

**CIVIL COURT
(FAMILY SECTION)**

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

Hearing of the 4th October 2023

App. No. : 469/2019 JPG

Number: 18

**DM
Vs
NS**

The Court,

Having seen the application filed by DM, dated 17th October 2019, at page 1 et seqq., wherein it held:

That the parties were in a relationship of seven and a half years, from the year 2010 to the year 2018, and they have been living in Malta since 2015.

That the respondent is the biological father of two twin boys, N and M, who were born on the 19th March 2011 (Copies of the birth certificates attached and marked Dok. A and Dok. B).

That the mother has no contact with the minors and does not reside in Malta.

That the applicant raised the said minors since their birth and effectively assumed the role of a parent in the said minor's regard. The parties had agreed that the applicant would assume the responsibility to take care of

the children while the respondent assumed the responsibility to work and provide for the needs of the family.

That when the applicant decided to terminate his relationship with the respondent, due to valid reasons which left him no other alternative, the respondent abruptly ended the applicant's relationship with the children and would not allow the applicant any contact with the minors.

That the applicant has been trying to come to an agreement with the respondent to enable him to have some form of contact with the minors for many months, and has made several attempts to establish contact with the children by means of emails (copies attached and marked Dok. C and Dok. D) but the respondent still refused.

That the applicant feels that this behavior of the respondent has caused and is causing serious psychological harm to the minors, who have suddenly lost a person who for them was a second parent, and who was a constant figure in their upbringing, as is also evident from the attached set of photographs marked Dok. E) and this without any explanation or preparation.

That furthermore the applicant is concerned regarding how the conflict between the parties is negatively effecting the minors and wishes that they are given support to understand that he has not abandoned them and that the situation is not their fault.

That the applicant has valid reasons to have concerns about the minor's psychological state and this because the respondent is emotionally abusive and uses the children to manipulate those around him. He does not have the necessary skills to understand what the children are going through and to understand what their emotional needs are.

That a clear example of this is a recording which the same respondent sent to the applicant to show him how much the children are missing him and to persuade him to come back. A transcription of the recording is attached

and marked Dok. F together with the relative audio file (DOK. G), which is being provided since it clearly demonstrates the children's anxiety and emotional distress, and that despite the wish and clear need of the children to see the applicant, the respondent refused to allow them any contact with the respondent and lied to them claiming that he has no means of communicating with the applicant.

That the applicant had insisted with the respondent that they seek psychological help for the children together, and had been given several recommendations among which was to meet together with the children to talk about the separation with them. This took place on the 13th May 2018 however the respondent completely ignored the psychologist's recommendations and chose to retaliate against the applicant instead, with insults and shouting and breaking his mobile phone, and this in the children's presence who were very emotional by what they witnessed. The applicant had met the respondent and the children by chance on the 1st March 2019 and when he approached them to talk to the children, the respondent once again reacted aggressively and filed a police report, following which the applicant was spoken to by police and he explained his position as can be seen from the attached report marked Dok. H.

That despite the fact that the applicant is not a biological parent of the children, it is his fundamental right as well as that of the children to have his right to family life protected, and the applicant feels duty bound to take every opportune action to ensure that the minors' emotional and psychological well being is protected.

That the applicant is petitioning this Honorable Court primarily so that the minors can be spoken to by professionals so that they can be given every psychological support that they may require as well as so that the opportune recommendations can be given regarding what the applicant's involvement in the minors' life should be given the particular circumstances of this case.

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Therefore the applicant humbly requests that it pleases this Honourable Court to nominate a psychologist to assess the psychological and emotional state of minors N and M S, and to give the opportune recommendations regarding what the applicant DM involvement in the minor's life should be in the minor's life, and this in the minor's best interest and under any other order which this Honorable Court deems fit and opportune.

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

Having heard the testimony on oath;

Having seen the judgement in parte dated 8th October 2020 (Vide Fol 37 et seq);

Having seen all the acts of the case;

Having seen final written submissions filed by the parties;

Considers:

Plaintiff testified on the 28th of January 2021, (vide fol 45 et seq) and explained that he met Defendant in 2010, whilst living in SP. The Defendant was working in W. Eventually Plaintiff went to visit him in W and after meeting quite often, they embarked on a relationship. Plaintiff explains that they both had the same desire to have children and to build a family. Defendant at the time was already in process of finding a surrogate mother. Then in 2011, the twins were born in Malta, and Plaintiff really wanted to be a part of this family and in fact he left his job in SP and went to live in W. They in fact spent the first three or four years after the birth of the twins in W. After having left R, they went to live in B for a while and then came to Malta in 2015.

