CIVIL COURTS
(FAMILY SECTION)

MADAM JUSTICE

Onor. Abigail Lofaro LL.D., Dip. Stud. Rel.,
Mag. Jur. (Eur. Law)

Hearing of the 15th March 2023

Application Number: 169/2020 AL
In the names of:

A B

-vs-

Dr Mark Mifsud Cutajar and LP Melissa Aastasi as Curators nominated by virtue of Court Decree dated 13th August 2020 to represent the Absentee C D

The Court:

Having seen the sworn application filed by the plaintiff,[1] wherein it stated that:

Whereas the parties entered a relationship, from which E F D was born on the 5th July 2013 (birth certificate marked Doc B attached with mediation letter);

Whereas the parties subsequently contracted marriage in Gibraltar on the 16th April 2015 (as per marriage certificate marked Doc A, attached with mediation letter);

[1] Fol. 1.

Whereas the applicant has been living in Malta together with her minor daughter since June 2019, and the defendant lives abroad, however the applicant does not know his exact whereabouts;

Whereas the parties have been de facto separated since September 2015 and there is no reasonable prospect of reconciliation between the parties;

Whereas the absentee is not paying any maintenance for the plaintiff or the minor; and is not seeking any maintenance payment from him in this regard;

Whereas irrespective of the fact that the applicant was not blocking visitation rights of the defendant, the defendant has not seen the minor child for over a year;

Whereas since the application and the minor have been residing in Malta, the defendant has only made contact with the minor telephonically very few times;

Whereas since the defendant's whereabouts are not known to the applicant, and the defendat only makes contact remotely, the appplicatis findig it difficult to obtain necessary permissions and authorisations fron the defendant's part in relation to the minor's health, educational and day-to-day needs;

Whereas the applicant has instituted mediation proceedings in order to leaglly regulate the personal separation between the parties;

Whereas the applicant has been authorised to proceed with the case, by virtue of a court decree issued by this Honourable Court dated 11th June 2020;

Whereas subsequently, by virtue of a court decree dated 13th August 2020, Dr. Mark Mifsud Cutajar and Legal Procurator Melissa Anastasi, were nominated for the purpose of instituting separation proceedings;

Whereas in view of the fact that the parties have been de facto separated for the past five years, the plaintiff requests this Honourable Court to pronounce divorce between the parties, according to Article 66B of the Civil Code, Chapter 16 of the Laws of Malta.

For these reasons, the applicant is requesting this Honourable Court to:

1. *Order that the care and custody as well as the parental authority of the minor E F D is vested exclusively with the applicant, in order for the applicant to be able to take day-to-day decisions; including educational and health decisions, in relation to the minor without seeking the authorisation of the absentee;*
2. *Pronounce the dissolution of marriage between the plaintiff and the absentee;*
3. *Order the Court Registrar to, within the time limit imposed by the Court, notify the Director of the Public Registry with the dissolution of the marriage for this to be registered in the Public Registry.*

And this saving other provisions that this Honourable Court views adequate in the circumstances.

Having seen the list of witnesses of the plaintiff;

Having seen the sworn reply of the deputy curators Lawyer Dr. Mark Mifsud Cutajar and Legal Procurator Melissa Anastasi,[2] whereby they stated:

Illi l-esponenti m'humiex edotti mill-fatti u ghalhekk qed jirriservaw id-dritt li jipprezentaw risposta motivate f'kaz u jekk jigu edotti mill-fatti.

Salv risposta ulterjuri.

Having seen the list witnesses of the absentee as represented by the deputy curators;

Having seen all documents which were exhibited;

Having seen the marriage certificate, which marriage took place on the 16th of April 2015 in Gibraltar;[3]

[2] Fol. 20.
[3] Fol. 10.

