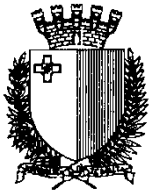

CIVIL COURT

(FAMILY SECTION)

MR. JUSTICE HON. ANTHONY G VELLA.

Sitting of Thursday 20th October 2022

Application number : 229/2016 AGV;

In the names of :

RN

Vs

KC N

The Court ;

Having seen the sworn application of RN , dated 11th October 2016 ;

1. That spouses N married on the 10th October 2005 and during their marriage, two children were born, NA. who is ten years old and BL who is three years old;

2. That the matrimonial life was no longer possible because of beatings, violence, excesses, threats, cruelty and grievous injury, amongst other valid reasons at law, which made it impossible for the parties to continue with their conjugal life, and which give rise to a personal separation according to Law, for reasons attributable solely to defendant

3. That therefore the conjugal life is no longer possible and this for reasons attributable solely to defendant;

4. That defendant is a controlling and emotionally violent person, so much so that applicant had to file an urgent application asking for the Court to evict him from the matrimonial home situated at Flat 4, A3, Triq Pietru Darmenia, Pembroke, and as a matter of fact, after having heard the parties, the Court ordered that with effect from the 15th September 2016, applicant was to continue living in the matrimonial home together with the two minors, with the exclusion of defendant;

5. That subsequently, although the parties were granted a period of time to try and reach an amicable settlement, defendant filed an application on the 10th August 2016 asking for the revocation contrario imperio of the said decree. However, by means of a decree dated 16th August 2016, the Honourable

Court, rejected his demands and authorized the parities to proceed with litigation;

6. That applicant knows these facts personally;

For these reasons, this Honourable Court was asked to:

1. Pronounce and declare the personal separation between the parties for reasons attributable to the respondent, including psychological violence, beatings, threats, grievous offences and cruelty; which made the matrimonial life of the parties impossible and led to the irretrievable breakdown of the parties' marriage so much so that respondent was ordered to evict the matrimonial home because of his behaviour;

2. Entrust the care and custody of the minors NN and BLN exclusively to applicant;

3. Authorise applicant to take all decisions in relation to the childen's health and education;

4. Orders that the two minors continue to reside within the matrimonial home, 'Flat 4, A3, Triq Pietru Darmenia, Pembroke', together with their mother, with the exclusion of respondent;

5. Establishes and liquidates maintenance for applicant and for the minor children, until the minors reach the age of eighteen years should they decide to work on a full time basis, or until the age of twenty three should they decide to pursue their studies on a full time basis; and also to order that such maintenance is deducted directly from respondent's salary or any income he might have; from both the employment he might have or from

any social benefits he might be receiving from time to time and be deposited in a bank account indicated by applicant, and to also decide about the provision for periodical increases so as make good for the rise of living every year and also to order that any social benefits in connection with the children, including but not limitedly the children's allowance, be received exclusively by applicant;

6. Order respondent to pay all of the minors' health and educational expenses, including but not limitedly, transport, donations, private lession and any other expenses relating to the their education, including extra-curricular activities of the minors, and this until they are in full time education;

7. Give all other directions and provisions which concern the minors, including but not limitedly, directions with regard to the minors' travelling and issuance of passports, the minors' attendance in schools, educational activities as well as extra-curricular activities and this save any other order this Court may deem fit in the best interests of the children;

8. Declare that respondent has forfeited his right to claim or receive maintenance from applicant;

9. Dissolve and extinguishe the community of acquests between the parties and liquidate the same in two portions in division and assign to the parties, if necessary with the aid of appointed experts;

10. Order respondent's forfeiture from any conjugal rights catered for in Article 48 et seq of Chap. 16 of the Laws of Malta and to apply entirely, or in part, against the respondent the sanctions established in articles 48, 51 to 55 of Chapter 16 of the Laws of Malta;

11. Establish which movables and immovable property are dotal and/or paraphernal to applicant and to order respondent to return the same to the applicant her paraphernal assets and credits, in a stipulated time which shall be fixed by this Court;

12. Appoint a deputy curator to represent respondent should he fail to attend for the publication of the act of division on a specific day, time and place which this Court will establish;

13. Authorise applicant to reside exclusively in the matrimonial home situated at Flat 4, A3, Triq Pietru Darmenia, Pembroke with the exclusion of respondent;

14. Authorise applicant to revert to her maiden surname, 'Schembri';

15. Authorise applicant to register this Court's eventual judgment with the Public Registry;

With costs, including those of the mediation number 296/16, against respondent, who is summoned so that a reference to his evidence be made.

The Court ;

Having seen the sworn reply filed on the 27th February 2017, respondent submitted:

1. Defendant agrees that personal separation be pronounced between the parties but contends that it was the plaintiff who brought about the irremediable breakdown of marriage due to adultery, excesses, cruelty and threats on the part of plaintiff and it is therefore untrue that defendant in any way gave rise to the breakdown of marriage as will become clear during the course of proceedings;

2. Defendant is opposing plaintiff's second and third requests that the Court order that the care and custody of the minor children be given exclusively to plaintiff since this is not in the best interests of the said minor children; It should also be stated that plaintiff is not the ideal parent to be trusted with the care and custody of the parties' minor children. In this context it should be pointed out that the plaintiff has for a long time been systematically attempting to alienate the children from the love and care of their father and the present request should, in light of this fact, be considered as no more than an attempt to acquire judicial approval of this behavior;

