CIVIL COURTS

(FAMILY SECTION)

MADAM JUSTICE

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

Today, 6th February 2023

Application no.: 130/2021 JPG

Case no.: 22

MM

Vs

CG and by virtue of the decree dated 15th February 2022, Dr Christopher Chircop and LP Joeline Pace Ciscaldi were appointed as curators to the absent CG

The Court:

Having seen the sworn application filed by MM, dated 5th of May 2021, at page 1, wherein it was held:

1) *That the parties were in a relationship which has ended and of this relationship was born one child, EMG, on X, and who is therefore X years old;*

2) *That at the beginning of the year 2020, the Defendant informed Applicant that she was feeling homesick and that she wished to spend some time with her family in S. Applicant understood Defendant's request and agreed that she could go to S for a temporary period of time and that the minor child could go too;*

3) *That the Defendant came back to Malta in August 2020 but left again with the*

agreement of Applicant subject to her definitive return after this period. Once she had returned to S, Applicant began to worry and began asking Defendant for a fixed date of return. On her end, Defendant used to ignore the question or tell him that it was still too early to return until, in October of the year 2020, she informed Applicant that "things had changed" and that she intended on remaining in S together with the minor child;

4) *That Applicant immediately made contact with the Maltese Central Authority and started the proceedings necessary for the return of the child to Malta. These proceedings are currently pending;*

5) *That it is in the best interest of the minor child to continue to reside in Malta where he has extensive family and various other connections;*

6) *That although Defendant is in S, she participated in mediation proceedings through her lawyer in Malta but unfortunately no agreement could be reached since she insisted that the child was to remain in S and for this reason this case was filed;*

7) *That Applicant was authorised to file this case by means of a decree of the 29 April 2021 (Dok A)*

For these reasons Applicant humbly requests that this Honourable Court, save any other provision which it deems fit in the circumstances, deem is fit to:

i. *Order that the residence of the minor child of the parties, E be together with the father in Malta with access in favour of the Defendant in accordance with the needs and best interests of the minor child and, together with the order of access to regulate access in case of public holidays and feasts, in Christmas and New Year, and other special occasions;*
ii. *Order that the care and custody of the minor child, E, be granted jointly to the parties, provided that all decisions concerning the travel of the minor child are taken by Applicant;*
iii. *Order the Defendant to pay to the Plaintiff, such alimony as is appropriate*

and adequate for the needs of the said minor, E to be fixed by the same Court, according to the means of the Defendant and the needs of the same minor, payable by the Defendant to the same Plaintiff in the week or month as ordered by this Court;

iv. Order that any passport in the name of the child be held by Applicant.

With costs including those incurred during g the mediation proceedings.

Having seen that the application and documents, the decree and notice of hearing have been duly notified according to law;

Having seen the reply filed by the Curators Dr Christopher Chircop and LP Joeline Pace Ciscaldi dated 8th of April 2022, vide page 46;

Having seen the note filed by Dr Malcolm Mifsud dated 15th of June 2022, exhibiting a copy of the Power of Attorney of Defendant , vide page 79;

Having seen the sworn reply filed by Defendant , dated 30th of June 2022, at page 82 et seqq., wherein it stated:

1. *Whereas preliminarily, the Defendant pleads by way of exception the lack of jurisdiction of this Honourable Court in view that the subject of this action, i.e, the care and custody of the minor EMG was decided by the Stockholm District Court, S, bearing case number A5478-21 of 10 May 2021 a copy and translation of which is annexed and marked as (Dok D).*

2. *Whereas it was the Plaintiff himself who in the Court case above mention in paragraph 1 who filed the legal proceedings in S and in doing so manifestly submitted himself to the jurisdiction of the foreign court. In the said case there was a judgment pronounced by the S Court on the custody of the minor son, EMG, as indicated in the annexed document and marked as (Dok D), therefore the case in S was in relation to the same subject as the current Court procedures in Malta;*

3. *Whereas it was the Plaintiff who voluntarily submitted himself to the jurisdiction of the S Courts and this Foreign Court gave its judgment following the claims of*

the Plaintiff on the custody of the minor son. The principle of the Court first seised comes into play only in a situation of lis pendens. In the current Court procedures there are no concurrent proceedings in view that the case on the custody of the minor which was filed in S is a res judicata.

