



**CIVIL COURT
(FAMILY SECTION)**

MADAME JUSTICE

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

Today 27th June 2024

Sworn Application: 289/2021 AL

A B

vs.

C D E

The Court:

Having seen the sworn Application filed by Plaintiff on the 6th December 2021¹ wherein it stated:

1) That the parties were married on the 21 September 2006 and from this marriage they had two children, F and G D B.

¹ Fol. 1 Maltese version and fol. 5 English version.

2) The parties obtained a divorce in 2018 and sought the guidance of the Berlin Court on the care and custody of their minor children. On 23 February 2018 the parties reached an agreement on the care and custody of children whereby the applicant gave a power of attorney to the respondent regarding the care and custody of minor children. Today the parties reside in Malta as the respondent, a member of a diplomatic corps of the Kingdom of Spain, was given a position within the Embassy of the Kingdom of France [recte: Spain] in Malta.

3) That subsequently, the respondent initiated proceedings here in Malta in the acts of mediation in order to obtain an order regarding the access of the minor children. The court ordered that the minor children should continue to reside with the respondent with access to the applicant.

4) That however, after the applicant was granted the times and days of his access, the respondent began to abuse his diplomatic immunity and began to refuse to grant the applicant access to his children. This continued for more than a month until, by a judgment of this Honorable Court of 10 September 2021, in respect of a warrant of inhibition, the Court waived the diplomatic immunity.

5) That unfortunately, the defendant father has done everything in his power to create distance between the mother and the children, to the extent that the minor child, F, attacked his mother in front of the workers of the Directorate of Child Protection during an access visit.

6) That the applicant contends that the respondent is absolutely not the suitable parent to care for the minor children and therefore the applicant had to open mediation procedures.

7) That the applicant withdrew the original power of attorney by means of two judicial letters which were filed in the Civil Court (Family Section) and in the First Hall of the Civil Court and therefore the care and custody of the minor child is a joint one.

8) That the respondent attended the scheduled mediation before mediator Godwin Genovese. However, he did not raise any pleas, and, despite attending, he remained uncompromising and so this case had to be brought.

9) That the applicant has been authorized to proceed with this case following a decree of this Honourable Court of 11 October 2021 (DOK A).

Therefore, reconvening defendant [recte: plaintiff] respectfully requests this Honourable Court that it may please to:

- i. Order that the care and custody of the aforementioned minor children be entrusted to their applicant mother save for access to the defendant that is to be exercised on the days and times established for that purpose by the Court;*
- ii. Condemn defendant to pay to the plaintiff that amount of alimony that is just and adequate for the needs of the aforementioned minor children, which shall be established by this Court, according to the means of the defendant and the needs of the same minor children, payable by the reconvened plaintiff [recte: defendant] to the same reconvening defendant [recte: plaintiff] weekly or monthly as ordered by this Court;*
- iii. Provides for access which is applicable specifically for the particular days as follows:*

- a) *Father's Day*
- b) *Mother's Day*
- c) *Christmas Eve and Christmas*
- d) *New Year's Eve and New Year*
- e) *Easter Sunday*
- f) *The father's birthday*
- g) *The mother's birthday*
- h) *The child's birthday*
- i) *Public holidays*

With costs, including those incurred during mediation proceedings, against plaintiff, whose oath is made reference to;

Having seen Plaintiff's list of witnesses;

Having seen a copy of the decree of the 11th October 2021² whereby the Court declared the mediation proceedings closed and authorised the parties to proceed with a court case;

Having seen that Defendant's sworn reply³ and counter-claim⁴ were filed *fuori termine* on the 7th February 2022;

Having seen that during the sitting of the 9th February 2022⁵ the Court ordered that the proceedings are to be conducted in the English language, and furthermore noted that defendant appears to be in a state of contumacy as the reply and counter-claim were filed when the time limit imposed by law had lapsed;

Having seen Defendant's application of the 11th February 2022 to excuse the state of contumacy and the decree of this Court of the 31st January 2023 whereby the Court decided that the Defendant had failed to justify his state of contumacy;

² Fol. 10.