3. With regards to plaintiff's fourth, fifth and sixth requests that defendant should be made to pay maintenance for the needs of the parties' minor children, defendant does not oppose this request provided the amount to determined be liquidated according to law and that is after all the needs of

the said minor children are taken into consideration, the time spent with either parent, the means of both parents and the capability of each parent to generate income;

4. The seventh request is not opposed;

5. The eight request is opposed since it is untrue. Defendant can never be considered by means of his actions to have forfeited his right to receive maintenance from his wife;

6. The ninth request concerning the winding up and liquidation of the community of acquests existing between the parties is not opposed; however, the fact that it was plaintiff who caused the breakdown of the parties' marriage;

7. The tenth request is opposed since defendant is not responsible for the breakdown of parties' marriage and there is therefore no reason for the application of the quoted articles against same;

8. The eleventh request is also opposed since it is also untrue. Defendant is not in possession of any of plaintiff's dotal or paraphernal property;

9. The thirteenth request is opposed since there is no valid reason at law for defendant to be removed from the matrimonial home;

10. The fourteenth and fifteenth requests are not opposed;

11. Defendant also opposes plaintiff's request on the payment of judicial expenses and interests since it was she who gave rise to the breakdown of the marriage.

Save any other pleas.

Rat id-digriet data 4 ta' Novembru, 2016, fejn il-Qorti, fuq talba tal-konvenut, ordnat li l-proceduri jitmexxew bil-lingwa Ingliza.

Rat id-digriet ta' astensjoni tal-Qorti kif presjeduta dak iz-zmien, data 29 ta' Novembru, 2016.

Having seen all the applications filed by the parties, and the relative decrees given by the Court.

Having seen all the evidence produced, and all the documents exhibited.

Having seen the legal referee's report and conclusions.

Having seen all the acts of the proceedings.

Having seen that this case was being heard in conjunction with the case 165/18, in the same names.

CONSIDERS:

<u>Personal Separation</u>

This is one of the few demands the parties are agreeing on, since both of them are asking this Court to pronounce their personal separation, even though both contest the responsibility for such separation, and claim that this is to be attributed to the other party. From the evidence it results that the parties cohabited for around 10 years and had two children. The relationship was, to say the least, turbulent. All the evidence has been examined by the Legal Referee, and the Court will not reproduce all that has been said by the parties against each other.

Refence is made to the decision delivered by the Court of Appeal on the 30th October 2015, in the names of **Susan Armeni vs Leonard Armeni** wherein the Court established that:

> 'Din il-Qorti tosserva li z-zwieg huwa intiz sabiex il-partijiet jizviluppaw bejniethom komunjoni ta' hajja u ta' imhabba kemm lejn xulxin kif ukoll lejn it-tfal taghhom u l-konjugi ghandhom jagixxu fl-interess tal-familja li ghandha tkun l-ewwel prijorita` fiz-zwieg.
>
> - omissis –
>
> Il-hajja matrimonjali tezigi impenn kontinwu dirett lejn l-interessi tal-familja anke jekk dan ifisser li parti tirrinunzja temporanjament jew anke permanentament ghal xi haga li tkun thobb taghmel u dan b'mod partikolarment fejn fiz-zwieg jitwieldu t-tfal ghax f'dan il-kaz dak li hu ta' priorita` huwa l-obbligu taz-zewg genituri li jiehdu hsieb it-trobbija u l-benessere tat-tfal taghhom, almenu sakemm dawn isiru maggjorenni u indipendenti.'

Reference is made to article 40 of the Civil Code, Chapter 16 of the Laws of Malta which states:

> *Either of the spouses may demand separation on the grounds of excesses, cruelty, threats or grievous injury on the part of the other against the plaintiff, or against any of his or her children, or on the ground that the spouses cannot reasonably be expected to live together as the marriage has irretrievably broken down.*

The Court also refers to the case in the names **Scicluna Maria Dolores Sive Doris Vs Scicluna Anthony** decided on the 27th November 2003 by the First Hall, Civil Court (Cit. Nru 1715/2011) in which it was established that:

> "Sabiex tintalab is-separazzjoni personali mhux meħtieġ li jikkonkorru l-eċċessi, is-sevizzji, it-theddid u l-inġurji gravi, iżda kull waħda minn dawn ir-raġunijiet waħedha hija suffiċjenti" u żżid tgħid li "Il-liġi tqiegħed bħala motivi li jiġġustifikaw l-azzjoni l-episodji saljenti tal-ħajja konjugali u mhux inċidenti minuri…..Għal dak li jirrigwarda theddid u vjolenzi l-liġi tikkontenta ruħha bil-persistenza f'ċerta mġieba ħażina u mhux b'xi atti iżolati waqt xi tilwima".

Reference is also made to the decision in the names **Tabone Lea pro et noe vs Tabone Jesmond** decided on the 2nd October 2003 from the First Hall of the Civil Court (Cit. Nru 1396/2001) and **Greengrass Hugh vs. Greengrass Lucia** decided on the 2nd October 2003 from the First Hall of the Civil Court (Cit. Nru 98/2002) wherein it has been stated that:

> "Għal dak li jirrigwarda theddid u vjolenzi l-liġi tikkontenta ruħha bil-persistenza f'ċerta mġieba ħażina u mhux b'xi atti iżolati waqt xi tilwima" and furthermore "Sabiex tiġi promossa t-talba għas-separazzjoni mhux

meħtieġ kumulu ta` kawżali, kull waħda mill-kawżali ta' sevizji, it-theddid u l-inġurji gravi hija suffiċjenti sabiex jiġu vjolati r-rigwardi tal-konvivenza konjugali".