Having seen the birth certificate of the parties' daughter, E F D, born on the 5th of July 2013 in Hertfordshire, England;[4]

Having seen the plaintiff's affidavit;[5]

Having seen the affidavit of G H;[6]

Having seen the affidavit of I B;[7]

Having seen the decree of the 16th February 2022, given in light of Article 173 of the Civil Code;[8]

Having seen the plaintiff's note dated 18th February 2022 and this in compliance with the above mentioned decree,[9] whereby she confimed that the judgement should be given in the English language, whilst presenting the following: (i) Mediation letter dated 10th June 2020,[10] (ii) Court application requesting the nomination of deputy curators to represent the defendant Yohannes D dated 10th June 2020,[11] (iii) Court decree dated 11th June 2020 upholding the request for the deputy curators,[12] (iv) Court decree dated 13th August 2020 nominating Dr Mark Mifsud Cutajar and Legal Procurator Melissa Anastas as deputy curators,[13] and (v) note of submissions;[14]

Having seen the note verbal of the 8th March 2022,[15] whereby the Court ordered the plaintiff to present the decree closing the mediation process;

Having seen the plaintiff's note dated 14th March 2022,[16] whereby she presented a copy of the decree dated 10th June 2020;[17]

[4] Fol. 11
[5] Fol. 18.
[6] Fol. 26.
[7] Fol. 29.
[8] Fol. 44.
[9] Fol. 52.
[10] Fol. 54.
[11] Fol. 56.
[12] Fol. 57.
[13] Fol. 58.
[14] Fol. 59.
[15] Fol. 75.
[16] Fol. 76.
[17] Fol. 78.

Having seen the decree dated 4th May 2022,[18] given in light of Article 173 of the Civil Code;

Having seen the note of plaintiff's lawyer dated 10 May 2022,[19] where he confirmed that he had observed his obligations as per Article 66G subsection 1 of the Civil Code;

Having seen the plaintiff's note dated 10 May 2022,[20] by means of which she presented a letter sent to the deputy curators with the latest details of the absentee's known whereabouts and contact;

Having seen the deputy curators' note dated 13 May 2022,[21] through which they presented a copy of a letter and electronic correspondence sent to the absentee according to the details given to him by the plaintiff;[22]

Having seen that the Court acceeded to the plaintiff's request so that the proceedings shall resume in the English language;[23]

Having seen that the application being adjourned for judgement today.[24]

CONSIDERATIONS:

1. The Legal Action:

The parties had a relationship from which the minor E F D was born on 5th July 2013 in England. Consequently, the parties got married in Gibraltar on 16th April 2015, but it is said that such marriage did not last long as the parties *de facto* separated from each other in September of the same year. The plaintiff then relocated to Malta with the minor, whilst on the other hand there is no clear indication as to where the defendant is residing. It is also said that the defendant is not present in the minor's life, and he does not contribute financially for the minor or the plaintiff, so much so that the plaintiff is waiving her maintenance

[18] Fol. 90.
[19] Fol. 96.
[20] Fol. 96a.
[21] Fol. 98.
[22] Fol. 100, 101.
[23] Fol. 26.
[24] Fol. 104.

right. On the other hand, the defendant is absent from Malta and despite the fact that an attempt was made to communicate with him, from the acts of the case it transpires that he never replied back.

In light of the premise, and after the mediation process was terminated by means of a decree dated 10th June 2020, the plaintiff lodged the present action for divorce, as well as to regulate the issue of care, custody and parental authority in relation to the minor. From the acts it appears that even though the parties have been *de facto* separated from each other for a considerable time, they are not legally separated through a public contract or judgement.

2. The Version of the Parties and the Evidence Submitted by Them:

From the plaintiff's sworn application, affidavit and the documents exhibited, it follows that:

i. The parties met for the first time in 2010 in Australia, after they had been communicating electronically since 2008;

ii. From such a relationship the minor E F D was born on 5th July 2013 in England;

iii. The parties were married in Gibraltar on 15th May 2012;

iv. The parties have been *de facto* separated from each other since September 2015, and since then the absentee was not consistently present in the minor's life;

v. In the meantime, the plaintiff was living with the minor in the Czech Republic, and this until 22nd June 2019 when the plaintiff relocated to Malta while the absentee also had to leave the Czech Republic because he did not have a valid visa;

vi. Since the time that the plaintiff relocated in Malta, the absentee spent about a year living in hostels in several countries and thus he did not have a fixed address. However, she confirms that in recent months he has been making

contact more often and calls the child during the weekend, but only when he deems fit and according to his conditions;

vii. The plaintiff confirms that the absentee never contributed financially towards their family, except for those rare cases where he sent money for the child. In view of this, the plaintiff confirms that she is not asking for maintenance from the defendant;

viii. There is no prospect of reconciliation.

