



Court Of Appeal

Judges

**THE HON. MR. JUSTICE GIANNINO CARUANA DEMAJO
PRESIDENT
THE HON. MR JUSTICE TONIO MALLIA
THE HON. MR JUSTICE ANTHONY ELLUL**

Sitting of Thursday, 21st October, 2021.

Number: 1

Application Number: 158/17/1 AGV

Anastasija Afanasjeva

v.

Dr Benjamin Valenzia and L.P. Veronica Rossignaud, who by decree dated 28th July 2017 were appointed as curators to represent the absent Christopher Martin Jones

The Court:

1. The case concerns issues relating to the care and custody of the minor Alexandra Anastasia Jones, daughter of the litigants and born on the 16th

February 2010, as well as maintenance. The plaintiff requested the Civil Court, Family Court to:

- i. Grant her the exclusive care and custody of the child, and all decisions related to health, education, religion, upbringing, travel, including the issue and renewal of a passport and all decisions relating to the child are to be taken by the plaintiff without defendant's consultation.
- ii. Confirm that the habitual residence of the child is with the plaintiff.
- iii. Liquidate maintenance due until the child is eighteen years old or if she works full-time and has stopped attending school, or until twenty three years of age if she continues studying full-time. The maintenance is to be deducted from the defendant's salary or from profits derived from his employment, job or from any other benefits that he is entitled to. Furthermore, the maintenance is to be increased each year according to the increase in the cost of living.

2. The defendant replied that:

- i. The Court does not have jurisdiction to hear and decide the case since the parents are foreigners and the child was born in England.
- ii. Plaintiff must prove that they have been residing in Malta.
- iii. A curator has to be appointed to represent the interests of the child.

- iv. Plaintiff must declare whether she is employed, and she has to file a statement explaining the expenses she incurs for the child.

3. By judgement delivered on the 21st May 2020 the Civil Court, Family Court decided:

“Having considered all of the above, the Court decides as follows:-

1. *Confirms that plaintiff shall be granted with the exclusive care and custody of the minor child Alexandra Anastasia Jones and she solely shall take decisions regarding the health, education, religion, upbringing, the minor child’s travelling, including the issuing or the renewal of the minor’s passport as well as all decisions related to the minor child.*
2. *Confirms plaintiff’s request that the habitual residence of the minor child Alexandra Anastasia Jones shall be with her mother Plaintiff.*
3. *Confirms that Defendant is to pay the sum of €250 monthly by way of maintenance for the child. Education and health expenses are to be shared equally between the parties. Maintenance is to be paid until the minor child reaches the age of 18, or is employed or until the child reaches the age of 23 if she continues to study on a full time basis. The said amounts are to be deducted directly from the Defendant’s salary and deposited in an account Plaintiff identifies for the said payments. The said maintenance shall be increased annually according to the cost of living”.*

4. The reasoning of the first Court was the following:

“CARE AND CUSTODY.

Plaintiff is presently living in Malta and she has been living here with her daughter Alexandra and her son Robert, born from another relationship, since 2017. She used to live in England with Defendant, but there were problems because she accuses Defendant of being addicted to marijuana. He smoked in the child’s presence and when he was under the influence of marijuana, which happened on a daily basis, he used to become aggressive with Plaintiff.

Defendant’s time with the minor child was limited to buying toys and playing with her. He would disappear for a number of days and Plaintiff explains that he would go with a certain Olga, with whom at present he is in a relationship and also fathered a son. This is confirmed by Plaintiff’s father too, who spent sometime with his daughter and grandchildren in London. He witnessed the life Plaintiff and her family were living and he didn’t approve of Defendant’s behaviour who smoked in the presence of his minor daughter and would then abandon them for a while to be with another woman, switch off his phone to

be unreachable and failed to provide for his family, except for food and toiletries. Whenever, plaintiff's father happened to be in London he spent more time with the children and helped to provide for them too, rather than Defendant.

At present, the minor child is in Malta and has been here for three years. Both Plaintiff and her parents describe her residing in Malta as very beneficial to her and they noticed a big difference in her. She came as a quiet and an introvert child, but over the span of months, she integrated well within Maltese society, at school, with friends and she adapted very well to her surroundings.