In the judgment **Jayne Margaret Chetcuti vs Lawrence Chetcuti** delived by the Court of Appeal on the 15th December 2015 it was declared that:

> "... mhux kull nuqqas da parti ta' konjuġi versu l-konjuġi l-ieħor jwassal għal sevizzi, minaċċi jew inġurja gravi fit-termini tal-Artikolu 40 tal-Kodiċi Ċivili u huma biss dawk in-nuqqasijiet li, magħmula ripetutament u abitwalment, iweġgħu u jferu lill-konjuġi sal-grad li l-konvivenza matrimonjali ssir waħda diffiċli u insapportabbli. Kif jinsab ritenut fil-ġurisprudenza patria: "Per sevizie nel senso della legge s'intendono atti abituali di crudelta' che offendono la persona o l' animo di colui e sono diretti al punto da ingenerare in lui perturbazione, un dolore ed un aversione verso chi commette tali atti. [PA **Camilleri utrinque**, 16 Marzu 1898]."

As also observed in **Catherina Agius v Benedict Agius**, decided on the 13th June 1967 the factors contemplated in article 40 have to be such which create a situation wherein the parties end up living in a "sistema costante di vessazione e di disprezzo, di oltraggio e di umiliazione che rendono almeno insapportabili l' abitazione e la vita comune".

In the judgment in the names of **Maria Mifsud vs. Vincenzo Mifsud** decide by the First Hall of the Civil Court on the 30th June 1961, it was stated that "Ċerti fatti, kliem u modi ta' azzjoni jew atteġġjamenti illi jistgħu irendu l-ħajja komuni insapportabbli, huma ritenuti mid-dottrina bħala sevizzi".

The Court agrees with the Legal Referee that the parties have reached a stage where cohabitation is no longer possible, and as a matter of fact they have been

living apart for five years and therefore personal separation is, for them, the only way forward. It has been proven that there is a basis for separation in line with Article 40 of Chapter 16 of the Laws of Malta, in that the parties "cannot reasonably be expected to live together as the marriage has irretrievably broken down."

11. The Responsibility of Separation

As expected, each one of the parties put the blame and responsibility for the irretrievable breakdown on the other.

Whilst the Wife contends that the marriage broke down because of beatings, violence, excesses, threats, cruelty and grievous injury, amongst other valid reasons at law, attributable to her Husband; the Husband on the other hand contends that the motive for marital breakdown was adultery, excesses, cruelty, threats and grevious injury attributable to the Wife. At this stage, the Court will refer briefly to the testimony given by the parties, in order to establish the fault, if any, for the marriage breakdown.

The Court refers to RN's testimony, as corroborated by the testimony of her mother Philippa Schembri - who was never cross-examined - both of whom testified about the possessive and controlling character of respondent KN. Whilst KCN admitted the fact that he gave R a lot of attention and took care of her, stating that she welcomed this attention as she claimed to have never had it before, he nonetheless rejected the allegation that he constantly dominated R, or that he phoned her constantly, asking about her whereabouts, or that his wife needed his permission to invite her parents over. So much so he stated that her mother also had the spare key and she could come whenever she wanted.

The Court is of the opinion that the testimony of the Wife and her mother concerning the responsibility of the breakdown of marriage is more credible than that of the Husband. PS lived under the same roof with the parties, after the birth of their first daughter, even if briefly, because as she explains she had to leave after three weeks because she could no longer take K's behaviour, and therefore having lived certain events personally, she can shed light about the real situation under spouses N's roof. Respondent Husband could have easily attacked her testimony by at least cross-examining her, or produce evidence of his family members; however he failed to do so. For this reason her testimony is hereby being given more weight.

Moreover reference is made to article 3 of Chapter 16 of the Laws of Malta:

> *"Both spouses are bound, each in proportion to his or her means and of his or her ability to work whether in the home or outside the home as the interest of the family requires, to maintain each other and to contribute towards the needs of the family."*

In her testimony, R explained that after his employment with VH, her husband remained unemployed for many years, whereas she always worked for the family's sake. She claims that it was often difficult to make ends meet, and her mother PS corroborates this testimony by stating that in fact on many occasions she had to aide him financially, including paying for daily needs, rent and his flight back to Nigeria to see his family. She also explains that financially they also helped K's mother's medical operation in Nigeria.

On his part, K rejects these allegations and insists that ever since he was sixteen years old he had been a professional footballer player and that he played in various countries all over the world. He sustains that he had managed to save up a good amount of money, and had many friends overseas, with one of whom he

had started a small business selling clothes, shoes and fashion accessories to supplement their income. In its decree of the 4th August 2016, the Court also remarked that ".. *Mr N again fails to explain why he states he is unemployed and is not registering for work. As the father of two minor children Mr N has the duty to find alternative employment."* Notwithstanding this, K denies that R was the sole breadwinner of the family; however documentation filed by Joseph Saliba[1] on behalf of Jobsplus indicate that in fact for a very long time, even when he was a footballer, he was not registered as being employed and similarly his bank statements did not shed light on the 'good amount of money' he alleges to have saved from when he worked as a footballer. Moreover, even though in his cross-examination he gave further evidence about his business, he failed to prove that in fact such business truly existed and/or that he was generating money for the family.

The bank statements, including those of the loan, confirm the Wife's testimony that in fact she was the sole breadwinner of the family and that all expenses, be it those relating to the loan and debts, as well as daily needs were being paid from her accounts even if these appertained to the community of acquests.