In order to corroborate her version, the plaintiff submitted the affidavit of G H, a friend and former colleague of the plaintiff, as well as that of her sister I B, where both confirmed the version of the plaintiff.

On the other hand, the defendant did not submit his version and/or proof, and this despite the attempt made by the deputy curators to communicate with the him.

3. Legal Principles:

Before the Court proceeds with its considerations, first and foremost it will proceed to refer to those legal principles which are pertinent to the present case.

a. Regarding Divorce:

The Court starts off by referring to Regulation number 4 of Legal Notice 397/2003 (Subsidiary Legislation Number 12.20), which is relevantto the matter in question, which provides that:

> *(1) Any party wishing to proceed to initiate a suit forpersonal separation or divorce against the other spouse shall firstdemand authority to proceed from the Civil Court (FamilyDivision), the Court of Magistrates (Gozo) (Superior Jurisdiction)(Family Division) as the case may be, each of such courts hereinafter in this regulation called the "Court", by filing a letter, inthe case of personal separation, or by filing an application, in the case of divorce, as the case may be, to that effect in the registry ofthe Court addressed to the Registrar, stating the name and address both of the person filing the letter as well as that of*

the other spouse, and requesting the Court to authorise him or her to proceed.Such letter shall be signed and filed by the party personally or by an advocate or legal procurator on behalf of such party".

Having established the premise, reference is made to Article 66A subsection 1 of the Civil Code, which stipulates that:

"(1) Each of the spouses shall have the right to demand divorce or dissolution of the marriage as provided in this Sub-Title.It shall not be required that, prior to the demand of divorce, thespouses shall be separated from each other by means of a contractor of a judgement".

Article 66B of the Civi Code, about the conditions required for divorce, holds:

"Without prejudice to the following provisions of this article, divorce shall not be granted except upon a demand made jointly by the two spouses or by one of them against the other spouse, and unless the Court is satisfied that:

(a) on the date of commencement of the divorce proceedings, the spouses shall have lived apart for a period of, or periods that amount to, at least four years out of the immediately preceding five years, or at least four years have lapsed from the date of legal separation; and

(b) there is no reasonable prospect of reconciliation between the spouses; and

(c) the spouses and all of their children are receiving adequate maintenance, where this is due, according to their particular circumstances, as provided in article 57".

Article 66D of the Civil Code, holds:

"(3) Where the spouses are not separated by means of a contractor a court judgement, the spouse making the demand for divorcemay, together with the same demand, make all those demands thatare permissible in a cause for separation in accordance with Sub-Title III

of this Title. The court shall hear and determine these demands as provided in the said provisions mutatis mutandis. Theother party may, in addition to the defences mentioned in previous sub-article, put forward all those defences which that party would have been entitled to make in a cause for separation.

-ommissis-

(5) Notwithstanding the other provisions of this article and only where the community of acquests or the community of residue under separate administration shall have ceased, the parties shal lhave a right, in any case, if they both agree, to divorce without liquidating the assets which they hold in common".

Article 66G of the Civil Code stipulates:

"(2) The application for the commencement of divorce proceedings shall:

(a) where the spouses are not separated by means of acontract or a court judgement, be accompanied by anote in which the advocate confirms that he hasobserved the requirements of sub-article (1); or

-ommissis-

Provided that where the advocate assisting a client in a cause for divorce shall not have presented the said note, the copy ofthe judgement of separation or of the contract of consensual separation, as the case may be, the advocate shall present these documents not later than, or during, the first sitting in the cause".