³ Fol. 27.

⁴ Fol. 32.

⁵ Fol. 39.

Having seen the judgement of the Court of Appeal of the 7th December 2023, whereby it declared Defendant's appeal to be null and void;

Having seen therefore that the Court will not take cognisance of the sworn reply and the counter-claim filed by Defendant;

Having seen the evidence brought forward by Plaintiff;

Having seen the Note of Submissions submitted by Plaintiff;⁶

Having seen the Note of Submissions submitted by Defendant;⁷

Having heard the oral submissions presented by both Parties during the sitting of the 14th May 2024;

Having seen the exhibited documents and all the case acts;

Having seen that the case was put off for judgement for today;⁸

Considered:

CONSIDERATIONS:

1. The present case:

The Parties were married and obtained a divorce in 2018 in Germany. Eventually in April 2020 Plaintiff gave Defendant a power of attorney regarding the care and custody of the children on which enforcability the Parties did not agree when the Parties moved to Malta together with their children. The

⁶ Fol. 254.

⁷ Fol. 263

⁸ Sitting of 14th May 2024 a. fol. 331.

Court of Appeal eventually rejected Defendant's request for the recognition and enforcement of such document in Malta and Plaintiff proceeded with the care and custody case before this Court.

By means of this sworn application, Plaintiff is requesting the Court to grant her care and custody of the Parties' two minor sons, save for visitation in favour of Defendant, and to condemn Defendant to pay to the Plaintiff a just and adequate alimony for the needs of the children, and furthermore to provide for the regulation of visitation on particular days during the year as indicated in the sworn application.

Defendant, on his end, rejected all claims brought forward by Plaintiff and filed a counter-claim; however his sworn reply and counter claim were filed *fuori termine* and cannot be considered by the Court. Defendant's state of contumacy was confirmed by the Court of Appeal. This means that Defendant is precluded from producing evidence, and any documentary evidence which Defendant nevertheless lodged in these acts notwithstanding his state of contumacy shall be likewise disregarded. Having said that, Defendant is entitled to lodge final submissions, in written or oral form, at the final stage of this lawsuit, based on the evidence that has been adduced.

2. The version of the Parties and evidence adduced:

Plaintiff's version of facts

1. Plaintiff testifies by means of an affidavit lodged via a Note in the Acts, dated 4th May 2022,⁹ whereby she explains that she married Defendant in 2006 and they were both ready to start a family. As soon as they married, they moved to Spain and she left her job and life in New York City to support Defendant in his career

⁹ Fol. 106.

in the Spanish diplomatic corps, and follow him around the world. She took care of the children, participating in activities where they were involved, arranged for their lessons and playdates, and was the primary carer of her children.

She recounts that in 2017 G, their younger son, spent four days in emergency on life support and almost died of pneumonia, during which Defendant never visited him as he did not want to get sick and left the country to visit one of his girlfriends in Moscow. She says that neither did he visit her in hospital when she was sick with scarlet fever and almost died and lost a baby. She said that she also used to find random women's clothing in her closet.

She continues that in September 2020 she came to Malta to settle their children at their new school, Verdala International School. She says she holds a real estate licence and works with Belair, and furthermore acquired a ten year residency permit here in Malta. She says that her children's wellbeing and being allowed to be a nurturing presence in their lives is her priority. She recounts that after she settled the children in Malta she went to California for work and she returned to Malta on the 16th December 2020 when she was shocked with the state she found G in. She says that she was approached by several parents who knew G telling her how neglected and sad he appeared, "*looking scruffy with irregular mealtimes and playing video games until 2 am.*"¹⁰ She says that one grandparent reported G was walking around with a gold chain and a knife in Pembroke at 10.30pm. She says that she had to take him under her wing as he had lost perspective and was up to mischief and risky behaviour. She says that within a month he was thriving again. When abroad she says

¹⁰ Fol. 107.

that she *face-timed* her two sons daily and that they were always left alone in their room.