The Court is convinced that there was no impediment for KN to find employment throughout marriage (as he did later on during these proceedings), and as a matter of fact his choices and behavior put unnecessary pressure on the entire family, which on various occasion had to turn on the Wife's family for financial aid. This irresponsible behavior increases in its gravity when one considers that the Husband had an obligation to sustain his family, including the two minor children.

[1] Refer to the sitting of the 21st October 2019 before Judicial Assistant Marita Tabone

On the other part, RN must also carry responsibilty in her decision to marry respondent KN, more so since she has been given credibility about respondent's character, in that he was very possessive. As a matter of fact, both herself and her mother claim that K was very possessive and controlling from the very start of their relationship. She goes on to say that he was oppressive, abusive and extremely possessive and states that their relationship had become unbearable, however, she still chose to marry him.

With all due respect, since it is quite evident that she knew that K had a difficult and possessive character, she has to also assume her responsibility for her actions because she was well aware of the serious problems they were facing and she still went ahead with the marriage.

It must be noted that respondent K N brought forward evidence relating to his Wife's adultery. Although it is not right that a spouse breaches the obligation of fidelity, it does not however lead to an automatic declaration that the fault for the marital breakdown is of the spouse who committed adultery and each case has its own circumstances and each case is to be decided on its own merits.

Although the relationship that RN started with HE is not being in any way justified, the Court is nonetheless of the opinion that the marital breakdown is not attributable to such relationship. Indeed, the relationship with Mr E. started when the marriage of the parties had already irretrievably broken down and not when they were still living as husband and wife. Although KN claims to have a recording dated end of 2015, between his wife and KE. wherein she asks Hto meet him and speaks about a photo of them which she wanted to enlarge and hang in the sitting room, he failed to produce the same as evidence.

Throughout the proceedings it has resulted that both parties are in a relationship with third parties, that is, RN with HE and KCN with a Ms CM . Having said that, even though adultery is not one of the causes for the marital breakdown in this case, but rather a consequence thereof, this however does not exonerate RN completely from the responsibility of the separation, since pending proceedings one of the factors contemplated in article 40 has been proved.

In light of the above, the Court is convinced that KCN is primarily responsible for the breakdown of the marriage whilst RN also ought to bear a degree of responsibility for such breakdown as a result of her actions. For these reasons, therefore, both parties are responsible for the breakdown of the marriage even if not in equal shares, such that the Husband has to bear a higher proprotion of responsibility as explained above.

12. Forfeiture

In the case **Francis Bugelli -vs- Josephine Borg ġa Bugelli** decided by the Court of Appeal on the 26th March 1996, the Court stated:

> "...Il-Qorti tissottolineja li l-konsegwenzi li jissemmew fl-artikoli 48 u 52 huma proprjament applikabbli f'kawża fejn ikun hemm talba ad hoc sabiex tiġi pronunzjata l-firda bejn il-konjuġi. Din ir-regola toħroġ mil-lokuzzjoni ċara tal-liġi stess, billi hija proprja f'kawża bħal din li jiġi determinat liema parti "tkun il-ħtija tal-firda" (artikolu 48) u "jekk il-wieħed u l-oħra jkunu ħtija ta' egħmil li jagħti lok għal firda" (artikolu 52). Din ir-regola toħroġ ukoll mill-insenjament kontenut fid-dottrina u fil-ġurisprudenza tat-tribunali tagħna."

This separation has been pending before this Honourable Court for around five years, and for whatever reason neither one of the parties asked the Court to terminate the community of acquests pending proceedings. It results that in fact it was the Wife who has been exclusively paying for the debts of the community of acquests.

For these reasons and those set out above[2], the relative date for the sake of forfeiture should be the date of eviction of the Husband from the matrimonial home, that is, the **15th September 2016**.

13. Maintenance for RN and KCN

Article 3 of the Civil Code states that:

> *"Both spouses are bound, each in proportion to his or her means and of his or her ability to work whether in the home or outside the home as the interest of the family requires, to maintain each other and to contribute towards the needs of the family.*

In the cases before this Court, both parties are claiming maintenance for themselves from one another.

The Courts have made themselves clear on this matter, that both jurisprudence and our Courts are, today, giving weight to the fact the legislative reform has put both spouses on the same level and acknowledge that the woman has the capability to work and therefore, should not look at marriage, more so during separation proceedings, as a form of guarantee of an income or as an insurance.

[2] See Heading 11. *The Responsibility for Separation*.

Reference is made to **Rosanna sive Roxanne Rizzo pro et noe -vs- Adrian Rizzo** decided by the Court of Appeal on the 31st October 2014 wherein it has been established that: "L-obbligu tal-manteniment hu tal-koppja miżżewwġa, u mhux taċ-ċittadini Maltin. Mara miżżewwġa m'għandhiex tkun ta' piż fuq il-Gvern [li jkollu jagħmel tajjeb għal dan, minn flus il-poplu] iżda ta'l-istess koppja." Furthermore, in **Saadia Vella El Bazza -vs- George Vella**[3] decided by the Court of Appeal on the 24th April 2015, the Court observed:

> "li tassew li llum li l-pożizzjoni legali tal-mara llum tbidlet fis-sens li l-mara bħala konjugi għandha l-obbligu li taħdem barra mid-dar, jekk possibbli, fejn meħtieġ u li hi wkoll għandha tikkontribwixxi għall-ħtiġijiet tal-familja. Kif osservat fil-każ **PA Marthese Vella v. John Vella**, deċiż fit-**28 ta' Frar 2003**: "Il-fatt li l-mara ma taħdimx ma jfissirx li din m'għandhiex il-potenzjal li taħdem u tiġġenera introjtu: it-tibdil leġislattiv filwaqt li rrikonoxxa l-avvanz tal-mara ġab miegħu wkoll responsabbiltajiet fuq il-mara miżżewwġa ferm aktar milli kellha qabel. Dawn i-responsabbiltjiet huma rifless wkoll anke fejn jirrigwarda l-manteniment li jfisser li hi wkoll trid terfa' bħal żewġha r-responsabbilita` għal dak li jirrigwarda l-manteniment tal-familja [ara **App.S Doris Tabone vs Carmelo Tabone, 15 Diċembru 1997**]" Kif qalet din il-Qorti fil-każ **Catherine Mifsud v. Louis Mifsud, 25 ta' Ottubru 2013**: "Il-manteniment mhux xi dritt sagrosant ta' min jissepara iżda jiġi ordnat il-ħlas tiegħu meta hemm il-bżonn."

From the evidence brought forward throughout the case, it results that in fact, not only both parties have the capability to work and generate an income, but that they are actually both in employment.

[3] Decided on the by the Court of Appeal

Furthermore, considering that both parties are in a relationship with third parties, and considering that as stated before, the undersigned submits that sanctions are to be applied against both spouses (including the sanction relating to maintenance), the parties' demands for personal maintenance are to be rejected.

14. The Minors

a. Care and custody

In matters concerning the care and custody of children, the main guiding priciple is that of the best interest of the child. The Court refers to the case in the names of **Giuseppe Scicluna vs Maria Scicluna pro et noe** decided by the First Hall of the Civil Court on the 31st May 1958, wherein it was stated "li l-kura tat-tfal komuni (..omissis..) hija regolata mill-principju ta' l-aqwa utilita' u l-akbar vantagg ghall-interess ta' l-istess tfal li c-cirkostanzi tal-kaz u l-koefficjenti tal-fatti partikulari tal-mument ikunu jissuggerixxu"[4]. Moreover in the case **Yolanda Formosa vs Maggur Frank Formosa** decided by the First Hall of the Civil Court on the 10th June 1965, the Court noted that "b'gid tat-tfal ghandna nifhmu mhux tant il-profitt materjali kemm il-ben esseri morali taghhom. It-tfal, f'kawzi bhal dawn, m'humiex oggett in kontraversja u l-interess tal-genituri fil-kwistjoni dwar il-kustodja taghhom huwa inservjenti ghall-interess tat-tfal". Similarly in the case, **Sylvia Melfi vs Philip Vassallo** decided by the Court of Appeal on the 25th November 1998 the Court stated that "In this case the Court must seek to do what is in the sole interest of the minor child. In its decision whether the care and

[4] See also **Jennifer Portelli v. John Portelli** decided on the 25th June 2003

custody of the child should be given to one parent or the other the Court must solely be guided by what is most beneficial to the child".

Reference is also made to the case in the names of **Miriam Cauchi vs Francis Cauchi** wherein the Court noted discarded a demand for joint care and custody "…ghaliex bhala sistema m'hijix prattikabbli meta l-genituri ma jiftehmux bejniethom." As established in **Francienne Fenech vs Alexander Fenech**, "id-decizjoni tal-Qorti f'din il-materja tmur lil hinn minn jekk parti hijiex kapaci jew affidabbli. Il-Qorti trid tiehu kont ta' x'inhu fl-interess suprem tal-minuri mil-lat l-aktar ampju tieghu, inkluz is-sahha fizika u psikologika taghhom, kif ukoll il-mod kif ukoll l-animu li jaraw li l-genituri ghandhom fil-konfront ta' xulxin."

As a matter of fact, both parties are asking this Court to grant them the sole care and custody of the two minor children N and B BL , siblings N.

Throughout the case, both parties filed applications before the Court asking it to decide on issues which they could not agree upon, including for the children to attend afterschool services. Such issues could have easily been resolved by the parents had it not been for the animosity existent between them, but as often happens with separation proceedings, this seems to be no longer possible between spouses Njoku. In other words, it is the Court that has to intervene and decide for them, something that this Court does reluctantly.

In light of the fact that civil discussion is clearly not possible between spouses N, not even when the interest of the minors are at stake, the Court is of the opinion that RN is to be granted sole care and custody of the two minor children, limitedly vis-à-vis decisions regarding their education, so that as much as possible the minors do not lose on academic opportunities.

In all other matters, the parties are to retain joint care and custody, as for example in health matters as well as for the issuance or otherwise of passports.

b. Residence and Access of the Minors

In the case before this Court, both parties are asking the Court to establish the minors' residence with him/her. It must be noted that throughout the proceedings the minors have continued to reside with the Mother, whereas the Father enjoyed regular access and despite many allegations, neither one of the parties managed to prove that the other is an unfit parent.

In his testimony, K N states that although on paper he has access once a week for a sleepover, as a matter of fact, he sees them as much as he can. He explains that the son visits him three times a week for a day or afternoon, sometimes even for two nights a week and he claims that the minor wants to stay with him and does not want to be returned to his mother's. He states that the minor cries when it's time to leave his father's house and that he calms him down by telling him that he will call him the following day so that they plan the next pick up. He also explains how N goes less as she allegedly is asked by R to help with her youngest siblings. He states that Naomi will only get what she needs if she obeys her mother and he also claims that R calls her often when she is with her father to try and obtain information about him. He claims that N would like to visit him often, but her mother makes this difficult.