Plaintiff explains that he tended to the twins since their very first year, and was connected to the children emotionally, even though he is not the biological parent. For five years, Plaintiff explains that he and Defendant were a very good team, while Defendant took on the responsibility of providing for the family, Plaintiff was taking

care of the children, as the primary carer. Plaintiff adds that he was concerned about the emotional well-being of the children, since they were being brought up without a mother, and in fact while in SP they had consulted with a psychologist who specialized and works with children, who had told them that their children were doing very well, and that the children felt that they were being brought up in a family. Plaintiff's relationship with Defendant lasted for about seven and a half years. Problems began when Defendant had problems at work, which changed Defendant's personality drastically, so much so that Defendant decided that he wanted to become a priest. Plaintiff comprehended that this situation might cause a lot of stress especially in B, and he also did not see himself as the partner of a priest of the Orthodox Church. At the time Defendant was depressed, and was not able to support the children the way they needed, so Plaintiff remained in this relationship until 2018, when they decided to split up also to avoid having continuous fights in front of the children. Plaintiff affirms that he never thought that Defendant would prohibit him from seeing the children but Defendant reacted very badly to the break up. He explains that he had managed to convince Defendant to speak to a psychologist as Defendant was under a lot of stress, which he did. In fact they had met in May of 2018, together with the children, and they explained that they were going to be living separately, however during this conversation, Defendant lost his temper and started insulting Plaintiff in front of the children, and even smashed his phone. This was the last time, Plaintiff saw the children.

Plaintiff explains that he kept writing emails and messages to try and have some contact with the children, however, Defendant, because of the stress he was under, failed to see and understand the needs of the children after their separation. Plaintiff affirms that the reason Defendant had given to the children as to Plaintiff's disappearance, from their life was that Plaintiff was busy with work, and could not see them. Plaintiff testified that he kept on sending postcards for Christmas and birthdays, he had also tried to call the children on Christmas, but Defendant hung up on him. Plaintiff explained that Defendant also isolated himself from any of their common friends who were attempting to convince Defendant to allow Plaintiff to see the children. Plaintiff confirms that Defendant did in fact become a priest, but this is not his full time job. Plaintiff contends that he would like this Court to assign a psychologist to assess the situation, and to determine whether the children are receiving adequate emotional support, and to have guidance as to how they can help the children with this situation and to possibly resolve

the conflict between the parties. Plaintiff confirms that he would very much like to have contact with the children.

When cross-examined on the 18th of May 2021, (vide fol 60 et seq), Plaintiff confirmed that he met Defendant at the end of the summer of the year 2010 in SP. At the time, Defendant was still married, but he was getting divorced from this man. Plaintiff also confirmed that he knew that Defendant was married to a woman, and that this woman was the twins' surrogate mother. In fact Defendant had disclosed that there was a financial agreement with this woman. Plaintiff confirms that he is now married.

When confronted with the fact that Plaintiff did not possess a residence permit to reside permanently in W, Plaintiff explained that he was coming and going to W but not permanently residing there with Defendant. Plaintiff confirms that at the time Defendant was not living with this wife, and that he had met her once at the embassy of Malta, and that the twins mother was never involved in the twins' upbringing and that she had left after their birth and has not visited the children.

Plaintiff confirms that he lived with Defendant for seven and a half years and affirms that he was not present when the mother visited the children in 2014 and 2015. Plaintiff confirms that he recognized the twins' mother when shown photos. Plaintiff affirms that when he moved to Malta, he moved in with Defendant and the children. When confronted with the fact that Defendant moved to Malta a year before Plaintiff, Plaintiff contends that the children were born in Malta and that at the time he was away. Plaintiff also affirms that Carina, Defendant's former colleague, was involved regularly in the children's life and sometimes even cooked for them. He recalls that after Carina left, he left for Malta. He explains that they had applied for partnership residence, and this gave them the right to live in Malta.

Plaintiff confirms that he used to take care of the children every day, and that he used to feed them ,prepare the bottle, wash them, change their nappies, take care of them when they were sick, he also taught them how to walk. During the day Defendant used to be at work and confirms that Defendant did take parental leave from work, but whilst on leave, he was doing private practice as a tourist guide and was quite busy. Plaintiff does not recall exactly how many months of leave Defendant took, but this lasted for quite a long period of time. Plaintiff explains that the parties had agreed that Plaintiff

would stay with the children while, Defendant would work outside the house. Plaintiff affirms that Defendant worked as a tour guide from time to time, and that it was only later in 2017, that Plaintiff had initiated a course with ITS and before that he was preparing for exhibitions at Ta' Xbiex and SP, but both did not take up much of his time, and in fact he was only away once or twice a year for two weeks. Plaintiff recalls that with regards to important matters regarding the children, it was he who had set up an appointment with a psychologist in SP, who was also Plaintiff's good acquaintance. Plaintiff contends that he was involved in decisions regarding the children.