She explains that here in Malta, G was living with her and F, his older brother, with their dad. She claims that as a result, Defendant was using F against her and in fact she and F grew apart. Defendant even sent F abroad during the Summer of 2021 without her consent. She says that in Malta, Defendant misled everyone, including Child Protection and the Spanish Embassy by telling them that he had sole care and custody on the strength of a power of attorney which she had given him in case it was necessary since they were often in different countries. She says that the Spanish Embassy and Child Protection Services called her out of the blue in June 2021 to bring G to their offices. She said she did not think this was normal and after speaking to her then lawyer, she refused and told them that they needed to wait the Court's decision. She stated that Mr Steve Libreri from Child Protection Services had stated that they they were pressured by the Embassy of Spain and the Ministry of Foreign Affairs. She presents Mr Libreri's evidence before the Family Court during the hearing of the 13th July 2021.¹¹

After Defendant sent F to Spain and France for months without her knowledge or consent, she filed a warrant of prohibitory injunction to protect G and to make sure not to lose him. Defendant in fact refused to submit the children's British and Spanish passports when asked by this Court differently presided, and to this day he still has them in his possession. She says that Defendant tried to invoke diplomatic immunity but the warrant was upheld and when Defendant tried to leave the country with his son he was stopped at the airport.

¹¹ Fol. 114.

At the time, the Court, as differently presided, had ordered during mediation sittings that the children reside with the father and that Plaintiff would have a couple of supervised visits with the children at Appogg. Defendant ignored the order and did not take them for Plaintiff to be able to exercise visitation. However she continued going and waiting for them. All this changed when Defendant had his diplomatic immunity waived on 10th September 2021. Still, very often he used to cancel with an hour's notice. He also blocked her from both his children's phones and threatened to make their life miserable should they dare contact her. G however found a way how to contact her and in fact she presents a document with screenshots of their exchanges.¹² However G was terrified of his father finding out and immediately deleted the messages after reading or sending them. He had his mother on his phone under a secret name and asked her to change her *Whatsapp* photo to something his father would not identify. She says that Defendant was doing everything to break their bond.

Supervised access with G always went well, however it was not the same with F who was confrontational and stubborn with one time even hitting and kicking his mother and being verbally abusive towards her after she insisted with him that he stops using his mobile. The social workers suggested having two different days of visitation for the children.¹³ She stated that Defendant remained calm when he was told that F was being abusive both physically and verbally with his mother and sarcastically blamed it on the social workers for not being able to control the situation. She says that later F was diagnosed with Oppositional Defiance Disorder and that this was hidden from her.

¹² Fol. 115.

¹³ Report about the incident a. fol. 118.

She says that after the Court of Appeal gave its judgement and revoked the ruling given during the mediation proceedings, G went back to live with her, where he lives to date. She recounts how initially Defendant tried to throw his weight around with the result that the school agreed that G should not be returned to the mother and Defendant even filed a missing person report despite the fact that he was informed that G had left home and had gone to live with her. Defendant filed an application before the Family Court which was rejected and the son's school only agreed to send G with her after two weeks, after she threatened legal action. One time the school also refused to send G with her after school even after he started living with her until the Police intervened. She states that the school always acted in favour of the father because of his position.