Ever since coming to Malta, according to Plaintiff and to her parents, the minor child Alexandra refuses to speak to her father whenever he calls and on the few occasions that he did she was very cold. She showed fear whenever she had to have some form of communication with Defendant. To date in fact the communication has been minimal.

Defendant argues that to a certain extent, the minor child was abducted by Plaintiff, but he didn't report her to avoid trouble with the authorities for her, however the Court tends to disagree with this accusation made by him, even more so when he acquiesced to the child's attendance to two different schools in Malta. Plaintiff produced the documentation to show that Defendant signed and gave his consent to the minor child attending first the Paola Primary School and then the Primary School at Sliema and these were at no point contested by Defendant.

Whenever a Court has to decide regarding a minor child's care and custody, it always has to do this keeping in mind the best interests of the child. In this case at issue, the Court has to evaluate between a parent who worked hard to try to maintain her daughter and moved on to a better place and a parent who despite being consistent in his job, smokes recreational drug, that still has its negative impacts, having no inhibitions of his minor daughter and the harm it could be causing her.

It is has been proved that the minor child has achieved a sense of stability in Malta and any contact with her father provokes a sense of fear within her, recalling her unhappy days in London. This proves that evidently, there is no room for doubt and that in the child's best interests she needs to remain within the exclusive care and custody of Plaintiff. Moreover, it is of paramount importance, that Plaintiff will exclusively take all decisions regarding the education, health and all other decisions related to the minor child.

ACCESS

Plaintiff did not make any request for access to be granted to Defendant, however Defendant insists on joint care and custody or alternatively he requests access. This necessitates the Court to make significant considerations, first and foremost, the fact that Defendant lives in England, secondly the child refuses to communicate with her father and thirdly and most importantly that Defendant smokes marijuana.

These lead to preoccupations of abductions, bonding issues and exposure to recreational drugs, thus, this Court cannot but envisage a form of access strictly here in Malta, when and if Defendant travels to Malta and the access must inevitably be always carried out in the presence of Plaintiff or one of her parents, if it is impossible for her to attend the access. Supervised access would be ideal because there exists no bond with the child, as has been proved, so some form of therapy would be needed and moreover supervision would prevent the drug exposure. Having said that, however Defendant does not reside in Malta, so this form of supervised access would be futile."

5. The defendant filed an appeal on the 2nd July 2020.

6. The first ground of appeal is that the first Court did not consider defendant's argument made in his note of submissions that prior to the appointment of curators to represent him, the plaintiff did not attempt to personally notify the defendant with the sworn application in terms of Art. 1 of Regulation 1393/2007 of the European Parliament and of the Council on the service in Member States of judicial and extrajudicial documents in civil or commercial matters.

7. In a sworn declaration (fol. 38) the plaintiff gave details of defendant's last known address. This notwithstanding there is no evidence that plaintiff attempted to personally notify the defendant with the original application, although in an application filed on the 4th July 2017 she declared that the defendant is an English citizen and permanently resides in England. The plaintiff merely requested the appointment of curators to represent the defendant since he does not reside in Malta.

8. This notwithstanding, the defendant raised no formal plea that he was not notified in terms of the EU regulation 1393/2007. Pleas are to be made in a sworn reply according to law and not in a note of submissions. Furthermore, the defendant had the opportunity to defend himself throughout the proceedings, as he did, since he was duly represented by curators appointed by the first Court. The curators established contact with the defendant and on the 12th March 2018 filed additional pleas. Therefore, it is evident that he was not prejudiced in his defence.

9. The second and third ground of appeal is that according to the defendant, *“..... there are not the necessary requisites and extremes at law for said care and custody to have been awarded to the plaintiff”*. He requested this court to *“..... revoke the decision given by the Court of First Instance and grant him joint custody”*.

10. The Court does not agree. The child has been living in Malta since June 2016. There is absolutely no evidence that the child is not well taken care of by her mother or that the mother took certain decisions that are not in the child's interest. In this respect the defendant did not give any reasons why this court should disturb the first Court's judgement. Although the defendant has requested that he be given joint custody of the child, this is not practical in the circumstances. While plaintiff and the child reside in Malta, the defendant resides in England. Furthermore, there is no evidence that the parties have

retained a good relationship notwithstanding the breakup. Therefore, in the child's best interest it is not appropriate to grant joint custody to both parents.

