

**CIVIL COURTS
(FAMILY SECTION)**

**MADAME JUSTICE
JACQUELINE PADOVANI GRIMA LL.D., LL.M. (IMLI)**

Today, 14th of March 2023

Warrant No: 18/2023/2 JPG

MH

vs

AH

The Court,

Having seen the application filed by MH dated 20th of January 2023, wherein it stated:

That the applicant has an interest that the minor, hereinafter indicated, be not taken outside Malta;

That the respondent is the person having, or who might have, the legal or actual custody of the said minor;

Wherefore, the applicant respectfully requests that this Court orders the issue of a warrant of prohibitory injunction against the respondent/s enjoining her not to take, or allow anybody to take, the said minor out of Malta;

Particulars of the minor:

NH who was born on X and who is therefore X years old and has A hair and B eyes. She has a mole on her chin and a reddish birthmark on her forehead. This as seen in the picture hereto attached and marked as Dok NH1. A picture of the child's residence card is being attached hereto and marked as Dok NH2.

That the applicant already has pending proceedings in the names mentioned above pending before the Civil Court (Family Section).

Having seen that the application and documents, the decree and notice of hearing have been duly notified in accordance with law;

Having seen the reply filed by AH dated 22nd February 2023, wherein it was submitted:

- 1. That the Applicant's demand as put forth before this Honourable Court in virtue of the aforementioned warrant of prohibitory injunction is both factually and legally completely unfounded and as such shall be rejected with costs, and this for the following reasons:*
- 2. That preliminary, the Respondent refers to the Applicant's written submissions and his demand as put forth in the aforementioned judicial act filed by himself, and draws attention to the complete absence of any one singular reason to justify his demand being both provisionally and definitively upheld by this Honourable Court — the Respondent thus reiterates that the Applicant's demand is both factually and legally completely unfounded;*
- 3. That legally, as stipulated by Law and the Courts' teachings as expressed through their decisions, a number of essential elements must concur for a warrant of prohibitory injunction to be upheld. Firstly, the applicant must appear prima facie to possess a right and secondly, that upholding the warrant is necessary in order to preserve that right (vide 'Panorama Company Limited -vs- Enemalta Corporation', delivered in the acts of Sworn Application 1552/2001 by the First Hall, Civil Court per Madam Justice L. Schembri Orland, 14 February 2013; and 'Emmanuel Sammut -vs- Josephine Sammut, delivered by the First Hall Civil Court on the 5 June 2003). The Courts' thus*

teach that it is imperative for the two elements to be satisfied concurrently and in default, it shall proceed to reject the demand for an issue of a warrant of prohibitory Injunction (vide 'Mary Borg vs Commissioner of Lands', delivered by the First Hall Civil Court, 15 December 2008; and 'The Golden Shepherd Group Limited vs Enemalta Corporation', delivered by the First Hall, Civil Court, 17 March 2009);

4. *That furthermore, there must also be an element which may prejudice the applicant's right which appears prima facie, an element that is placing the said right in danger prior to the Court's pronouncement of a cause on the merits, the so-called periculum in mora (vide 'Sonia Grech pro et noe -vs- Stephanie Manfre', delivered ecided by the Court of Appeal, 14 July 1988 [Kollez. Vol. LXXII.ii.290]; 'Main Street Catering Establishment Limited -vs- Planning Authority', delivered by Civil Court, First Hall, 2 November 2010; and 'Fenech Estates Co. Limited -vs- Malcolm Cutajar et', delivered by Civil Court, First Hall, 24 May 2019);*

5. *That it is humbly submitted that the Subparagraphs 1 and 2 of Article 873 of the Code of Organisation and Civil Procedure, Chapter XII of the Laws of Malta, are intrinsically linked and the element of necessity may be tested against a degree of prejudice. A degree of prejudice required to grant the issuance of the warrant of prohibitory injunction is one may not be remedied. It follows that if the inconvenience may be removed, even by a decision after examining the merits of the case, the element of 'necessity of the warrant' will be missing, and the demand for its issue shall not be upheld;*