Article 66I of the Civil Code holds:

"(1) Where a demand for divorce is made to the competent civil court by either of the spouses, or by both spouses after havingagreed that their marriage is to be dissolved, and where the spouses are not separated by means of a contract or a court judgement,before granting

leave to the spouses to proceed for divorce, the court shall summon the parties to appear before a mediator, either appointed by it or with the mutual consent of the parties, and this for the purpose of attempting reconciliation between the spouses,and where that reconciliation is not achieved, and where the spouses have not already agreed on the terms of the divorce, for the purpose of enabling the parties to conclude the divorce on the basis of an agreement. The said agreement shall be made on some or allor of the following terms:

-ommissis-

(c) the maintenance of the spouses or of one of them and of each child;(d) residence in the matrimonial home;(e) the division of the community of acquests or the community of residue under separate administration".

b. Care, Custody and Parental Authority:

In respect to care and custody, the Court maintains that in such aspects our jurisprudence has always taught that it should consider the best interest of the minor. In the case **Jennifer Portelli pro.et noe. vs. John Portelli**[25] was told: *"Jingħad illi l-kura tat-tfal komuni tal-mizzewġin, sew fil-liġi antika u sew fil-liġi viġenti, kif ukoll fil-ġiurisprudenza* estera *u f'dik lokali hija regolata mill-prinċipju tal-aqwa utilita' u l-akbar vantaġġ għall-interess tal-istess tfal li ċ-ċirkustanzi tal-kaz u l-koeffiċjenti tal-fatti partikulari tal-mument ikunu jissuġġerixxu. Illi in konsegwenza, ir-regola sovrana fuq enunċjata għandha tipprevali dwar il-kustodja u l-edukazzjoni tat-tfal komuni tal-mizzewġin, sew meta l-konjuġi jisseparaw ruħhom ġuddizzjarjament, sew meta jiġu biex jisseparaw konsenswalment".*

In the judgment in the names of **Susan Ellen Lawless vs. The Reverend George Lawless**,[26] the Court had said that: *"la cura ed educazione dei figli, nel caso che la moglie non continua ad abitare col marito, deve essere commessa ed affidata a colui, fra i conjugi, che si riconoscera' piu atto ed idoneo a curarli ed educarli,*

[25] Decided by the First Hall Civil Court on the 25th June 2003 (App. Nr. 2668/1996/2RCP).
[26] Decidd by the First Hall Civil Court on the 8th December 1858.

avuto riguardo alla loro eta', ed a tutte le circostanze del caso – sotto quie provvedimenti, che si reputino spedienti pel vantaggio di tali figli".

In the cases of **John Cutajar vs. Amelia Cutajar et**,[27] and **Maria Dolores sive Doris Scicluna vs. Anthony Scicluna**,[28] it was also held that *"apparti l-ħsieb ta' ordni morali u dak ta' ordni legali, li għandhom setgħa fil-materja ta' kura u kustodja tat-tfal in ġenerali, il-prinċipju dominant in 'subjecta materia', li jiddetermina normalment u ġeneralment il-kwistjonijiet bħal din insorta f'dina l-kawza, huwa dak tal-aktar utilita' u dak tal-aqwa vantaġġ u nteress tal-istess minuri fl-isfond taċ-ċirkostanzi personali u 'de facto' li jkunu jirrizultaw mill-provi tal-kaz li jrid jiġi rizolut…".*

Taking into account the basic principles as enunciated by the jurisprudence just cited, and namely the principle of the most utility and that of the best advantage for a minor, according to Article 56 of the Civil Code, the Court has the faculty to entrust the care and custody of the minor to only one parent and this so that the supreme interest of the minor is always safeguarded. The Court underlines that the interest of the minor is paramount to the rights of the parents. In the judgment in the names of **Frances Farrugia vs. Duncan Caruana**,[29] and **Marlon Grech vs. Charlene Banks**[30] it was held that the Court *"filwaqt li dejjem tagħti piz għad-drittijiet tal-ġenituri, l-interess suprem li zzomm quddiemha huwa dejjem dak tal-minuri, kif anke mgħallma mill-ġiurisprudenza kostanti tagħna"*.

On the other hand, and in relation to the parental authority, the Civil Code deals with this particular section under Title IV entitled *'Of Parental Authority'.* The salient legal provisions are Article 131 and Article 154(1):

> *"131. (1) A child shall be subject to the authority of his parents for all effects as by law established.*
>
> *(2) Saving those cases established by law, this authority isexercised by the common accord of both parents. After the death ofone parent, it is exercised by the surviving parent.*

[27] Decided by the First Hall Civil Court on the 28th January 1956.
[28] Decided by the First Hall Civil Court on the 27th November 2003 (App. Nr. 1715/2001/RCP).
[29] Decided by the Civil Court (Family Section) on the 31st May 2017 (App. Nr. 268/2011 AL).
[30] Decided by the Civil Court (Family Section) on the 15st June 2017 (App. Nr. 218/2013 AL).