It also results that Naomi has been spoken to by the Child Advocate Dr Stephanie Galea more than once[5], and although it appears that she enjoys her access with

[5] See child advocates' report dated 18th January 2017 (a fol. 78 of the file) and that dated 9th April 2018 (a fol. 178 of the file)

their father, she never hinted that she would like to set up her residence with the Father[6].

For these reasons the Court feels that the status quo should not be altered, and that the minors should continue to reside with the Mother, with access towards the Father. Considering that N is now 15 years of age, she should enjoy free access towards her father, which shall be coordinated between herself and the Father. In B L 's case, access towards his Father shall be exercised every Tuesday and Thursday from 4pm till 8pm, and a sleepover from Friday at 6pm till Saturday at 6pm, alternating the following week from Saturday at 6pm till Sunday at 6pm. In either case, it should be the Father who picks up the children at the beginning of access from the Mother's residence and returns them at the same residence at the end of access.

c) Maintenance and Children Allowance

Reference is made to article 3B of Chapter 16 of the Laws of Malta:

> *Marriage imposes on both spouses the obligation to look after, maintain, instruct and educate the children of the marriage taking into account the abilities, natural inclinations and aspirations of the children.*

And article 7(1) of the Chapter 16 of the Laws of Malta:

> *Parents are bound to look after, maintain, instruct and educate their children in the manner laid down in article 3B of this Code.*

[6] Bill Leon never spoke to the Child Advocate as he was still very young when Dr Galea met with Naomi.

In the case **Borg Angelo vs Borg Kristen**, decided on the 24th June 2009 it has been established: "In tema legali jigi osservat li, ghalkemm il-manteniment dovut ghandu jkun proporzjonat bejn il-mezzi tal-konvenuta u l-bzonnijiet tal-minuri, jibqa' ferm il-principju li "kull genitur ghandu obbligu jikkontribwixxi ghall-ghixien u l-manteniment tal-ulied, u ghal dan il-ghan kull genitur ghandu jara x' jaghmel biex jaghmel sforz genwin [anke a skapitu tal-interessi personali tieghu] biex imantni lill-ulied li jkun gab fid-dinja".

Reference is also made to article 54 of Chapter 16 of the Laws of Malta, according to which, the maintenance due to children shall be determined having regard to the means of the spouses, their ability to work and their needs, and regard shall also be had to all the other circumstances of the spouses and of the children. In the case **Claire Booker vs Roger Mahlangu** decided by the by the Civil Court (Family Section) on the 7th December 2017 (Rik. Gur. 186/2016RGM), the Court stated that:

> "Il-Qrati taghna kostantament irritenew illi l-quantum tal-manteniment tal-minuri pagabbli mill-genitur li m'ghandux il-kustodja tal-minuri, jigi stabbilit wara apprezzament li l-Qorti trid taghmel tal-fatti migjuba quddiemha fid-dawl tal-provvedimenti legali appena citati."

In the case of **Angela Conti vs Lawrence Bonnici**, decided by the Court of Appeal on the 6th February 2015, it was noted that:

> "Wiehed l-ewwelnett jifhem li f'ezercizzju bhal dak li taghmel il-Qorti meta tiffissa hlas ta' manteniment l-istess Qorti tkun qed taghmel apprezzament tal-fatti li jkollha quddiemha u mbaghad skond l-artikoli fuq imsemmija tal-Kodici Civili tasal ghall-konkluzjoni taghha dwar x'ghandu jkun l-ammont gust li jithallas."

In its decree of the 18 ta' Jannar, 2017, this Court liquidated maintenance to the amount of Eur 400 together with half health and educational expenses. No

evidence whatsoever has been brought forward about the minors' actual expenses, save for the fact that the Minor B L attends a Church School. It appears that maintenance is regularly paid by the Father via bank transfer, and the only contestation seems to be about his share of health and educational expenses. In fact when asked in cross-examination whether he pays his share, he claims he does so in cash, and that sometimes he buys his own medicine for the children, but fails to bring forward evidence to this effect.

Considering that for the past four years the maintenance liquidated by the Court was not revised in accordance with the cost of living, considering that the minor BL attends in a Church School, and considering that there is no relationship between the parties, the Court is of the opinion that maintenance should be inclusive of health and educational expenses, so as to avoid further incidents between the parties.

For these reasons, the Father shall be ordered to pay the sum of Eur 250 for each minor, that is a total of Eur 500 every month, which amount includes his share of health and education expenses. Rather than having the maintenance be revised every year in accordance with cost of living, the Court orders that this increases by €50 per month every three (3) years, and should be directly deducted from the Father's salary and paid directly in the Mother's bank account.

Moreover maintenance is to be paid until the minors reach the age of eighteen years should they decide to work on a full time basis, or until the age of twenty three should they decide to pursue their studies on a full time basis.

Any children's allowance payable by the State for the two Minors is to be solely and exclusively received by the Mother since the minors' residence is with her.

