecting Defendant's plea as to its lack of jurisdiction:

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[6] "*Il-Qorti għaldaqstant, għandha s-setgħa illi jekk ikun fl-aħjar interess tal-minuri, tafda wieħed biss mill-ġenituri bil-kura u l-kustodja tal-minuri u dana ai termini tal-Artikolu 56 tal-Kodiċi Ċivili. Illi kif kellha l-okkażjoni ttenni din il-Qorti diversi drabi, l-interess tal-minuri huwa iprem mid-drittijiet tal-ġenituri. "Il-Qorti tirrileva illi filwaqt li dejjem tagħti piż għad-drittijet tal-ġenituri, l-interess suprem li żżomm quddiemha huwa dejjem dak tal-minuri, kif anke mgħallma mill-ġurisprudenza kostanti tagħna hawn 'il fuq iċċitata.'*""

1. **Grants Plaintiff exclusive or sole care and custody of the minor child AB;**
2. **Orders that AB shall continue to reside and be domiciled in Malta with Plaintiff;**
3. **Takes no further cognisance of the first request since this has already been decided; takes no further cognisance of the fifth request since this was withdrawn by Plaintiff and takes no further cognisance of the sixth request;**
4. **Rejects the seventh request.**

In view of the circumstances, each party is to bear their own costs.

Read.

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

Lorraine Dalli
Deputy Registrar