She explains that Defendant was acting terribly after the Court of Appeal decision, taking it out on G by refusing to pay certain school services for him such as warm meals, to the extent that he eventually stopped paying for his schooling. G spent 9 days out of school without an education until the Family Court ordered Defendant to continue to pay the fees. Around mid October 2021 Plaintiff says that she was contacted by Dr Claire Francica from Child Protection Services to attempt access visits and although G was very unsure he eventually started going to see his father, and F finally started visiting her as well. F, however, showed a lot of attitude with Plaintiff and Plaintiff realised that he was very much influenced by his father. Once he was with her and they had to use the bus and he told her *"I'm not poor like you and I don't ride the fucking bus."*

G went to his father's house for the first time on the 14th February 2022 and after the visit he made a note of what had happened, saying:

"I walked into my dad's house with Claire, our therapist. My dad awkwardly greeted me. Then the maid made me feel uncomfortable, saying, "didn't you miss us" over and over again, which felt intrusive. Then my dad asked me to talk upstairs, leaving Claire alone downstairs for 90 minutes with the maid. When we sat down, my dad started questioning why I left that day and how I hurt his feelings, and F's, and my grandparents, and H's. It felt like a guilt trip. He said I ruined his Christmas and proceeded to tell me if I think I would get friends if I acted like that. He then called me my mums little spy. Saying I was old enough to make my own decision. I asked him whether he thought I was forced to live with my mum. He said yes that some part mummy made me live with her and told me, "do you know who paid for your school in Spain in Germany and Malta? It's me!" He said the embassy did not pay for school, but it came out of his own pocket. After that lecture, he told me he would get my gifts. He came back with one half-empty bag, which was strange since I had asked for a keyboard piano then he told me he was only going to give me these little gifts and the only way I would get my other gifts was if I called and apologised to my grandparents for leaving and apologise to H, his girlfriend. Then we had to have a group reunion with my grandparents, him and H, Only then I would only get my other gifts, and I could only use them when I saw him at his house. I asked about my birthday gifts. He told me the same. Then asked why he or F wasn't invited to my birthday party. Then he started to do the same thing again, making me feel small and bad. It was a horrible and painful 90 minutes. I was very uncomfortable, then we went downstairs, and I put my shoes on. Before leaving he asked me to kiss him."

While G was with his father, Plaintiff says that she spent time with F at a café celebrating St Valentine's Day together. They spoke a lot and enjoyed quality time together and were both very happy. She says that she kept Dr Francica abreast with what was going on and that she had a very good relationship with her. In March 2022 it was Dr Francica herself who told Plaintiff that F was diagnosed with Oppositional Defiance Disorder but that he kept the diagnosis secret from her. It was at this time that Dr Francica started pushing for G to start sleepovers at his dad and G categorically refused sleeping over at his dad. Dr Francica did not take this well and in fact she emailed Child Protection Services and told them she was not able to continue with her services because of the arguments between the parents. She says that Defendant denies that F needs help when even Child Protection Services and Dr Francica have told him that he needs to be seen by a psychiatrist and that he yearns the nurturance and love of his mother, although he simultaneously seeks the approval of the father.

2. Testimony of Inspector Brian Xuereb¹⁴ who exhibited two reports filed with the police as follows:
 - a. Copy of Report filed on the 17th December 2021 by Defendant;¹⁵
 - b. Copy of Report filed on the 5th February 2021 by A B;¹⁶

Inspector Xuereb explains that he was only involved in the incident of the 17th December 2021 in which Defendant had reported that it could be that someone took his son. He explains that at first he wanted to file a

¹⁴ Sitting of the 4th May 2022 a. fol. 66.

¹⁵ Fol. 68.

¹⁶ Fol. 72.

report of a *missing person* but then the discussion developed and it emerged that it could be that his son is at his mother. This is what Defendant said himself. He continued that it then emerged that Dr Robert Thake, Plaintiff's lawyer, had sent him an email before Defendant went to file the report and in the email the lawyer had told him that his son is with his mother. The Inspector told Dr Thake to speak to the mother who in turn went to the Police Station with her son and fully cooperated with the Police. From their end the Police saw that everything was fine and informed the Parties that the matter was of a civil nature and that therefore they will not get further involved in it.