6. *That the need to show that the party requesting the issue of the warrant of prohibitory Injunction has a prima facie claimed right is an objective test and thus not subjective, and shall not depend on the judge's discretion (vide 'Sonia Grech pro et noe -vs- Stephanie Manfré', delivered by the Court of Appeal, 14 July 1988 [Kollez. Vol: LXXII.ii.290]. Therefore, in order for a Court to meet an applicant's demand for the issue of a warrant of prohibitory injunction, the applicant's right which may be irremediably prejudiced must appear at first glance;*

7. *That these listed elements are legally cumulative and not alternative. If either of these two elements are not proven to the satisfaction of the Court, the Court must reject the request for the issue of such a warrant (vide 'Mary Borg -vs- The Commissioner of Lands', delivered by the First Hall, Civil Court , 15 December 2008; 'Jeffrey Farrugia -vs- The Commissioner of Lands et', delivered by the First Hall, Civil Court, 18 February 2018; 'Marica Cassar et -vs- Del Sol Properties Limited', delivered by the First Hall, Civil Court, 27 December 2016; and 'Fenech Estates Co. Limited -vs- Malcolm Cutajar et', delivered by Civil Court, First Hall, 24 May 2019);*
8. *That on the merits, in virtue of a deed of personal separation published in the records of Notary Carmel Gafà on 17 May 2018, the Parties personally separated from each other and regulated their rights as well as their minor daughter's with regard to her residence, maintenance, parental authority, and access. In virtue of Clause 9 of the said deed, the Parties contractually, bilaterally and jointly entrusted the care and custody of their minor daughter exclusively unto the Respondent — a true copy of the said deed is hereby attached and marked as 'Document A';*
9. *That it is being respectfully submitted that a warrant of prohibitory injunction is an exceptional procedural measure and is not recognised as a common or ordinary remedy (vide 'Angelo Xuereb -vs- Marin Hili', delivered by the Civil Court, Commercial Section, 22 September 1994). The protection that the Law aims for is that, without the issue of the warrant of prohibitory injunction, the right that the party requesting its issue may have which right must result prima facie, may be irremediably prejudiced. Thus, on the merits, since the Applicant, jointly, bilaterally and contractually together with the Respondent entrusted the care and custody of their minor daughter exclusively unto the Respondent, there is no right that may be prejudiced or needs to be preserved;*
10. *That in view of the extraordinary procedural nature of the warrant of prohibitory injunction as a precautionary warrant which stops or prohibits the person against whom its issued from doing or performing something, the Respondent brings to the attention of this Honourable Court that any travel of the Parties' minor daughter is already regulated, and restricted, in virtue of*

Clause 14 of the aforementioned deed of personal separation — in terms of the said Clause 14, the Parties had thereby convened and agreed that the consent of both parents is necessary for their minor daughter to travel outside Malta;

11. *That it must also be brought to this Honourable Court's attention that the Respondent never took or attempted to take their minor daughter out of Malta without the Applicant's necessary authorisation as the minor daughter's father, and the Respondent has during the past 4 years obtained numerous written consents from the Applicant for their minor daughter to travel outside of Malta — copies of the written consents are hereby attached and marked as 'Document B';*
12. *That on the merits, it was only after the Applicant came to knowledge of the Respondent's current pregnancy and upcoming marriage to the father of the child she is currently carrying that the Applicant vexatiously and irritably filed his demand as put forth in the aforementioned application for an issue of warrant of prohibitory injunction for their minor daughter not to leave Malta;*
13. *That in his sworn application, the Applicant declared under oath that judicial proceedings before this Honourable Court are pending between the parties, however no proceedings have yet been instituted by the Applicant against the Respondent and instead of pursuing ordinary remedies available at law, the Applicant resorted to extraordinary judicial procedures, and this simply vexatiously. The Respondent draws attention to the Applicant's untrue declaration, simply intended to derail this Honourable Court;*
14. *That with regard to the above, the Court emphasised that:*

“The attachment of an injunction must not be used as a weapon of threat or coercion (arm twisting) to the respondent party to either do what the applicant party wishes to, or do nothing. In this way, the Warrant is no longer a tool that protects the prima facie right of the requesting party, but becomes a tool that prevents the respondent party from enjoying its rights. The Court is of the opinion that it was never the will of the law to turn the injunction into such a weapon”;