Plaintiff re-produced on the 7th February 2022 (vide fol 74 et seq) confirmed that the first time he came to Malta was after the birth of the twins in 2011. After Marda left, he had come to help and they had stayed in Malta. Subsequently they took the children to W. Then in 2015, Plaintiff affirms that they had decided to relocate to Malta, and that the children should attend school in Malta. Plaintiff does not recall whether in 2015, he came to Malta with the children and Defendant, as they had been coming here a few times, and they were constantly moving from Malta to B or to W, or from B and W to Malta. However, Plaintiff testified that from 2011 onwards, they were spending most of their time together and Plaintiff was taking care of the children as they were constantly moving, sometime Defendant moved alone and sometimes they moved together. Plaintiff confirms that they also lived together abroad, and in fact they lived together in W but did not need a residence permit to live in W since he is a citizen of R, and he did have the keys to the apartment and the access cards. Plaintiff confirms that they lived in an apartment within the diplomatic embassy compound. Plaintiff affirms that at the time he had left his job and was spending most of his time in W, but he did go back to SP to help his parents at times. Plaintiff clarifies that he would spend between 10-11 months with the children and two months away. Plaintiff confirmed that they had hired help, but the lady in question was a cleaner and not a nanny, but would sometimes stay with the children whenever they needed to go out but during the day it was Plaintiff who took care of the children.

Plaintiff confirms that Defendant's mother would come to help with the children once or twice a year, and she would stay for two whole weeks. During her stay, Plaintiff would return to SP. Galina, the children's god mother, would also help with the children on occasions. She would normally come after work for an hour or two.

With regards to Defendant's decision to become a priest, Plaintiff confirms that this was around 2014. Defendant was passing through a stressful time, and Plaintiff had seen his decision to go to the seminary to study religion, as something which would help him deal with stress, but had absolutely no idea that Plaintiff would end up making the decision to become a priest especially because of the kids and their relationship. Plaintiff explains that Defendant was going to study in B while Plaintiff would stay with the children in Malta. Whenever he confronted Defendant with his concerns, Defendant insisted that he wanted to become a priest and that they would try to make it work. Plaintiff confirms that Defendant took five years parental leave possibly between 2012 and 2017, and although Defendant participated in the upbringing of the children, he used to keep himself busy working as a tour guide, at times he went to B to study once or twice a year, where he would stay for a week or two. Plaintiff explains that their relationship terminated following a number of problems Defendant was facing including problems relating to his work, problems with the bank, wherein Defendant had lost a substantial amount of money he had invested with the Bn bank and problems with his father which had never been addressed. All of this began accumulating and Defendant became emotionally aggressive towards everyone, making it impossible for Plaintiff to remain in this relationship.

Plaintiff confirms that Defendant was helping him financially but during the last year of the relationship, Plaintiff was considering starting to work with Heritage Malta where he still works, but Defendant did not want him to work. Plaintiff testified that he left the house in March 2018, but since February of 2018, they had already started discussing the possibility that their relationship had to be ended. Asked about the children's laptop, Plaintiff affirms that once Defendant asked him to return the said laptop, Plaintiff did so. Plaintiff reiterated that whenever he had the chance to engage in paid work, he would contribute financially but most of the expenses were paid by Defendant.

With regards to any mention about parental rights, Plaintiff contends that Defendant had told him that once they would settle in a country which gives rights to same sex parents, he would be attributed with said rights and this is why he spent so much of his time into this. Plaintiff reiterates that this was the agreement they had reached and it was not a simple discussion. With regards to the mother's involvement in the children's lives, Plaintiff explained that although she did visit, she was not taking part in their

lives, and whenever he took the children to see their mother, Plaintiff did not go with them as Defendant did not want the children's mother to know that Defendant was living with a man. Plaintiff confirms that he did attend a number of celebrations at St Aloysius but he never spoke to any teachers, since Defendant was trying to keep him away in light of his desire to become a priest and was always introduced as the children's godfather. Plaintiff confirmed that he has not seen nor spoken to the children in almost three years.

Defendant testified on the 23rd of May 2022, (vide fol 96 et seq) and explained that the twins were born on the 18th of March 2011. He adds that he had met their mum, who became his formal wife, in 2009 and she became pregnant with the twins. His wife also had a daughter from a previous relationship. They married in B in October of 2010. Defendant affirms that he then met the Applicant in August of 2010 in SP, when his wife was already pregnant. He and Plaintiff had a lot of common friends in SP and W. Defendant affirms that it was his wife who insisted that they should move to Malta and leave B, and they did in November of 2010. At the time Defendant was deputy and ambassador to Malta of the national federation from 2007 until the end of 2013. Defendant confirms that the twins were born in Malta after a problematic pregnancy, which was then followed by a complex post –partum, depression. It was agreed that Defendant's wife was to go back to W, since Defendant also had to go back to W as part of his diplomatic tour of duty. Defendant explains that when they went back to W, his wife had to look after her grandfather, and in fact went to live with her grandfather. As the months progressed, their relationship improved and in fact they went back to B for a family holiday with the twins and his step daughter, at the end of May 2012, and they were in fact planning on christening the twins. The persons who were initially chosen to stand as godparents for the twins, due to personal reasons could not be present, and as a result Defendant asked his best friend from B. Defendant contends that Plaintiff had shown an interest in being the second god parent and was in fact chosen to be the godfather. On their return to R, things started going out of control once again, and Defendant filed for divorce in B. Defendant contends that it was the nanny who was looking after the children, since his wife was suffering from severe post natal depression.