4. *Whereas this is an abusive tactic in respect of the dispute between the two parties committed by the Plaintiff who when faced with a decision of the foreign Court, res judicata, is now invoking the Maltese Courts with the same proceedings on the same subject of the case which was already decided. This tactic is nothing other than forum shopping which is manifestly contrary to public order and contrary to the applicable Regulations of the European Union.*

5. *Whereas in addition the minor presently, as well as when this judicial procedure was tabled, is resident and domiciled in S and therefore this honourable Court does not have jurisdiction in terms of article 742 of Chapter 12 of the Laws of Malta;*

6. *Whereas without prejudice to the aforementioned and without the Defendant in any way tacitly accepting the jurisdiction of the Maltese Court in this case, and only in the case that the Honourable Court has jurisdiction under Article 742 of Chapter 12 of the Laws of Malta, the Defendant is objecting to the first and second claim of the Plaintiff in view that it is in the supreme interest of the minor E that he remains living in S together with his mother, by virtue of the fact that the habitual residence of the minor E is S and since the Defendant is the primary carer of the minor child, any changes to his current residence will be detrimental to his stability and wellbeing;*

7. *Whereas in the list of witnesses of the Plaintiff there is listed under point 4 the "Friends of the parties for them to testify …" and point 5 "Doctors psychologists and social workers, curators of the parties and the minor for them to testify…" which is in breach of Article 156(4) of Chap 12 of the Laws of Malta, which states "(4) The Plaintiff shall together with the declaration also give the names of the witnesses he intends to produce in evidence stating in respect of each of them the facts and proof he intends to establish by their evidence". And therefore point 7 has to be withdrawn from the Court file.*

8. *Providing for other pleas.*

With expenses.

Having seen the exhibited documents and all the case acts;

Having heard oral submission made by counsel to parties;

Considers:

This is a judgement in parte, following a preliminary plea raised by Defendant in her sworn reply, as to whether this Court has jurisdiction to hear and determine the Applicant's requests. Plaintiff filed contentious proceedings wherein he is requesting this Court to *inter alia* order that the residence of the minor child of the parties be with the father in Malta, order that the care and custody of the minor child be granted jointly and that Defendant be ordered to pay Plaintiff adequate and appropriate alimony for the minor.

This judgement in parte shall also address a second preliminary plea raised by Defendant in her sworn reply, namely the plea of *res judicata.*

Deliberates:

The Court notes that proceedings are still at a very early stage, however, from the acts of the case it appears that the parties were involved in an intimate relationship, which has now terminated. The parties had a son EMG who was born on X and is now X years old. The minor was born in S. It appears that the parties lived together as a family here in Malta until the beginning of the year 2020, when Defendant expressed her wish to visit her parents in S and spend some months in S, together with the minor. Defendant came back in August of the same year (2020), however, Defendant returned to S shortly after and the parties had agreed that she would be returning to Malta in due course. In October of 2020, Defendant allegedly informed Plaintiff that things between them had changed and that she had decided that she shall be staying permanently in S with the minor.

It appears that Plaintiff made contact with the Maltese Central Authority and initiated the relative

proceedings for the return of the minor child E. Plaintiff also attests that notwithstanding the fact that Defendant was in S, she had participated in mediation proceedings in Malta via legal counsel, whom she had engaged for this purpose.

In her sworn reply, Defendant affirmed that:

> *1. Whereas preliminarily, the Defendant pleads by way of exception the lack of jurisdiction of this Honourable Court in view that the subject of this action, i.e. the care and custody of the minor EMG was decided by the S District Court, S bearing case number A 5478-21 of 10 May 2021.*
>
> *3. Whereas it was the Plaintiff who voluntarily submitted himself to the jurisdiction of the S Courts and this Foreign Court gave its judgment following the claims of the Plaintiff on the custody of the minor son. The principle of the court first seised comes into play only in a situation of lis pendens. In the current Court procedures there are not any concurrent proceedings in view that the case of the custody of the minor which was filed in S is res judicata.*

In her sworn reply, Defendant contends that the Maltese Court lacks jurisdiction and that the subject matter of these litigious proceedings were already decided by the S District Court in S affirming it was Plaintiff who filed the said legal proceedings in S. Defendant adds that in so doing, Plaintiff submitted himself to the jurisdiction of the S Court. In the said case, Defendant holds that a judgment was pronounced. Defendant also opines that the principle of the Court first seised comes into play only in a situation of *lis pendens.* In this case, there are no concurrent proceedings but a case of *res judicata* since the case filed in S has already been decided. Defendant additionally affirms that this is nothing but an abusive tactic on the part of the Plaintiff in forum shopping.