(3) In case of disagreement between the parents on matters ofparticular importance, either parent may apply to such court as may be prescribed by or under any law in force from time to timeindicating those directions which he or she considers appropriate in the circumstances.

(4) The court, after hearing the parents and the child if the latter has reached the age of fourteen years, shall make those suggestions which it deems best in the interest of the child and the unity of the family. If the disagreement between the parents persists, the court shall authorise the parent whom it considers more suitable to protect the interest of the child in the particula rcase, to decide upon the issue, saving the provisions of article 149.

(5) In the case of an imminent danger of serious prejudice to the child either parent may take such measures which are urgent and cannot be postponed.

(6) With regard to third parties in good faith, each of the spouses shall be deemed to act with the consent of the other where he or she performs an act relative to parental authority relative to the person of the child".

"154. (1) Saving any other punishment to which he may be liable according to law, a parent may be deprived, by the said court,wholly or in part, of the rights of parental authority, in any of the cases following:

(a) if the parent, exceeding the bounds of reasonable chastisement, ill-treats the child, or neglects his education;

(b) if the conduct of the parent is such as to endanger the education of the child;

(c) if the parent is interdicted, or under a disability as to certain acts, as provided in articles 520 to 527 inclusive of the Code of

Organization and Civil Procedure, and articles 189 and 190 of this Code;

(d) if the parent mismanages the property of the child;

(e) if the parent fails to perform any of the obligations setout in article 3B in favour of the child".

It is noted that Article 3B which makes reference to Article 154 quoted above stipulates: *"(1) Marriage imposes on both spouses the obligation tolook after, maintain, instruct and educate the children of the marriage taking into account the abilities, natural inclinations and aspirations of the children".* The Court reminds that these obligations should not be applied only in relation to children of married parents, but also to those children who are born out of wedlock. In fact, the law itself in Article 7 of the Civil Code stipulates that: *"(1) Parents are bound to look after, maintain, instruct andeducate their children in the manner laid down in article 3B of this Code".*

4. Application of Legal Principles to the Current Case:

Firstly, the Court observes that the parties are not legally separated and, this is in view of the fact that no personal separation contract or court judgement pronouncing separation between the parties has been exhibited in the acts. Therefore, the provisions of the Civil Code in the matter of a request for divorce between parties who are not separated by means of a contract or a judgement, are applicable *in toto*.

However, and before the Court comments on the application of the above-mentioned provisions, it underlines that the plaintiff failed to follow the mediation procedures in accordance with the aforementioned provisions. From the acts it appears that the primary purpose of the plaintiff was to get a personal separation from her husband, as she proceeded initially by presenting a letter to the Registrar of the Civil Courts for such purpose. But it turns out that at the end of the mediation, the plaintiff filed a sworn application whereby her requests do not fall within the parameters of what was requested by her goodself in the letter addressed to the Registrar, as instead she asked for divorce. The Court sees that if the intention of the plaintiff was to obtain a divorce, in terms of Regulation 4 of

the Subsidiary Legislation 12.20, she was then obliged to file an application in the Court's registry and not a letter. In light of this, the Court sees that this in itself creates an obstacle to pronounce itself in favour to the paintiff's request, as this was even confirmed by the Court of Appeal in the judgment of **Anthony Pisani vs. Maria Rita Pisani**.[31]