Defendant affirms that he was granted full custody however, he still consulted his wife on matters related to the twins' health since she was a nurse, and he had in fact sought

her advice when one of the twins had to undergo surgery. Asked about his relationship with Plaintiff, Defendant explained that Plaintiff was initially an acquaintance who became a good friend. Plaintiff lived permanently in SP and never moved to W, since he would need to register with the local authorities. At the time Defendant lived in a closed diplomatic compound which housed the Maltese embassy, together with seven or eight other embassies. People entering required permission, which permission was given for visits of the Applicant. Defendant affirms that Plaintiff would come and go as he pleased, and in time even started asking Defendant for money. With regards to Plaintiff's relationship with the children, Defendant contends that Plaintiff had no responsibility vis-à-vis the children, but he would maybe watch a film with the children whenever he visited. It was the nanny who from day one up until the 31st of December 2013 that looked after the children. Plaintiff adds that friends helped him settle in Malta, and he had used up his leave till February 2014. Additionally Defendant had applied for one year parental leave from the 9th of March 2014, which was eventually extended till 9th March 2019.

During this time, Defendant confirms that he used to offer half day guided tours between 15 to 20 times per year while the children were at school. On occasions where someone else could watch the children, Defendant would take on full day tours.

In 2015, Defendant took up theological studies in B, and his mother used to come from B to tend to the children. This happened once or twice a year. Defendant reiterates that Plaintiff was always coming and going because of his art gallery in R, and Plaintiff only had the right to be physically living in Malta. Defendant clarifies that he and Plaintiff were never married, nor were they in any civil union or cohabitation agreement. Defendant affirms that Plaintiff was abusive towards the children and was asked not to interfere in the manner in which the children were being disciplined. Plaintiff would however help with the carrying of the shopping bags, he would read the children a book, or play with them. Defendant affirms that Plaintiff did not turn out to be the person he thought he was and had in fact had stolen the children's laptop, Defendant's bicycle, books etc. Defendant testified that he always had full responsibility over the children and Plaintiff was never given any role, other than that of godfather.

Defendant re produced on the 1st of June 2023, (vide fol 108A et seq) reiterates that Plaintiff was never given or assumed parental responsibility for the children, and Plaintiff has never financially supported the children. Defendant affirms that the last

time Plaintiff saw the children was four to five years ago, in Carnival of 2019, when Plaintiff pushed himself on the children, where Defendant ended up calling the police. Defendant confirmed that he took the children out of the country in the beginning of September of the year 2022, and testified that the children never mention Plaintiff. Defendant adds that there also a phone call in Christmas 2020 where after being handed the phone by one of the twins, Defendant hung up.

Defendant confirms that the children are doing well in school and have had top grades throughout the years. The children are also involved within the community and attend a number of extra curricular activities such as scouts, sailing, golf and karate. The children speak a number of languages including, Maltese, English, Bn and Rn. At the moment they are also studying French and Spanish and will eventually study Italian and Latin. One of the children was accepted at one of the Colleges in Oxford, while the other is under consideration for acceptance at Eton College. However, Defendant contends that the children decided to attend school in Lembourg and where then enrolled in the European School of Lembourg. Defendant is residing with the children in Lembourg and is working with the European Court of Auditors. Defendant explains that the school hours are from 8am till 16:30 on Monday, Wednesday and Friday, on certain days the children have after school extra curricular activities and stay at the school until 18:00. On days where they do not have any activities, they walk to Court which is only a short distance away from the school and stay with Defendant until he finishes from work.

Defendant explains that the children are enrolled at the Lembourg school for the year 2023, and are still in the process of deciding what will happen next year, however the general plan is to move to the X.

In cross-examination on the 2nd June 2023 Defendant (vide fol 228 et seq) Defendant confirmed that he was in a romantic relationship with Plaintiff for five and a half to six years and that Plaintiff lived with him in his house between 2015 and March 2018. While Defendant contends that they broke up because of the robbery he confirms that Plaintiff was issued a visa to reside in Malta based on the fact that Plaintiff was his partner and that the said permit did not entitle Plaintiff to work in Malta. Defendant confirms that he was involved in the application process and was knowledgeable of this. Defendant however contends that his maid, also did not have the right to work in

Malta, but she still worked. Defendant reiterates that Plaintiff worked in R and travelled there regularly since he was the curator of a five star hotel gallery and was also giving master classes in SPsbourg, however Defendant asserts that Plaintiff was continuously requesting to borrow money from Defendant. Defendant confirms that he met Plaintiff for the first time in 2010 and that their relationship ended in 2018 instated that in, when he met Plaintiff, his wife was already pregnant with the twins, but at the time they were not as yet married. Defendant explains that he met Plaintiff in August of 2010, he married his wife in October 2010 but he has been in a relationship with his wife since 2009.