The Defendant also holds that since the minor was resident and domiciled in S at the time these proceedings were filed, this Court does not have jurisdiction in terms of Article 742 of Chapter 12 of the Laws of Malta. However, without prejudice to the above, Defendant also states that should this Court find that it has jurisdiction on the matter, the Court should reject the first and second request as put forth by Plaintiff in his sworn application, since the minor's habitual residence is S and that Defendant is the minor's primary carer.

Considers:

The record of the proceedings show that Plaintiff filed mediation proceedings against Defendant on the **5th November 2020** (vide mediation proceedings 1187/2020 annexed to these proceedings). This Court as presided, appointed a mediator on the 6th of November 2020. On the 11th of November 2020, the appointed mediator took cognisance of the acts. The first mediation sitting occurred on the 2nd of February 2021. **During the second mediation sitting of the 23rd of March 2021, Dr Roberta Bonello appeared on behalf of the Defendant**. On the third sitting, that of the 28th April 2021, the mediator indicated that it was the parties' wish that the mediation be terminated. By means of a decree dated the 29th of April 2021, this Court as presided ordered the closure of the mediation proceedings and authorised the parties to file litigious proceedings within the time period established by law. Plaintiff in fact filed these proceedings on the 5th of May 2021.

On the other hand, together with her sworn reply Defendant filed a number of documents to substantiate her pleas. Prima face, this Court notes that Defendant only filed translations of the documents, yet **failed to file the original documentation in the S Language**. Additionally this Court also notes that the translations filed are merely copies of the original translations. From the documentation filed, the Court has observed the following:

- Defendant filed custody proceedings, case with number: T 6773-21 in the S District Court on the **16th of April 2021** against Plaintiff as apparent from Dok B *a fol 93* of the acts, wherein she requested the sole custody of the minor child. The document in questions states that: *"**The claim is also presented provisionally**."*
- Subsequently, Plaintiff received summons in relation to the proceedings filed by Defendant with number T 6773-21 requesting him to submit a written reply within 14 days from service and to appear on the **24th of May 2021** as evidence from Dok C *a fol 115 A* of the acts.
- Document D *a fol 120* of the acts relates to case with number A 5478-2021 and according to the heading of the document relates to minutes of a meeting held in S on the 10th of May 2021 before Councillor Lena Carlberg Johansson, Chairman, and Committee Members Clarence Jorland, Mona Gullstrand and Annica Grimlund. From the said document it appears that the Applicant in this case is Plaintiff, who was represented and assisted by Legal Aid Lawyer Jessica Sandberg. Page 2 of the document reads:

On the initiative of the court, and under the chairmanship of the chairman, the parties initiate discussions with the goal of reaching a compromise. It is noted that the judges leave the room.

It is noted that the parties enter into the following agreement.

1. *The custody of EMG will still be shared.*
2. *EMG will be a permanent resident of CG.*
3. *EMG shall have the right to associate with MM as follows:*

a) *Three weeks in Malta from 24 May to 14 June 2021, with CG committing to inform MM of the visit's start time no later than 18 May 2021.*

b) *Three weeks in S starting on 26th July whereby MM undertakes to notify CG no later than 18 May 2021 if this date is appropriate.*

c) *Each party undertakes to arrange accommodation for the parent who comes to the other country.*

4. *The parties agree to collaborate so that EMG and MM develop extensive relationships in S and Malta. It is noted that the parties intend to end the ongoing court proceedings regarding custody residence and contact in each country immediately.*
5. *CG agrees to present a contact proposal as soon as possible and MM agrees to provide information on the matter shortly thereafter.*

MM withdraws his request for the transfer of his children and requests dismissal of the case.

…

FINAL DECISIONS:

1. *the case is dismissed without further processing.*

…

Reason

The application has been withdrawn, so the case must be closed without further proceedings.

The Court also took note of the email a *fol 127* of the acts filed by Plaintiff by means of note dated 2nd November 2022. After having taken cognisance of the details purported therein, the Court notes that essentially the email in question which was forwarded to the Plaintiff and his counsel *tramite* the Maltese Central Authority, wherein the latter received the said email from the S Central Authority, is nothing but a summary of Dok D, filed by Defendant. The Court notes that in her list of documents, Defendant indicated Dok D as "Judgment of the 10 May 2021 of the S District Court." The context, within which this "judgment" was delivered, (that is Hague Convention proceedings) was only disclosed by Defendant's counsel during oral submissions.