15. Termination, Liquidation and Division of the Community of Acquest

As in all separation cases, both parties are asking this Court for the termination and liquidation of the community of acquests existent between them. It follows, therefore, that such demands are consequential to the demand for personal separation, and these demands shall be upheld. The parties were married on the 10th October 2005 and thus that is the date when the community of acquests started between them.

a) Assets Pertaining to the Community of Acquests:

1. One third ($^1/_3$) undivided share of the Matrimonial Home on which there is still a pending loan of circa Eur 44,000 with HSBC Bank Malta plc;
2. The vehicle of the make Mitsubishi bearing the registration number CCC-219;
3. Bank accounts;

i. The Matrimonial Home

The matrimonial home is situated at Apartment 4, Block A3, in Pietru Darmenia Street, Pembroke, of which, the parties bought a third undivided share from the Housing Authority by means of a promise of sale 'contract' dated the 1st July 2009, in acts of Notary Romina Cuschieri. It also results that they took a loan from HSBC Bank Malta plc in order to pay for the same and to date there is still a balance of circa Eur 44,000 due to the bank, and the Housing Authority has also imposed a groundrent on the said property. Moreover, the parties had been given the right by the Housing Authority to buy the remaining share within ten years, something which they have failed to do and therefore the Housing Authority in

its absolute discretion can establish a sum which is to be paid by the parties as compensation for the occupation of the entire apartment[7].

In his affidavit the Husband contends that the current value of the matrimonial home is between Eur 300,000 and Eur 350,000 allegedly as valued by a Remax Agent who also owns an apartment in the area. However, neither one of the parties submitted in evidence a formal valuation of the property.

The Wife contends that when she bought the 1/3 of the Government property Kent was still unemployed and the loan was calculated on her salary only, even if it was issued on both names since they were spouses. She explains that she has always paid the loan on her own, from her personal HSBC account and she continues to do so until this very day. On the other hand, the Husband claims to have paid for the finishings of the house, such as internal doors, windows and insect screens, as well as their son's bedroom.

From the bank statements exhibited by Ms Lorraine Attard, representative of HSBC Bank Malta plc during the sitting of the 16th October 2020, it results that as a matter of fact, the loan accounts numbered 87900761[8] and 16161783[9] were in fact always paid from Ramona Njoku's savings account 016037087050.

In examination[10], RN submitted that between the 30th May 2018 and the 27th June 2018 she was based in Pembroke. She later confirms that she slept at her partner's house on various occasions. Later, during cross-examination[11], she states that she is staying more frequently at HE (her partner) place as she is

[7] As per clause 3 of the contract in acts of Notary Romina Cuschieri.
[8] Joint loan account closed on the 17th September 2017.
[9] Joint loan account opened on the 17th September 2015 and is still open.
[10] Refer to the sitting of the 3rd July 2018 before Judge Abigail Lofaro
[11] Refer to the sitting of the 13th January 2020 before Judicial Assistant Marita Tabone

scared to stay at home, as K often turns up next to the house or next to the school and causes trouble. Under oath, as summoned by her husband so that a reference to her oath could be made[12], RN testified that she still lives in Pembroke and that she sleeps there. She states that she is afraid to stay there on her own and that she is still waiting for a domestic violence sitting before the Magistrates' Court to appear in those proceedings. She also testified that whenever she asked her husband to return the keys of the apartment and the car, he refused stating that he has a right to everything.

On the other hand, KCN , in his affidavit[13] filed on the 7th October 2019, insists that even though Ramona states that she lives in the matrimonial home in Pembroke, in fact she does not. He claims that she drives from Tarxien early in the morning so she is with the minors in Pembroke when the school van picks them up, and she is back at Pembroke to wait for the van's drop off, only to then drive back to Tarxien with them. He claims that as a matter of fact R lives in Tarxien and she merely uses the matrimonial home in Pembroke as a stop-over place to wait for the children to finish school and do the laundry.

To this effect he also summoned SE, former wife of HE (R's partner), who when asked whether she knows if anyone cohabits with H , she replied that whenever her children visit their father, there is his partner, RN, K's wife, even after an overnight sleep, in the morning.[14] KCN [15], in examination stated that he went with one of his friends, on three different days, at different hours of the day, usually at midnight and early in the morning to take photos of his wife's car and

[12] Refer to the sitting of the 18th September 2020 before the undersigned legal referee
[13] A fol. 33 – 40 of the file
[14] Refer to the sitting of the 16th October 2020 before the undersigned legal referee
[15] Refer to the sitting of the 3rd July 2018 before Judge Abigail Lofaro

her boyfriend's car to confirm that she in fact often spent nights at her partner's house and he also exhibited a number of photos which confirm his version.[16]

Based on the evidence submitted by both parties, there is no doubt in the Court's mind that RN lives primarily in Tarxien with her current partner HE and her four children (the parties' two children and the children she had with HE). Having said that, however, it is also true that KN was evicted by the Court, from the matrimonial home, after a violent incident. Furthermore, he still holds a copy of the keys of the apartment, and it has been established that it was RN who paid and is still paying, exclusively, for the loan incumbent on the property.

The Court tends to agree with the Legal referee on this matter, and therefore one third undivided share of the matrimonial home is to be assigned to R N who shall live in the matrimonial home with the minors, with the exclusion of respondent KN.

Furthermore, this decision is without prejudice to the Housing Authority's rights, namely clauses 3 and 4. Paragraph 2 of clause 4 is hereby being reproduced:

> "B'dana illi f'kaz li l-kumpraturi ma jkunux iridu jkomplu jghixu f'dan il-fond jew jekk ikunu jridu jbieghu s-sehem taghhom, jew ma jkunux jixtiequ jibqghu kopropjetarji tal-fond imsemmi, huma ghandhom jitrasferixxu s-sehem taghhom lill-Awtorita` tad-Djar."