Defendant confirms that he was previously married to another man, and that he had filed for annulment but denies that the relationship with the children's biological mother was a surrogacy arrangement. He insists that his relationship with Plaintiff commenced at a much later stage, in 2013 but at the time they were not living together. Defendant explains that whenever they travelled back to Malta, since his wife had a daughter from a previous relationship, and since the twins had to be held in arms on the aircraft, they needed another person to help them with the twins. That is why his friend Galina, had accompanied his wife, and Plaintiff accompanied him.

Defendant contends that back in 2011, Plaintiff had volunteered to help with the children in the same manner as a number of other friends who also volunteered to help. At the time Plaintiff used to come and go but did not live with Defendant. He affirms that the last time he lived with his wife and children on a permanent basis was in Malta in 2015 and confirms that in 2012, Plaintiff was in B for the twins' christening as were another fifty people. Questioned about the surgery performed on one of the twins, Defendant affirms that it would not have been possible for Plaintiff to have spent the night with the child since hospital policy only allows parents, so it was either himself or his wife who would have stayed with the child overnight, but confirms that his wife was not at the hospital.

With regards to the day to day care of the twins, Defendant admits that Plaintiff used to babysit on occasions and that both the children and himself missed the Plaintiff when their relationship ended, but they also felt terribly betrayed. At the time the children were about seven years old and could not understand why Plaintiff left all of a sudden, just as they were upset whenever their grandmother would leave. Defendant felt

betrayed by Plaintiff because the person he prayed with, the person who went to the monastery with, the person who gave the impression that he was a devout Christian, stole his property and that of the children. The children however used to get upset and cry whenever Plaintiff would be mentioned. Defendant recalls having sent a recording to Plaintiff and affirms that he had sent this for Plaintiff to understand that he did not live up to the commitment he undertook as godfather to these children.

Defendant contends that he always sought professional help for the children's emotional needs in light of the fact the absence of the mother in their lives, but not because of Applicant. Plaintiff had met the children in May of 2018 at the airport to tell them that he had his life and that he would not be able to take care of their spiritual needs as a godfather anymore. Defendant confirms that he had attended a meeting with a psychologist together with Plaintiff, who had advised Defendant to allow Plaintiff to meet the children to give them closure, but had stated that Plaintiff was of no relevance to the children's life. Defendant confirms that this meeting ended up in an argument which happened in the presence of the children. Defendant affirms that he was not aware of the emails sent by Plaintiff following this meeting.

Considers:

This is a decree following proceedings instituted by Applicant wherein he is requesting that this Court appoints a psychologist to examine Respondent's minor children and give its recommendations as to the involvement he should have in their life.

The Court observes that in his reply Defendant pleaded the lack of juridical interest on the part of Plaintiff to institute these proceedings, to put forth the said requests, as this is not contemplated in civil law and that this Court as presided lacks competence to determine the said proceedings. As afore mentioned, the second preliminary plea relating to this Court's competence or lack thereof, was already addressed by this Court by way of a preliminary judgment dated 8th October 2020, (*vide decree at page 37 et seq*), wherein this Court rejected Respondent's plea and ordering the continuation of the proceedings.

The Court shall now determine whether Plaintiff has sufficient juridical interest to institute said proceedings. In his note of submissions Defendant submits that the

demand put forth by Plaintiff is not contemplated at law, since Applicant is not biologically related to the minor child N and M, and nor does he possess a legal relationship with the minor children. During his testimony before this Court, Defendant reiterated that the parties never married, nor did they enter into a civil union agreement and nor did they ever enter into a cohabitation agreement. Furthermore they did not discuss let alone commence adoption proceedings. Defendant contends that it therefore cannot even be stated that the applicant acted in loco parentis in terms of article 3B of the Civil Code.

Moreover, Defendant affirms that the jurisprudence cited by Plaintiff in her note of submissions, particularly the local judgment wherein grandparents were given *locus standi* to file a lawsuit for access, cannot be deemed to be relevant to this lawsuit. As for the other foreign judgments, Defendant contends that the applicants in the cited judgments were either the legal parent, the foster parents or the parents of a child born from a surrogate mother and listed on the minor's birth certificate.

On the other hand, in his note of submissions Plaintiff submits that when Defendant argues that Applicant's claim is not contemplated by law but simultaneously argues that Applicant has no juridical interest to bring his claim forward, Defendant is acknowledging that the said claim is contemplated by law. Plaintiff insists that his claim is based on article 149 of the Civil Code which allows this Court to give any direction it deems appropriate in the best interest of the child, provided that a good cause is shown and that the said claim is in the best interest of the child.