In their oral submissions counsel for Defendant state that Plaintiff based the issue of jurisdiction in their sworn application on the principle of the first Court seised, and that essentially legal proceedings starts with the initiation of the mediation proceedings. They also affirm that it was Defendant who first filed Court action on the 21st April 2021 before *the cest de turn* district Court as per attachment C, whereas Plaintiff filed the proceedings de quo on the 5th of May 2021, and thus the Court first seised was the Court in S. Defence Counsel also makes reference to article 12 of the Brussels II Bis. With regards to the agreement reached by the parties as indicated in what Defendant terms as judgment, counsel highlights that under our law all minutes are binding on the parties and the said agreement was minuted.

It is pertinent to note however, that this "agreement" was formulated in the course of the abduction proceedings. Nonetheless, Counsel to Defendant seems to be suggesting that the agreement reached by the parties within the context of the abduction proceedings, is enforceable in Malta. Indeed that once Plaintiff had agreed in that context that the minor child's residence ought to be in S, that is binding and final.

Counsel to Plaintiff on the other hand, *inter alia* contends that according to jurisprudence, the jurisdiction of the Maltese Courts is initiated at the moment Plaintiff files the letter of mediation. Moreover Chapter 12 of the Laws of Malta also indicates a number of grounds, one of which, if sufficiently proven, confers jurisdiction to the Maltese Courts. Plaintiff cites article 742(g) of Chapter 12.

Moreover, with regards to the plea regarding *res judicata*, counsel to Plaintiff submits that the fact that Defendant felt that it was necessary for her to initiate custody proceedings in S, belies the contention that the cause was a *res judicata* in the first place. If Defendant is contending that

the agreement reached within the context of the Hague Convention proceedings is binding and a *res judicata*, why would Defendant file separate proceedings for exclusive custody?

Deliberates:

The Court shall begin by first addressing the plea of *res judicata*.

On the matter our Courts have maintained in numerous occasions that in order for the plea of *res judicata* to subsist, there must exist three elements i.e. *eadem personae, eadem res,* and *eadem causa petendi*. A case in point is ***Charles Cortis v Francis X Aquilina et*** (First Hall Civil Court, 29th September 2003) where the Court held:

> ***'Hemm qbil generali kemm fid-dottrina u kif ukoll fis-sentenzi tal-Qrati dwar x'inhuwa mehtieg biex l-eccezzjoni tal-gudikat tista' tintlaqa'. Tlieta huma l-elementi li jmisshom ji1u murija minn min iqanqal l-eccezzjoni biex din issehh. Dawn l-elementi huma l-istess oggett (eadem res), l-istess partijiet (eadem personae) u l-istess mertu (eadem causa petendi)'.***

In the judgment ***Dottor Jose' Herrera noe. vs Anthony Cassar et.noe.*** the Court reiterated:-

> ***"L-eccezzjoni ta' "res judicata" f'certi kazijiet, tiggenera certa diffikolta'. Dak li tista' taddotta favur taghha l-kumpanija konvenuta, hija duttrina kkwotata minn din il-Qorti – Sede Inferjuri – f'sentenza fl-ismijiet Nicola Camilleri vs Carmela Pace tal-31 ta' Mejju, 1911 (Vol. XX I. . 324):***
>
> ***"tra gli estremi della cosa giudicata si annoveri l'identita' dell'oggetto, pure tale identita' non e' uopo che sia assoluta (Aubry et Rau paragrafo 769 e Laurent XX, 56 eseg) e potrebbe farsi luogo all'eccezione del giudicato anche quando l'oggetto dedotto in lite quantunque distinto da quello della lite precedente, pure l'uno e l'altro formano parte di un sol tutto, purche' pero' il punto controverso sia identico";***

In this same judgment, the Court also cited from another judgment in the names ***Catarina Gerada vs Avukat Dr. Antonio Caruana*** wherein it was stated as follows:-

> ***"Intqal tajjeb illi "l'eccezione di regiudicata si deve ammettere con molto circospezione, tant piu'quando trattasi di escludere un diritto (Coen. Cosa Giudicata, (materia civile) no.145) ….jehtieg ghall-eccezzjoni tal-gudikat illi lkwistjoni tkun giet "effettivament" deciza bis-sentenza ta' qabel, u mhux biss li "setghet tigi deciza….Ighid il-Mattirolo:- "Sta soltanto nel dispositivo; onde e' principio che la cosa giudicata risiede esclussivamente nella parte dispositiva della sentenza, non nei motivi (Diritto Giudiziario Civile, Vol.V 28)***