(vide 'Xavier Joseph Debattista pro et noe -vs- Alan Xuereb et', delivered by Civil Court, First Hall, 21 October 2019);

15. *That the Respondent respectfully sums up that this Court should not definitively issue such a warrant of prohibitory injunction unless it is satisfied that the same is necessary to protect the Applicant's rights and an irreparable damage that requires such an extraordinary remedy is present. In other judgments our Courts continue to elaborate on what irreparable damage means, such as the phrase 'might be prejudicial' (in Art. 873(1) of Chapter 12) should be given an interpretation that what is trying to be prevented, if it is not prevented, could be prejudicial in the sense which not only causes damage but which causes damage for which there is no alternative at least in the circumstances of the case or for which the alternative is disproportionate and this position reflects a doctrine that had already been established and previously enunciated by our Courts (vide 'Angelo Xuereb -vs- Marin Hili', delivered by the Civil Court, Commercial Section, 22 September 1994; 'Avukat Dr. Victor Borg Grech v. Joseph Gasan et', delivered by the Court of Appeal (Appeal No. 3984/1992); 'Victor Mizzi -vs- Joseph Gasan et', delivered by the Court of Appeal (Appeal No. 4216/1992)', and 'Perit John Gambina -vs- Fithome Limited', delivered by the Civil Court, First Hall, 28 January 2005;*

16. *That it is being respectfully submitted that no precautionary act can be used to put pressure on the opponent in the sense of arm twisting as abovementioned. The procedural tools and remedies available to persons wishing to preserve their rights must be used in a legitimate way and for genuine purposes, and also in balance and due consideration to the rights of the counterparty. At this instance, the Respondent believes that the present request is superfluous and vexatious, and has been demanded simply by way of revenge and to harm the Respondent;*

17. *That a legal copy issued by this Honourable Court's registry of the schedule of deposit filed by the Respondent in adherence to this Honourable Court's order, in virtue of which schedule the Respondent deposited at the registry the Parties' minor daughter's passport, is hereby attached and marked as 'Document C';*

Therefore, in consideration of the above cited Law and abovementioned facts, the Respondent respectfully and humbly replies to the Applicant's sworn application that this Honourable Court should definitively reject the Applicant's demand as put forth before it, with all costs and expenses to be borne by the said Applicant.

Having heard the evidence on oath;

Having seen all documents exhibited in the proceedings;

Having heard final oral submissions;

Considers:

Applicant, on oath declared that the parties had signed a care and custody maintenance and access contract, on the 17th May 2018 wherein, according to Article 9, exclusive care and custody was entrusted to the wife. According to Article 11, the child was to reside with the wife in Malta and that five years following the signing contract, the wife and child were free to re-locate her residence to any country of her choice. It appears that are pending mediation proceeds for the care and custody contract to be amended. Applicant states that he was coerced into signing the care and custody contract because Defendant made the signing of the care and custody contract a precondition to Plaintiff's residence requirements in Malta. Applicant stated that Defendant is soon to be married and plans to move with their daughter to R for good. Applicant stated that his child is X years old and she told him that her mother intends to leave Malta for good and plans to take her to R. Applicant stated that he had never refused Defendant from visiting her family abroad with the child and he had in fact given her repeated written consent for this to be done. His reason for filing this procedure is only due to the fact that he has discovered that the Defendant is to leave Malta for good and to settle permanently in R. Before the filing of divorce proceedings by Defendant, Applicant had been attempting not only to convince Defendant to change the care and custody contract but to actually reconcile with Defendant for the sake of the child.

Defendant from her part, stated that the parties had a good working relationship even after their separation, but thus this started to deteriorate in 2021. Defendant stated that Applicant was only interested in remaining in Malta. She stated that both parties were perusing relationships with

third parties. In cross-examination Defendant admitted that she had send an email to Identity Malta regarding Applicant's extension of his Malteses residence permit and this after he threatened her. Defendant confirmed that she did not object to Applicant's having access by means of a sleepover to his child. She also confirmed that she is marrying a R citizen and that she intends to transfer her residence to R.

Deliberates:

Article 877 of Chapter 12 of the Laws of Malta provides:

877. (1) A warrant of prohibitory injunction may also be issued to restrain any person from taking any minor outside Malta.