11. In the third ground of appeal, the defendant requested that if the plaintiff is granted sole custody, he should be consulted on important decisions regarding the child's health, education and whereabouts.

12. The child has been residing in Malta for nearly five years, and certain decisions will necessarily have to be taken. It is in the child's best interest that matters which concern the child are decided by her mother since she is her primary carer. This notwithstanding:

- i. The child is not to be permanently removed from Malta unless the defendant consents in writing or the competent court authorises her permanent departure from Malta. If such authorisation is granted and the child permanently departs from Malta, the plaintiff has to inform the defendant with all contact details of the child.
- ii. The defendant is periodically informed of the child's progress in school. The plaintiff is to provide the defendant with the details of the school where the child attends, on condition that the defendant provides his contact details to the plaintiff. The defendant has a right to request the school administration for information concerning his daughter's progress in school.

- iii. The defendant is informed if the child is admitted to hospital and given regular updates about her medical condition and progress.
- iv. The defendant is informed with the child's contact details and also any change of her residential address.
- v. The defendant is to be informed of any major decision concerning the child.

13. The fourth ground of appeal concerns visitation rights towards the father. The appellant argued that although he does not reside in Malta, the Court should have granted him supervised access and he is granted access to his daughter through digital means.

14. The first Court said that the defendant made no such request. However, in his additional statement of defence he declared:

"2. Il-kuntatt ma' bint l-esponent huwa limitat u aċċess effettiv mhux qed jingħata minħabba raġunijiet imputabbli lir-rikorrenti..... L-assenti għandu jingħata aċċess adegwat lill-minuri u jitħalla jaraha".

15. During the proceedings before the first Court, the defendant gave no information about himself. This notwithstanding the Court is of the view that defendant's request for:

- i. Supervised access if he visits Malta;

- ii. Contact with his daughter through virtual communication should be granted;

are justified. It is in the child's best interest to have contact with her natural father. Without contact the child cannot have any sort of relationship with her father, and this is certainly not in her interest.

16. Whenever the defendant intends to visit Malta he is to inform the first Court of the date of his arrival and departure from Malta, so that the Court appoints the dates and time when supervised visitation can be held between the defendant and his daughter. The visits are to be held at Appoġġ Agency which provides a safe environment where parent and child can communicate and an effort is made to have physical contact between the two.

17. With respect to virtual contact between the defendant and the child, since she is eleven years old she should have the opportunity to contact her father whenever she would like. Furthermore, virtual contact is to be held every Wednesday and Saturday between 5pm and 6.30 pm local time. Although the contact between the father and child seems to be minimal, the plaintiff has to make an effort to ensure that this type of communication is executed. A means of communication which poses no danger to the child.

18. The fifth complaint of the defendant is that the first Court, “..... *ordered the plaintiff to pay the court related expenses without clarifying that the plaintiff is to pay the deputy curators related fees and that these are then recoverable by the plaintiff against the appellant*”.

19. The first Court merely decided that “*All costs are to be borne by the defendant*”. The appointment of curators was requested by the plaintiff. Therefore, the plaintiff should pay the fees due to the curators, and thereafter recover the same from the defendant.

For these reasons the Court rejects the first and second grounds of appeal. The Court partially upholds the third ground of appeal and confirms what was ordered in paragraph twelve (12) of this judgement. The Court upholds the fourth ground of appeal and varies the judgement delivered by the Civil Court, Family Court on the 21st May 2020 and orders that defendant is to have supervised access to his daughter whenever he visits Malta as explained above, and virtual communication every Wednesday and Saturday between 5pm and 6.30 pm local time. The child can also contact her father, the defendant, whenever she wants. With regards to the fifth ground of appeal, the court orders the plaintiff to provisionally pay the legal fees due to the curators, without prejudice to her right to recover the same from the defendant.

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The Court confirms the rest of the judgement delivered by the first court. Costs of appeal are at the charge of both parties in equal shares. However, plaintiff is to provisionally pay the fees due to the curators with a right to recover one half of the same from the defendant.

Giannino Caruana Demajo
President

Tonio Mallia
Judge

Anthony Ellul
Judge

Deputy Registrar
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