It continued stating as follows: -

> ***"……xi drabi jigri illi d-decizjoni mhix interament fil-parti dispositiva tassentenza, izda anki fil-parti razzjonali taghha, meta fil-motivazzjoni tigi definita u rizoluta xi vera kwistjoni, b'mod li dik il-parti tkun il-premessa logika u necessarja tad-dispositiv, u allura dik il-parti tifforma haga wahda middispositiv, li kollha flimkien jiffurmaw il-gudikat,"***

Defendant pleads *res judicata* in relation to the proceedings initiated by the Plaintiff before the S Courts. In her sworn reply **Defendant makes no mention that the proceedings bearing case number A 5478-21 before the S District Court are in actual fact the proceedings initiated by Plaintiff under the Hague Convention on Child Abduction wherein Plaintiff requested the return of the minor child back to Malta.** This however, was only mentioned during the oral submissions. In fact in her reply, Defendant merely states that the subject of the proceedings *de quo*, that is the care and custody of the minor, have already been decided by the S District Court. Document D, bears no reference to the fact that the said proceedings involve an application under the Hague Convention on Child Abduction.

It is evident in article 1 of the Convention, that the scope of the Convention is first and foremost to determine whether a minor has been **wrongfully removed** or **wrongfully withheld** from a particular state **and if so to secure the prompt return of the said minor**. It is this Court's considered opinion that the crux of return proceedings under the Hague Convention are: (1) the determination of whether a minor was wrongfully removed or not; (2) the prompt return of the said minor. **Custody proceedings are completely separate and distinct from abduction proceedings.**

This Court holds that the agreement reached between the parties in the return proceedings was

first and foremost only a temporary agreement, and secondly such agreement was reached **solely** within the context of return proceedings under the Hague Convention, the scope of which was to essentially establish whether the child was wrongfully removed from Malta. It is evident from the wording of the agreement that the agreement reached between the parties is a very specific agreement intended solely for the purpose of resolving the abduction case. **This agreement, does not in any manner affect customary custody proceedings before national courts.** Moreover, this Court notes that had there been substance in Defendant's argument, Defendant would not have filed judicial proceedings before the S Courts requesting exclusive custody of the parties' minor child. The initiation of judicial proceedings requesting the exclusive custody of the minor child on the part of Defendant only further illustrates that the agreement reached in the return proceedings did not in actual fact constitute a *res judicata.* This very action on the part of Defendant completely undermines the *res judicata* plea brought forth by Defendant in her sworn reply. Thus it is evident that the three elements for the *res judicata plea* to subsist namely, *eadem personae, eadem res,* and *eadem causa petendi* do not subsist.

In light of the above-mentioned considerations, the Court rejects the plea of res judicata as put forth by Defendant in her sworn reply.

Deliberates:

The Court notes that in her sworn reply, Defendant amalgamated the plea of *res judicata* together with the plea of the lack of jurisdiction of the Maltese Courts. Defendant in fact contends that the issue at hand is not one relating to the ***court first seised principle***, since this principle only applies in circumstances of *lis pendens,* whereas these proceedings concern a matter of *res judicata* that leaves no room for the jurisdiction of the Maltese Courts.

The Court, in its considerations above, has already rejected Defendant's arguments regarding *res judicata*.

It is this Court's considered opinion that once the plea of *res judicata*, has been denied, the Court **is** in fact presented with a situation of *lis pendens* as correctly highlighted by Plaintiff. At present, custody proceedings are pending both before this Court as presided and before the Courts in S. Moreover, after having heard the oral submissions tendered by the parties' counsel, it has come to this Court's attention that the S Courts have in point of fact **stayed proceedings** until this Court as presided determines whether it has jurisdiction over the matter. Plaintiff contends that this

implies that the S Courts have acknowledged that the Maltese Courts may in fact be the Courts first seised.

On this point, the Court notes that the *prior temporis* rule in paragraph 1 of Article 19 of the **Brussels II Regulation**, seeks to avoid the multiplicity of proceedings and irreconcilable judgments by stipulating that the second seised court is to stay proceedings. This permits the Court first seised to examine and determine whether it has jurisdiction. In spite of the fact that both parties have not exhibited proof manifesting the S Court's decision to stay proceedings, this fact was confirmed by the parties' counsel during submissions and tends to suggest that the S Court are adhering to the rule envisaged in article 19 of the Regulation.

In his oral submissions Plaintiff holds that this Court as presided has jurisdiction on the matter on the basis of article 742(g) Chapter 12 of the Laws of Malta which provides that the Maltese Courts **"shall have jurisdiction to try and determine all actions, without any distinction or privilege, concerning the persons hereinafter mentioned:"**

……. (a) to (f) omissis

g) any person who expressly or tacitly, voluntarily submits or has agreed to submit to the jurisdiction of the court.