3. Testimony of psychotherapist I J¹⁷ who states that when Plaintiff was referred to him she was in a state of sadness, stress and nostalgia. It was the time when her sons were not living with her. He says that he started seeing her once a week, working on some coping skills and existential thoughts and she started improving. He says that she started understanding that the universe is random and when you accept things that is a coping mechanism in itself and one moves forward when one understands that. He explains that he worked with her mostly when she did not have the children with her and that he helped her cope with events she had no control of.

He says that when one of her sons went to live with her she was a completely different person. He says that when she used to attend for supervised access visits with the other son her concern was that he was not well looked after mentally and emotionally because he rebels etc. He confirms that she has no personality disorder and that she loves her children a lot and has a certain

¹⁷ Sitting of 4th May 2022 a. fol. 75.

passion towards her children and is capable of taking care of them.

4. Testimony of Ignatius Zammit¹⁸ in his capacity as Director of Bel Air Estate Properties who states that Plaintiff is one of their agents and specifies that she is a letting agent, so she has flexible hours and goes to work at flexible times. She is also able to work from home. Her work is commission based and she does not have a salary.

5. Testimony of Dr Alexia Aquilina¹⁹ in her capacity as Assistant Registrar Civil Courts and Tribunals who lodges before the Court the following judgements/decrees which resulted from her searches in the names of the Parties:
 - a. Warrant of prohibitory injunction made by Defendant against Plaintiff against the departure of their son G from the Islands;
 - b. Court of Appeal judgement in the names C D E vs Joanna B (Application No. 135/2021/1JPG)

6. Testimony of K L,²⁰ Director of Wellbeing within Verdala International School, who confirms that both boys attend school regularly, well dressed, with lunches, they submit their homework and do their work. She states that academically they are doing fine, they are average students, following mainstream classrooms. She mentions an incident when the school provided a laptop device to G as his was broken and she says that “*I-istudenti li kienu jagħmlu, li meta jużah they don’t log out allura hu seta’ jaċċessa l-password u ċertu dokumenti ta’ profiles tat-tfal u sibnilu dokument bil-password ta’*”

¹⁸ Sitting of 4th May 2022 a. fol. 77.

¹⁹ Sitting of 4th May 2022 a. fol. 78.

²⁰ Sitting of 4th May 2022 a. fol. 130.

numru ta' studenti u għalliema waħda."²¹ She says that the school took action on it and she concludes that this was done more out of deviousness than maliciously. Asked about issues regarding fees, she confirms that there was an instance when fees were not being paid and therefore a legal letter was sent saying the children would have to be disenrolled until fees are paid.

3. Legal principles applicable to the case

The Court deems it necessary to start the delivery of this judgement with a declaration regarding cases like the present case where minor children are involved and decisions need to be taken in their regard. It emanates from the law and is uniform in all local and foreign jurisprudence that the Courts decide cases of care and custody by taking into account primarily the best interests of the children and promoting always their welfare. In fact, Article 3(1) of the Convention on the Rights of the Child²² states that:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Although the Courts listen to the parents and the evidence adduced by them, it primarily gives attention to the rights of the children even before those of the parents. The Court needs to be convinced that the best interests of the children are being protected and are being given paramount consideration. The European Court of Human Rights affirms

²¹ Fol. 130.

²² The Convention on the Rights of the Child (CRC) is the most universally accepted human rights instrument, ratified by every country in the world except two. The Convention incorporates the full range of human rights - civil, political, economic, social and cultural rights - of children into one single document. The Convention was adopted by the UN General Assembly on 20 November 1989 and entered into force in September 1990.

in the case **Sahin vs Germany [GC]**,²³ that the child's best interests may, depending on their nature and seriousness, override those of the parents.