In addition to the above, the Court sees another obstacle for the granting of the divorce and this in light of the issue regarding the dissolution and liquidation of the matrimonial regime in force between the parties. The Court sees that the parties got married in the Gibraltar and consequently formed their family in the Czech Republic. Therefore, in the case under examination, there is in play the so-called foreign element, and thus it was necessary for the plaintiff to at least bring an expert's testimony on the foreign law concerned so that the Court would be in a position to determine what kind of matrimonial regime was in place. This was necessary because subsection 5 of Article 66D of the Civil Code in brief, *"jikkoncedi dritt lill-parti li jrid jikseb il-hall taz-zwieg tieghu, f'kazijiet fejn tkun diga` waqfet il-komunjoni tal-akkwisti, illi jghaddi ghad-divorzju minghajr ma jitlob ukoll li tigi likwidata l-komunjoni, basta jkun hemm "qbil" mal-parti l-ohra. Altrimenti, jekk m'hemmx il-qbil tan-naha l-ohra, il-parti li jrid jinhall miz-zwieg tieghu jkun tenut ukoll li jitlob, mhux biss li jittermina izda wkoll jillikwida l-istess komunjoni. Il-Ligi ma tesigix talba kongunta, kif qalet l-ewwel Qorti, izda huwa sufficjenti li jkun hemm semplici qbil li l-komunjoni tista' tigi terminata minghajr ma tigi likwidata"*.[32]

Therefore, the Court is of the opinion that the request for divorce is not sustainable given that: (i) the mediation procedure was not followed correctly, and, (ii) in the circumstances of the present case the plaintiff should have also brought forward proof as to the matrimonial regime applicable between the parties as from date of marriage and her claim against her husband for divorce, should have also be accompanied by a claim for the termination and liquidation of their matrimonial regime. The Court reteriates what the Court of Appeal has taught, that: *"Ghalkemm huwa risaput illi l-komunjoni tal-akkwisti tigi terminata mas-sentenza tal-Qorti li tippronunzja l-hall taz-zwieg a tenur tal-Artikolu 1319 tal-Kodici Civili, din il-Qorti tqis li dan il-fattur ma jistax ikun ta' ghajnuna ghal-attur ghaliex f'kull kaz, il-konvenuta ma qablitx li l-komunjoni tigi terminata*

[31] Decided on the 26th January 2018, Appeal Number 156/2014 RGM.
[32] *Ibid.*

minghajr ukoll tigi likwidata. Kieku l-konvenuta fil-kors tal-proceduri wriet l-aderenza taghha fir-rigward, allura din il-Qorti taqbel li l-procedura maghzula mill-atturi bir-rikors tieghu kif imfassal, kienet tkun sanata u ma kienx ikun hemm dan ix-xkiel ghall-pronunzjament tal-hall taz-zwieg fic-cirkostanzi".[33]

Despite the above, the Court sees that even though the requst for divorce should not be granted, it is of the opinion that the request regarding the minor E F D should be considered anyway and this for the sake of the supreme interests of the minor herself. Therefore, and despite the above, in terms of Article 149 of the Civil Code, the Court will proceed to utilise its powers in the best interests of the minor concerned.[34] It is said that where the supreme interest of the minor is dealt with, the Court should not be hindered by the strict and rigorous procedural rules, so much so that the Family Court has the power to take any provision in the best interest of the minor even if none of the parties has made a request in this respect.

Having established the premise, the Court sees that this is a request made by the plaintiff so that this Court grants her the exclusive care, custody and parental authority of the minor E F D. From the uncontradicted testimony of the plaintiff, it appears that the minor was born from the relationship of the parties on 5th July 2013 in England, and therefore the minor is now nine (9) years old. It also emerges that the plaintiff and the minor have been residing in Malta since June 2019 and it is not disputed that since that time the contact between the defendant and the minor has not been stable and frequent, nor it is disputed that the defendant doesn't have a particular interest in his daughter. In fact, it is noted that the defendant has completely abandoned his daughter and has no contact with the plaintiff.

However, the Court points out that, although it was not provided with any concrete evidence from the defendant, it appears that at least from the time when the plaintiff relocated to Malta from the Czech Republic, it was the plaintiff who assumed the effective care and custody of the minor. It is also clear that the plaintiff has the interests of the minor at heart.