Plaintiff contends that during mediation proceedings, Defendant had even instructed a lawyer to appear on her behalf, and this is tantamount to acquiescence or submission to the Jurisdiction of these Courts. On this point, Defendant conversely submits that the Court must look at when litigious proceedings commenced to determine whether or not it has jurisdiction over the subject matter.

On this point, the Court makes reference to the considerations it made in its preliminary judgment in the names ***MB f'ismu proprju u bhala kuratur 'ad litem' tal-minuri RBG Vs MG*** (Rik.Gur. 218/2020 JPG) decided on the 24th of May 2021:

Il-Qorti taghraf illi l-partijiet kienu ilhom f'medjazzjoni mill-21 ta'Novembru 2019 u kif tafferma l-istess intimata, il-partijiet kienu qeghdin jippruvaw jilhqu ftehim bonarju izda l-attur ma kienx irrisponda ghall-proposti tal-intimata u tal-avukat difensur taghha.

Il-Qorti taghraf illi il-medjazzjoni hija l-ewwel pass fi proceduri quddiem il-Qorti tal-Familja, sew jekk dawn huma ghall-separazzjoni personali u sew jekk dawn ikunu jikkoncernaw il-kura u l-kustodja ta' tfal jew access tat-tfal jew manteniment tal-istess, fejn ikun hemm relazzjoni intima bejn zewg partners bla rabta ta' zwieg. Infatti, fis-sentenza fl-ismijiet: Ivanka Jovanovic Axisa vs Ronald Axisa deciz fit-18 ta' Dicembru, 2013 mill-Imhallef Dr. S. Meli gie ritenut illi:

9.1 Illi jirrizulta effettivament pacifiku bejn il-kontendenti li l-procedura fil-Qorti tal-Familja ghadha fi stadju tal-medjazzjoni;
9.2 Illi pero` hi l-fehma ta' din il-qorti li l-procedura de quo qieghda f'dak l-istadju semplicement ghaliex hu obbligatorju li kontendenti jibdew l-iter gudizzjarju hemm involut b'din il-procedura…
9.3 Illi in effetti din il-fazi procedurali sollevata mill-intimat m'hi xejn hlief l-ewwel pass ghas-separazzjoni personali, u ghalhekk ghandha tittiehed li effettivament hi parti integrali mill-procedura tas-separazzjoni vera u proprja, u mhux separata minnha;" (Enfasi ta' din il-Qorti)

Il-Qorti tinnota illi l-intimata ma kinietx issollevat il-kwistjoni tan-nuqqas ta'gurisdizzjoni fl-istadju tal-medjazzjoni. Hi tiggustifika il-pozizjoni taghha billi ssostni li f'dak l-istadju l-partijiet ma kienux qeghdin jidhru quddiem Qorti. Hija il-fehma konsiderata ta' din il-Qorti illi dan l-argument ma jregix u filfatt l-intimata accettat tacitament il-gurisdizzjoni ta' din il-Qorti fl-ewwel stadju tal-proceduri li jikkoncerna it-tifla minuri tal-kontendenti u cioe' proceduri ghall-kura u kustodja, residenza u access tal-istess minuri, kif ukoll talba ghall-manteniment taghha. Infatti, l-artiklu 742(1)(g) tal-Kap 12 tal-Ligijiet ta' Malta jaghti gurisdizzjoni lill-Qrati Maltin fuq:

(g) kull persuna li tkun b'mod espress jew taċitu volontarjament qagħdet jew qablet li toqgħod għall-ġurisdizzjoni tal-qorti.

This Court also makes reference to the judgment in the names ***AB vs CB*** decided on the 31st of May 2016 (App No 27/2015 AL), wherein this Court diversely presided held that:

However under Maltese Law, separation proceedings have to start by filing a letter in the registry to start the mediation process, which will precede contentious separation proceedings in court if an agreement is not reached between both parties within a fixed time period. After the end of mediation proceedings and where an agreement has not been reached between both parties, either party may file a law suit for marital separation, if the law suit is not filed, then separation proceedings are deemed to have been abandoned. However, if a law suit is filed within the specified time period as per regulation 7 of LN397/2003, then the separation process is considered to be an ongoing one. The Court makes reference to the case quoted by the Plaintiff in his note of submissions which is ABC vs DE (73/2015) where the court stated the following:

"Mill-qari tal-istess Artikolu, jidher car li din il-Qorti fil-vesti taghha giet meqjusa li ghandha pussess fil-mument li l-attrici intavolat l-ittra ta' medjazzjoni li permezz taghha bdiet il-proceduri ta' separazzjoni. M'hemm ebda dubju li l-ittra tal-medjazzjoni giet intavolata nhar it-12 ta' Frar 2015. Sussegwentement ghall-imsemmija ittra, l-attrici (dejjem fit-terminu moghti lilha mil-ligi u cioe' fi żmien xahrejn mid-data tad-digriet li permezz tieghu giet awtorizzata li tintavola l-kawza odjerna, mexxiet bl-istess kawza). Ghal finijiet ta' kjarezza, jinghad li l-kawza odjerna giet intavolata nhar is-27 ta' Marzu 2015, filwaqt li d-digriet li permezz tieghu lattrici giet awtorizzata tintavola l-istess kawza kien datat it-13 ta' Frar 2015."

Thus, and in light of the above-cited jurisprudence, since mediation proceedings in Malta were filed on the **5th November 2020**, the Civil Court (family Section) the Maltese Courts were the Courts first seised of the matter relating to the care and custody of the child Emilio.

Defendant also invokes provisions of the Brussels II Bis, Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. Article 8 of the Brussels II Bis provides the general rule for the determination of jurisdiction and stipulates that:

1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.

This Court has already pronounced itself on the implications of the habitual residence of the child as a connecting factor. In ***MB f'ismu proprju u bhala kuratur 'ad litem' tal-minuri RBG Vs MG*** (Rik.Gur. 218/2020 JPG) decided on the 24th of May 2021 this Court opined:

> ***Din il-Qorti tinnota illi l-artikolu 3(1) li jirregola il-gurisdizzjoni f'kawzi ta' divorzju, separazzjoni legali jew annullament taż-żwieġ, jindika time frames li Qorti ghandha tiehu in konsiderazzjoni meta tigi biex tiddetermina jekk hija ghandhiex gurisdizzjoni o meno a bazi ta' dak l-artikolu, b'dana illi l-interpretazzjoni tal-kuncett ta' residenza abitwali hija necessarjament wahda aktar ristretta f'dan il-kuntest. Illi pero' l-artikolu 8 tar-Regolament ma jimponi l-ebda zmien jew rekwiziti appositi meta Qorti tigi biex tiddetermina r-residenza abitwali tal-minuri. Siccome, l-Artikolu 8(1) tar-Regolament ma jagħmel l-ebda referenza espress għad-dritt tal-Istati Membri fir-rigward tad-determinazzjoni tal-portata tal-kunċett ta' "residenza abitwali", din għandha tiġi ddeterminata fid-dawl tal-kuntest tad-dispożizzjonijiet u tal-għan tar-Regolament, b'mod partikolari dak li jirriżulta mill-premessa 12 tiegħu. Din il-premessa tipprovdi li r-regoli rigward ġurisdizzjoni huma magħmula fl-aqwa interessi tal-minuri u b'mod partikolari tal-kriterju ta' qrubija.***
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> ***Ghalhekk ir-"residenza abitwali" tal-minuri, fis-sens tal-Artikolu 8(1) tar-Regolament, għandha tiġi stabbilita fuq il-bażi tać-ċirkustanzi fattwali kollha li huma partikolari għal kull każ. Apparti l-presenza fiżika tal-minuri fi Stat Membru, għandhom jittieħdu in kunsiderazzjoni fatturi oħra li jistgħu jindikaw li din il-presenza fl-ebda mod ma hija waħda ta' natura temporanja jew okkażjonali u li r-residenza tal-minuri tirrifletti ċerta integrazzjoni f'ambjent soċjali u familjari. B'mod partikolari għandhom jittieħdu in kunsiderazzjon: t-tul, ir-regolarità, il-kundizzjonijiet u r-raġunijiet tar-residenza fit-territorju ta' Stat Membru u tat-trasferiment tal-familja f'dan l-Istat, iċ-ċittadinanza tal-minuri, il-post u l-kundizzjonijiet ta' tagħlim, il-konoxxenzi lingwistiċi kif ukoll ir-rapporti familjari u soċjali tal-minuri f'dan l-Istat.***
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> ***Illi f'dan l-istadju u ghar-rigward huwa rilevanti dak li ddikjarat il-Qorti tal-Appell fl-Ingilterra fil-kawza: Re N (Children) (Adoption: Jurisdiction) [2015] EWCA Civ 1112] moghtija fit-2 ta' Novembru 2015.***

".....To be 'habitually resident' in a country you will require some degree of integration in that country. Whether or not a child is 'habitually resident' in a particular country is essentially a question of fact. We can glean the following principles from the case law: (a) habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to that whereby a child automatically takes the domicile of his parents. (b) The test adopted by the European Court is "the place which reflects some degree of integration by the child in a social and family environment" in the country concerned. This depends upon numerous factors, including the reasons for the family's stay in the country in question. (c) The test adopted by the European Court is preferable to that earlier adopted by the English courts, being focused on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors. (d) The social and family environment of an infant or young child is shared with those (whether parents or others) upon whom he is dependent. Hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned. (e) The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce. (f) It is possible that a child may have no country of habitual residence at a particular point in time."