It is this Court's understanding that today, families have their own individual dynamics, and that the concept of the family nucleus varies from family to family with the natural consequence that Courts and Judicial Authorities, will necessarily be facing multiple claims and requests such as the ones put forth by Applicant. This Court as diversely presided in *f'AB and CD vs EB and FG*, in a preliminary judgment dated January 2020 held that:

This issue is by far and large an untouched area of our law and jurisprudence and in itself represents a "grey area" that requires great thought and adapting to the lines of thought at an international level.

The Family Court in *AB and CD vs EB and FG* cited *Valcheva vs Babanarakis* decided on the 31st of May 2018 by the **Court of Justice of the European Union** wherein it was held that:

At the sociocultural level, equally profound transformations are affecting the way of life of citizens. The phenomenon of families whose members (parents and children) have dual or different nationalities (which is closely linked to the free movement of persons and, more generally, to globalisation), the diversity of forms of union and cohabitation, besides marriage, in particular the civil partnership... are just a few examples. The diversification of family strictures is therefore a reality of contemporary society... Those economic and sociocultural changes, whose multiple effects on the lives of citizens are being felt at a steady pace, require in some cases a reconsideration of the assumptions underlying legal systems and the substance of their rules, and necessitate an adaptation of the law and in particular EU law (including private international law)

However, despite the efforts of the EU Legislature to adapt the legislation in matters of parental responsibility to developments in society, those developments are proceeding at a much faster pace than the process of legislative adaptation and it is clear that there remain some “grey areas” for which the legislation does not provide an explicit response. The case in the main proceedings is an illustration of those grey areas created by developments in society, in particular with regard to a child’s contact with other persons to whom the child has family ties based on law or on fact (such as the former spouse of one of the parents, the child’s siblings, grandparents...). Those grey areas may give rise to, sometimes paradoxical, uncertainties concerning the existence of rights of access by persons other than the parents, in this case grandparents.

This Court has always considered that the law is inherently dynamic and adaptable, qualities which allow it to metamorphose over the course of time in a manner which reflects the reality of the society or community, this same law aspires to regulate. As indicated above, current times, demand that a wider concept of the family nucleus is to

be embraced, since today children are born in different and varied realities. It is rather counter-productive that while the Legislator, is keen to endow its citizens with a wider spectrum of civil rights, that same Legislator fails to provide its citizens with a remedy, wherein the citizen can invoke these same civil rights. This Court is cognisant of the fact that requests such as the ones put forth by Applicant, are nothing more than a natural consequence of the diversity of forms of unions and families present not only in Maltese society but elsewhere in democratic countries.

In fact it is this Court's understanding that the European Court of Human Rights, has in its judgments confirmed on multiple occasions that the concept of family life extends beyond the confines of the relationships between parents and children. This *raison d'être* is also palpable in the Council of Europe's **Convention on Contact Concerning Children of 2003**, which Convention has been applicable in the local context since 1st June 2015. Article 5(1) of the said convention provides that:

“subject to his or her best interests, contact may be established between the child and persons other than his or her parents having family ties with the child”.

Article 2 (d) of the Convention stipulates that the term ‘**family ties**’ signifies:

“a close relationship such as between a child and his or her grandparents or siblings, based on law or on a de facto family relationship”.

This Convention confers member states with the obligation to promote measures by means of which minors are assisted in establishing contact or access with persons with whom they have established family ties, provided that said ties are in the best interest of the minor children concerned.

The Court of Justice of the European Union in its decision of the 31st of May 2018 in the names *Neil Valcheva vs Georgios Babanarkis*, held that:

“It must be noted that the “rights of access” are defined broadly, encompassing in particular the right to take a child to a place other than that child’s habitual residence for a limited period of time. That

definition does not impose any limitation in regards to the persons who may benefit from these rights of access.

...

Regulation No.2201/2203 does not expressly exclude a request made by grandparents for rights of access to their grandchildren from coming within the scope of that regulation.

It follows that the concept of rights of access referred to in Article 1 (2) (a) and in Article 2.7 and 2.10 of Regulation 2201/2003 must be understood as referring not only to the rights of access of parents to their child, but also to the rights of access of other persons with whom it is important for the child to maintain a personal relationship, among others, that child's grandparents whether or not they are holder of parental responsibility.