Having said this, the Husband is entitled to be equitably compensated as a result of the assignment of his third undivided share to the Wife, and as suggested by the Legal Referee, the Court shall appoint an architect to evaluate the one third

[16] A. fol 22 of the file number 229/2016/1

undivided share of the apartment, after which the pending loan has then to be deducted so that the husband's undivided share of one sixth ($_1/_6$) is established.

Again, the Legal Referee suggests that R N is to be refunded from K's share, half of the loans she has paid from the 15th September 2016 onwards, to a total of Eur 217.61 X 64 months = Eur 14,579.89/2 = **Euro €7,289.94**.[17] The Court is also in agreement with this suggestion.

ii. The Vehicle of the Make Mitsubishi

There seems to be agreement between the parties that during marriage a vehicle of the make Mitsubishi was bought. Whereas the Wife contends that her parents gave them the money for the initial deposit (but no documentation was produced to this effect), the Husband sustains that he had started paying the vehicle in cash against receipts issued by United Acceptance Finance Limited which he claims he could produce in court (but never did).

From evidence given by Ms Patricia Hili[18] on behalf of United Acceptance Finance Limited, it transpired that the parties bought the car for Eur 20,000, and they signed a number of bills of exchange to pay it in installments. The witness exhibited various documents, including a list of bills of exchange which had been paid and those which are still due by the parties.

From the paperwork submitted by United Acceptance Finance Ltd, together with RN 's HSBC Bank Malta plc's statements[19], it appears that the vehicle has been paid in full in March 2021.

[17] Amount calculated in terms of Dok HSBC9
[18] Refer to the sitting of the 17th April 2018 before Judicial Assistant Greta Mifsud Agius
[19] In particular Dok HSBC2

Although not every entry in the documents submitted by United Acceptance Finance Ltd is clear as to who of the spouses paid for the instalments, various transactions can be linked back to RN, HSBC Savings Account (Dok HSBC2), who had, and still has, the actual possession of the vehicle for the past years. Although the Husband testified that he paid some instalments in cash, and insisted that the company issued receipts in his favour, he failed to produce the same in the acts of the case.

For these reasons, the Court finds that this car is to be assigned to the Wife, whilst the Husband is to receive half the value of the said movable, as explained below.

Despite the fact that six and a half years have passed since they purchased the vehicle, neither one of the parties has produced today's market value of the said car. Since the car has always been in RN's possession, who has made use of the car for six and a half years, exclusively, the undersigned submits that the Husband's share of the car should be of Eur 10,000.

However, in light of the sanctions applied by the undersigned above, the undersigned humbly submits that the Wife is to be reimbursed for half the instalments she has paid for since September 2016. From the documentation produced by the representative of United Acceptance Finance Ltd as cross referenced with R N 's bank statements, it results that in fact, from September 2016, she paid a total of €10,315 from her bank account. The Legal referee lists all these transactions in her report.

Therefore, whilst the Wife is to be assigned the car, the Husband is to receive the sum of **Euro €4,842.50** as set off for his share. [Eur 20,000 – Eur 10,315 = Eur 9,685/2 = Eur 4,842.50].

iii. The Bank Accounts [Savings and Current Accounts]

After having reviewed all the documentation filed by the representative of the local banks, and after having seen that the amounts in the parties' respective bank accounts, which are minimal, each one of the parties is to be assigned those bank accounts which are in his or her name personally, as is customary in such cases. There are no joint savings or current accounts between the parties.

DECIDE:

Now, therefore, for these reasons the Court:
With regard to the pleas raised by **RN** ;

1. Upholds the first demand and declares the personal separation of spouses N for reasons attributable to both parties, even if in unequal measure, as explained above;

2. Upholds *in parte* the second and third demands, by entrusting the mother with the sole care and custody of the two minors, for educational purposes only, and orders that extraordinary health decisions and the decision of the issuance or otherwise of passports, are still be taken jointly by both parents;

3. Upholds the fourth demand and authorises RN to reside in the matrimonial home together with the minor children, with the exclusion of KCN with access in favour of the Husband as explained above;

4. Upholds the fifth demand, and liquidates the amount due by KC N to the

amount of Eur 250 per month, per child, which amount is inclusive of the Husband's share of educational and health expenses and which is to be revised every three (3) years by €50 per month as explained in the judgment. Such payment shall be deducted from the Husband's salary and shall be due until the minors reach the age of eighteen years, should they decide to work on a full time basis, or until the age of twenty three should they decide to pursue their studies on a full time basis. Moreover any children's allowance is to be perceived exclusively by the Wife.

5. Upholds the sixth demand as included above, since health and educational expenses have been catered for in by means of the fifth demand;

6. Rejects the seventh demand as no evidence has been brought to this effect;

7. Upholds the eighth demand for the reasons set out above;

8. Upholds the ninth demand and orders the termination and liquidation of the community of acquest as set out above, under the sub-title "Termination, Liquidation and Division of the Community of Acquests";

9. Upholds the tenth demand and sets the 15th September 2016 as a cut off date for such forfeiture;

10. Rejects the eleventh demand as no evidence of dotal and/or paraphernal assets and/or claims have been brought forward;

11. Upholds the twelfth demand;

12. Upholds the thirteenth demand for the reasons set out above;

13. Upholds the fourteenth demand and authorises the wife to revert back to her maiden surname;

14. Upholds the fifteenth demand and orders that the judgment be registered in the Public Registry of Malta, in termin of Article 62A of Chapter 16 of the Laws of Malta.

With costs apportioned as to two thirds (2/3) to be paid by the KCN and the remaining one third (1/3) to be paid by RN.

Anthony J Vella
Judge

Cettina Gauci
Dep Reg