Din il-Qorti taghmel ukoll referenza ghal dak rilevat minn din il-Qorti kif preseduta fid-decisjoni taghha fl-ismijiet: 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 deciza nhar it-2 ta' Novembru 2020:

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. 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" 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."

Il-kunċett ta' residenza abitwali, skont l-Artikolu 8(1) tar-Regolament, għandu jiġi interpretat fis-sens li din ir-residenza tikkorrispondi mal-post li jirrifletti ċerta integrazzjoni tal-minuri f'ambjent soċjali u familjari.

Defendant also makes reference to article 12(3) of the Regulation in her oral submissions. Article 12(3) provides:

3. The courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in paragraph 1 where:

(a) the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State; and

(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child.

The Court notes that Defendant filed a number of documents to substantiate her claim that the habitual residence of the minor Emilio is in S. The Court notes that the lease agreement submitted by Defendant dates back to the year 2011, when the parties had not even commenced their relationship. Thus, this merely establishes the Defendant's connection to S and not the minor's connection thereto. In fact the Court notes that apart from the vaccination records, which date back to 2018, after the birth of the minor, the document indicating the minor's placement at pre-school **is dated 23rd April 2021, that is ex post facto, Defendant's decision to leave Malta for S with the minor child.** The document indicating the state benefits received by Defendant and her Tax payments do not in any way purport any substantial connection between S and the minor. On the matter, this Court in ***MB f'ismu proprju u bhala kuratur 'ad litem' tal-minuri RBG Vs***

MG (Rik.Gur. 218/2020 JPG) decided on the 24th of May 2021 held that:

ir-residenza abitwali tal-genituri rispettivi, c-cirkli socjali taghhom, l-interessi taghhom u r-rabtiet taghhom mal-pajjiz jew pajjizi in kwistjoni huma biss fatturi ta' importanza sekondarja. Dak li trid tiddetermina l-Qorti hu: the place which reflects some degree of integration by the child in a social and family environment" in the country concerned.

The Court notes that although the minor child was born in S, and possibly lived in S for a while, it is not the case that the minor always lived in S as affirmed in the oral submissions since the minor was subsequently moved to Malta with his parents, where they lived as a family up until some time between August and October 2020 when Defendant informed Plaintiff that she would not be returning to Malta, as stated by Plaintiff in his sworn application, statements which were not contradicted by Defendant. The minor attended school in S because prior to that the minor was still too young to be attending school in Malta.

Thus, and in light of the above considerations, it is this Court's considered opinion that Defendant did not sufficiently prove that the child's habitual residence is in S in accordance with article 8 of the Regulation. **The change in the minor's habitual residence was only brought about by the mother's unilateral decision to relocate to S**, while on a supposed holiday to S to visit her family. With regard's to the application of article 12(3) of the Regulations to the circumstances *de quo,* the requisites in sub article a and b are conjunctive. While the requirements in sub article (a) find fulfilment via both parents, in the sense that a substantial connection can be established both with Malta by virtue of Plaintiff's habitual residence here and that with S since the child is a S national, the same cannot apply to sub-article (b). The Court considers that the fact that this Court was the Court first seised with the filing of the mediation letter on the 5th November 2020, and since Defendant unequivocally submitted to the jurisdiction of the Maltese Courts with her engagement of a Maltese Lawyer to represent her during mediation proceedings, confer jurisdiction on this Court as presided.

In light of the above deliberations, it is the considered opinion of this Court that it has jurisdiction to preside over the matter in terms of Article 742 (g) of Chapter 12 of the Laws of Malta and Article 13 of the Brussels II Bis Regulations.

Consequently, this Court rejects the preliminary pleas of both res judicata and lack of jurisdiction and finds that this Court has jurisdiction to determine the current proceedings

and orders the continuation of the same.

Costs are reserved for final judgement.

Read.

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

Lorraine Dalli
Deputy Registrar