In a Press Release the Court held that:

“In today’s judgment, the Court of Justice begins by stating that the notion of ‘rights of access’ within the meaning of the Brussels IIa Regulation must be interpreted autonomously. After pointing out that that regulation covers all decisions on parental responsibility and that rights of access are identified as a priority, the Court notes that the EU legislature chose not to provide for any limitation of the range of persons who may exercise parental responsibility or hold rights of access. Thus, according to the Court, the notion of rights of access refers not only to the rights of access of parents to their child, but also to the rights of access of other persons with whom it is important for the child to maintain a personal relationship, among others, the child’s grandparents. The Court also points out that, in order to avoid the adoption of conflicting measures by different courts, and in the best interests of the child, the same court — as a general rule, the court of the child’s habitual residence — should rule on rights of access.”¹

¹ Curia.europa.eu - T_h_e_n_o_t_i_o_n_o_f_“r_i_g_h_t_s_o_f_a_c_c_e_s_s_”

The Court observes that in his note of submissions Defendant contends that in this case, not even article 3B of the Civil Code is applicable. Article 3B(3) of the Civil Code provides that:

3) The obligations provided in sub-article (1) also bind a person acting in loco parentis with regard to another person's child, by reason of the marriage of such person to a parent of that child, where the other parent of that child, shall have, at any time before or during the marriage, died or was declared as an absentee according to Title VII of Book First of this Code, or is unknown:

Provided that the provisions of this sub-article shall be without prejudice to the obligations of the natural parents of the child and shall in any case be without prejudice to the provisions of article 149.

The law does not proffer a definition of this concept. In *Loomis vs California (1964)*² it was held that this status:

arises when a person places himself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formalities necessary to legal adoption.

A new dimension to this concept was introduced with the introduction of the Institute of Divorce in Malta, and the intent of extending this status to step parents. In national Parliamentary Debates which preceded the introduction of the institute of divorce, it was held that³:

Primarjament meta tkun qed tillegisla ghat-tfal, trid thares at the best interest of the children, where does it lie? Meta thares lejn judgements ta' qradi esteri - u f'dawn iċ-ċirkostanzi ta' step parent, families, blended families, etc. - issib li kien hemm instances fejn il-qorti hasset li huwa fl-

_i_n_c_l_u_d_e_s_ _t_h_e_ _r_i_g_h_t_s_ _o_f_ _a_c_c_e_s_s_ _o_f_ _g_r_a_n_d_p_a_r_e_n_t_s_ _t_o_ _t_h_e_i_r_ _g_r_a_n_d_c_h_i_l_d_r_e_n.

² Civ.No.21819 First.Dist.,Div Three July 31 1964

³ Kumitat Permanenti għall-Kosniderazzjoni ta' Abbozzi ta' Ligi Laqgħa Numru 80, 19 ta' Lulju 2011

ahjar interest tal-minuri, li meta jinfirdu koppja, jinghata l-kura u l-kustodja taghhom lill-istep parent.

U l-idea tista' tkun meta inti jkollok familja li per eżempju għandha jew l-estrem ta' father unknown jew father li huwa abbunduna, eċċ. u allura dak il-parent mhuwiex fix-xena u jifdal biss l-omm naturali u l-istep parent. U l-qorti sabet li jista' ikollok każ fejn l-omm naturali mhijiex the ideal parent għal dak il-persuna, iżda l-istep parent tkun.

Jista' jkollok - u kien hemm anke każijiet - fejn il-missier naturali jkun għadu fix-xena għax imantni imma per eżempju ma jkunx close, ma jkoll a psychological bond with the child, missier li għalkemm huwa naturali telaq lill-omm wara sena. Din l-omm dejjem ghexet ma' dan ir-raġel gdid tagħha għax iżżewġu, issa sseparaw u l-omm mhijiex meqjusa bhala l-ahjar persuna għal dan it-tifel.

Li huwa importanti hu li peress li ahna f'parti ohra ghedna kemm hu importanti u qeghdin nghabbu lin-nies li huma in loco parentis bid-dmir li jmantnu anke lil dawn it-tfal, ma rridux nghabbuhom bil-piż li jmantnu biss imma mbaghad tneħhilhom l-importanza tagħhom meta jiġu għall-kura u l-kustodja jew għall-aċċess, dejjem jekk dan ikun fl-ahjar interest tat-tfal, imma l-importanza rridu nagħtuhelhom ukoll. U huwa importanti li nuru li jista' jkollok dan il-każ għax mhux biss taż-żejjed u n-nieqes, meta jmantni iva u meta jkollu l-aċċess jew il-kura u l-kustodja le.

Of interest is a decision delivered by the Court of Justice of Ontario in the names *Agmon v. James*⁴ and the criteria adopted by the Court in its determination of whether the former step mother could put forth a request for access with her former husband's son after divorce. The Court held that:

A person who has formed a settled intention to treat the child as a child of his or her own family not only has additional rights regarding the child – they have additional

⁴ *Agmon vs James*, 2018 ONCJ 4 (CanLII)<http://canlii.ca/t/hplq9> accessed 17-06-2022

obligations. Pursuant to subsection 1 (1) of the Family Law Act they are included in an expanded definition of parent and have child support obligations. This is an obligation that is not imposed on family or community members who have not formed this settled intention. Here, the stepmother assumed a role as a third parent to the child. While the wishes of the mother and father are given some consideration, they do not have the parental autonomy to exclude the stepmother from the child's life. The court finds that it is in the child's best interests to have meaningful temporary access with the stepmother because:

- a) The child loves the stepmother and the stepmother loves the child.*
- b) The child views the stepmother as a parent and the stepmother treats the child as her own child.*
- c) The child has an important relationship with the stepmother that needs to be preserved and fostered.*
- d) Access with the stepmother will ensure that the child can have important relationships with his sister, friends and extended family members.*
- e) The court is satisfied that the stepmother will act responsibly in parenting the child.*

Deliberates:

The Court had the opportunity to hear the parties testify extensively, and it is its considered opinion that no person would institute court proceedings requesting contact or access with the children of his former partner, unless those same children held a significant role in the Applicant's life. The Court has seen how Defendant has in the course of his testimony before this Court belittled his relationship with Plaintiff, and **has noted that it was with great reluctance and ambivalence that Defendant, in his cross examination, finally admitted that he was in a romantic long-term relationship with Plaintiff.** The Court finds Plaintiff version more plausible and believes Applicant when he states that the parties wanted to build a family together. It is rather palpable that the parties were in a long committed relationship and lived together under the same roof together with the twins as a family unit. This Court understands that the parties had help from others from time to time, especially when

Applicant had to travel back to R for work purposes, however this Court is morally convinced that it while Defendant was legally the children's father, Plaintiff was the de facto parent who took care of the children on a day to day basis.

This Court is also convinced that the parties' intention was for Plaintiff to be the stay-at home parent, while Defendant was the family's breadwinner who financially supported the family including Plaintiff. This intention is evident from the documentation exhibited (*vide page 70 et seq*) as otherwise, Plaintiff would have applied for a visa on a different premise entirely. Thus, it is palpably evident that Plaintiff was involved in the children's life since right after their birth and had an active role in their upbringing and that Plaintiff's absence from their life, caused great grief and distress to the twins as may be seen from the audio recording exhibited in the acts of the case, something which the Defendant himself admitted to during his testimony despite equating their distress with what they experience when their grandmother or their friend's father leave after their stay with them. Thus, it is this Court's considered opinion that Plaintiff was the *de facto* parent of the twins and the primary caretaker of the minors, and as such has *locus standi* and sufficient juridical interest to institute the said proceedings.

Having determined Applicant's legal standing, this Court must now examine whether contact or access with Applicant is in the minor children's best interest.

The Court notes that the proceedings were filed on the 17th October 2019 and at the time the children were circa eight (8) years old. Today the twins are twelve (12) years old and are currently settled in Lemburg together with Defendant and have been entertaining plans to start schooling in prestigious colleges in the X as from the coming scholastic year. It is apparent that the children are excelling academically, are learning multiple languages and are also involved in extra curricular activities in Lemburg.

From the parties' testimony it transpires that the last contact Plaintiff had with the children was in the year 2018, when the parties had met to tell the children that their relationship had ended. Despite attempts on the part of Plaintiff to keep in contact with the minor children, Defendant blatantly disallowed this, hence Plaintiff initiated proceedings towards the end of the year 2019. From the evidence produced, it is apparent to this Court, that the children now live in a different country with the Father

that is in Lembourg, and may be possibly moving to the X in the near future to further their studies. It is this Court's considered opinion that the relationship that Plaintiff had with the children **was a significant one and one forged at a very crucial period in the children's life**, because the Plaintiff was the primary carer of the children from a little after birth until they were approximately seven to eight years old. The abrupt severance of the relationship of the children with the Plaintiff was, in this Court's considered opinion, a traumatic one as maybe evidenced in the telephone conversation outlined in Document F at page 16 and 17 and as contained in the pen drive Document G at page 18. The Court is convinced furthermore that the relationship between the parties had been a stable one, which lasted over a span of several years, resulting in a meaningful relationship between the children and the Plaintiff who cared for them and therefore it is in the children's best interest that this relationship be sustained and developed. The position would have been very different had the relationship between Plaintiff and Defendant been a short and fleeting one.

For these reasons the Court limitedly upholds Plaintiff's request and orders that Plaintiff in the minor children's best interest shall have access to the two minor children N and M Soukmandjiev as follows:

- (i) Orders that Plaintiff shall communicate with the two minor children telephonically or by means of social media once weekly, that is, every Friday for a period of time not exceeding thirty minutes for each child;**
- (ii) Orders that Plaintiff shall have access to the two minor children N and M Soukmandjiev when the said children are present in Malta every Tuesday and Friday from 5.00 p.m. to 7.00 p.m.;**
- (iii) Orders furthermore that Plaintiff shall have access to the two minor children in Lembourg or in which ever country the said minor children may be residing or conducting their studies for a period of a week every year, which period of time shall be chosen by the Plaintiff during the scholastic holidays of the minor children. Plaintiff shall inform Defendant of the precise dates for the chosen week at least two months in advance.**

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Each party shall bear his own costs.

Read.

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

Lorraine Dalli

Deputy Registrar