(2) The warrant shall be served on the person or persons having, or who might have, the legal or actual custody of the minor enjoining them not to take, or allow anyone to take the minor out of Malta.

(3) The warrant shall also be served on:

(a) the officer charged with the issue of passports enjoining him not to issue, and or deliver, any passport in respect of the minor and not to include the name of the minor in the passport of the minor's legal representatives or in the passport of any other person; and

(b) the Commissioner of Police enjoining him not to allow such minor to leave Malta.

The Court notes that in proceedings for the issuing of a precautionary warrant, the Court may not delve into the merits of the case, but it must be satisfied that the person asking for the warrant to be issued has a *prima facie* right and that the warrant is necessary in order to preserve that right. (See **Panorama Company Limited vs Enemalta Corporation** decided by the First Hall of the Civil Court on the 14th of February 2013; **Emanuel Sammut vs Josephine Sammut** decided by the First Hall Civil Court on the 5th of June 2003). The two elements must subsist and if they do not subsist, the Court has to reject the claim for an issue of a warrant of Prohibitory injunction. (See **Mary Borg vs Commissioner of Lands** decided by the First Hall Civil Courts

on the 15th of December 2008; **The Golden Sheperd Group Limited vs Enemalta Corporation** decided by the First Hall Civil Court on the 17th March 2009).

These proceedings were filed by the Plaintiff, in order to request the Court to issue a warrant of Prohibitory Injunction against the Respondent to prohibit her from allowing the minor child NH from leaving Malta. Plaintiff confirmed on oath that Defendant is about to marry a R citizen and intends to set up residence in R together with their daughter NH. Plaintiff insists that he was coerced into signing the care and custody contract regarding NH because Defendant made it a precondition to confirming Plaintiff's residence requirements in Malta:

“at the time she told me that if I don't accept the clause, she will inform the authorities that we are no longer living together and they will revoke my residence permit” (vide page 107)

Plaintiff declared that this threat was actually carried out. Indeed, Defendant actually confirmed this on oath.

Plaintiff stated that should Defendant be allowed to leave Malta for good and relocate to R with their daughter NH, *“I will never be able to see my daughter ever again”* (vide page 112). Plaintiff stated that there are mediation procedures regarding the amendments of the custody contract.

From her part, Defendant states that Plaintiff was only really interested in ensuring that he remained in Malta and that she always had Plaintiff's written consent whenever she wanted to travel with her daughter to see her family. Plaintiff denies that Plaintiff has proven, on a prima facie basis, that Applicant has a right and that without the issuance of the warrant of prohibitory injunction, the decree of prejudice suffered, may not be remedied. She alleges that the care and custody contract gives her exclusive custody of the minor daughter with a right of relocation after the expiry a term of five years. Defendant submits that the exceptional remedy of a warrant of prohibitory on injunction may not be used as a weapon to coerce another party and prevent them from enjoying their rights.

It is this Court considered opinion that Plaintiff has a right of access to his daughter NH and a right to maintain and enjoy meaningful relationship with his daughter. It is this Court's belief that should this warrant not be upheld, the prejudice to Plaintiff and to the child NH will be

irremediable since it is likely that Applicant will not be able to see his child again. Moreover, in spite of the fact that R is a signatory to Brussel II Bis, enforcement procedures for the return of children are remarkably ineffectual - vide **Ignaccolo – Zenide v. Romania** (Application no. 31679/96) decided on the 25 January 2000.

Therefore, this Court, having seen Articles 873 to 877 of Chapter 12 of the Laws of Malta is of the opinion that all the essential elements of the prohibitory injunction concur. For these reasons the Court orders that the defendant AH mother of the minor child NH, born on the X, X years of age which child has D hair, has B on her chin and a C on her forehead, daughter of MA, be prohibited from taking or allowing anybody to take the said child out of the Maltese Islands, and orders Respondent to deposit with the Court Registrar within 24 hours any passports or travel documents of the minor child in her possession.

Furthermore, the Court orders that a copy of this decree be notified to all the Authorities concerned in accordance with the law.

Costs shall be divided between the parties.

Given in camera.

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

**Christabelle Cassar
Deputy Registrar**