In light of the above, the Court is satisfied that it is in the best interests of the minor, that the care and custody of the minor E F D should be vested exclusively

[33] *Ibid.*
[34] *Vide* judgement in the names of **Edward Briffa pro et noe vs Georgina sive Georgia Seguna**, decided on the 25th January 2019.

in the hands of the plaintiff, whereby the minor shall continue to reside with the plaintiff in the premises which the plaintiff herself establishes as her residence. The Court continues to confirm its consideration in view of the fact that there is no communication between the parties. In this regard, the Court makes reference to the judgment in the names of **Miriam Cauchi pro et noe vs. Francis Cauchi**,[35] where the Court of Appeal held that it is *"tiskarta t-talba ghall-kustodja kongunta ghax, bhala sistema, mhux prattikabbli meta l-genituri ma jitkellmux bejniethom"*. This was further elaborated in the judgement of **Scott Schembri vs Dorianne Polidano**,[36] wereby the Court held that *"filwaqt li tiddikjara li taqbel ma' tali pronunzjament izzid illi l-istess principju japplika fejn iz-zewg genituri m'humiex kapaci jitkellmu b'mod civili ma' xulxin li l-kura u kustodja ma ghandhiex tkun kongunta ghaliex immankabilment tkun sors ta' litigji ulterjuri b'detriment serju ghall-benessere tal-minuri".* This was reconfirmed in the judgement of **Claire Booker vs Roger Mahlangu**.[37]

In light of the above, the Court holds that the issue of the parental authority is not equal to that of care and custody, and thus if a parent is not vested with the care and custody of a minor this should not mean that such parent is also stripped of his parental authority. In this context the Court sees fit to refer to the judgment in the names **Mark Micallef pro et noe vs. Ramona Caruana**,[38] where this principle was clarified: *"(...) s-setgħa tal-ġenitur ma hijiex ugwali għal kura u kustodja, izda huwa kunċett legali li emanixxa mid-Dritt Ruman li jinkorpora fih, fost oħrajn, il-kunċett tal-kura u kustodja. Fil-fatt jekk wieħed ma jkollux f'idejh il-kura u kustodja, ma jfissirx li jitlef id-drittijiet l-oħra li jappartjenu lilu bħala ġenitur, fosthom id-dritt ta' aċċess, id-dritt li jieħu deċizjonijiet flimkien mal-ġenitur l-ieħor, id-dritt li jkun infurmat dwar il-progress tal-minuri, u d-dritt li jiffirma u jġedded passaport. Għaldaqstant ġialadarba ġenitur ikun għadu f'pozizzjoni li jezerċita dawn id-drittijiet, minkejja li ma jkollux il-kura u kustodja tal-minuri, ifisser li xorta waħda jkollu s-setgħa ta' ġenitur, liema setgħa tista' titneħħa skont id-disposizzjonijiet tal-liġi kif misjuba taħt is-Sub-Titolu II tat-Titolu IV tal-Ewwel Ktieb"*.

In the present case and considering the child's abandonment from her father is proven, the Court considers that it is not in the best interest of the minor that her

[35] Decided on the 3rd October 2008 (App. Nr. 2463/1999/1).
[36] Decided by the Family Court on the 30th April 2015 (App. Nr. 277/2012 RGM), not appealed.
[37] Decided by the Family Court on the 7th December 2017 (App. Nr. 183/2016 RGM), not appealed.
[38] Decided by the Family Court on the 27th May 2021 (App. Nr. 140/2019 AL), not appealed.

mother has to resort to judicial procedures every single time the defendant's signature is needed, such as for example the minor's enrollment in schools, an educational school trip, or any decisions in the medical field. Therefore, the Court orders that the defendant be stripped of his parental authority in terms of Article 154 of the Civil Code, provided that the plaintiff will have the sole parental authority over the minor with the right to take exclusively on her own any decision regarding minor, both ordinary and extraordinary.

DECIDE:

Accordingly, and for all the reasons mentioned above, the Court is deciding the case as follows:

1. Acceeds to the first request and declare that the care, custody and parental authority of the minor E F D is vested exclusively in the hands of the plaintiff, provided that the minor shall reside with the plaintiff in the premises which the plaintiff herself establishes as her residence;

2. Rejects the second request in relation to the divorce, given that: (i) the mediation procedure was not followed correctly, and, (ii) in the circumstances of the present case the plaintiff should have also brought forward proof as to the matrimonial regime applicable between the parties as from date of marriage and her claim against her husband for divorce should have also be accompanied by a claim for the termination and liquidation of their matrimonial regime;

3. Rejects the third claim.

All costs shall remain tax-free between both parties.