The Court of Appeal, in the judgement **Sylvia Melfi vs Philip Vassallo**,²⁴ stated that *"The Court should at all times seek the best interests of the child irrespective of the allegation, true or false, made against each other by the parties. Such allegations often serve to distance oneself from the truth and serve to render almost impossible the search of the Court for the truth. This is why it is the duty of the court to always look for the interests of the child. Exaggerated controversies between the parties often make one wonder how much the parents have at heart the interest of their children. Sometimes parents are only interested at getting at each other and all they want is to pay back the other party through their minor child."*

Also in **Bounab Lanouar noe vs Attorney General et**²⁵, the Constitutional Court noted that where there is a conflict of interest between the right of the parents and the interests of the children, it is the latter that will prevail. This reflects the paramount status given to the notion of best interests.

Care and custody of children in marriage is well defined in Article 3B of Chapter 16 of the Laws of Malta which provides as follows:

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

²³ No. 30943/96, § 66, ECHR 2003-VIII.

²⁴ Decided on the 25th of November 1998.

²⁵ Decided on the 27th of February 2004.

This reflects that said in Article 18 of the Convention on the Rights of the Child which states:

“States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.”

In cases where the parents are no longer in a relationship, the Parties themselves, or the Court if the Parties cannot reach agreement, need to decide who shall be entrusted with the children’s care and custody. Article 56 of Chapter 16 in fact states:

“(1) On separation being pronounced the court shall also direct to which of the spouses custody of the children shall be entrusted, the paramount consideration being the welfare of the children.”

In the judgement in the names of **AB vs CD** decided on the 23rd of February 2018, the Court affirmed that it has the power to entrust the care and custody of a minor solely in the hands of one of the parents if this is in the minor’s best interests, in accordance with Article 56 of Chapter 16, and that while the parents’ rights is a relevant consideration, the child’s best interests are the Court’s primary consideration.

The Court considers a number of factors when deciding which parent should be entrusted with the custody of children; however the Court deems it necessary to emphasize that minors of all ages need stability and cases of care and custody many a time rock children’s stability to the core. The Court gives importance to the fact that if the parents are deemed fit, the presence of both parents is vital in their

children's lives, together with a sense of stability and calm. In the publication *A judge's guide – Making Child Centred Decisions in Custody Cases*²⁶ the author lists a number of competing interests when there is a relocation of the child, these being:

- *The child's right to stability and meaningful regular contact with both parents;*
- *The custodial parent's right to move on with his life after divorce without interference and potentially costly litigation;*
- *The non-custodial parent's right to continue to have a meaningful contact with his or her child after divorce.*

It emanates from the same Article 3B of Chapter 16 that it is the parents' obligation to also maintain their children. The quantum of this obligation of a child's maintenance is calculated according to the parents' means, and the criteria set out in article 20 of Chapter 16.

Article 20 provides that:

“(1) Maintenance shall be due in proportion to the want of the person claiming it and the means of the person liable thereto.

(2) In examining whether the claimant can otherwise provide for his own maintenance, regard shall also be had to his ability to exercise some profession, art, or trade.

(3) In estimating the means of the person bound to supply maintenance, regard shall only be had to his earnings from the exercise of any profession, art, or trade, to his salary or pension payable by the Government or any other person, and to the fruits of any movable or immovable property and any income accruing under a trust.

²⁶ American Bar Association, September, 2001.

(4) A person who cannot implement his obligation to supply maintenance otherwise than by taking the claimant into his house, shall not be deemed to possess sufficient means to supply maintenance, except where the claimant is an ascendant or a descendant.

(5) In estimating the means of the person claiming maintenance regard shall also be had to the value of any movable or immovable property possessed by him as well as to any beneficial interest under a trust.”

In the judgement in the names **Georgina Schembri pro et noe vs Dino Schembri**²⁷, the Court held that: “*L-obbligi ta’ manteniment tal-konjugi huma regolati bl-artikolu 3 tal-Kap 16...jirriżulta mid-disposizzjonijiet tal-Liġi, li l-ġenituri għandhom l-istess obbligi versu l-ulied tagħhom, u għalhekk it-tnejn li huma għandhom jikkontribwixxu għat-trobbija tal-istess, aktar u aktar meta illum il-miżewwġin huma f’posizzjoni ta’ ugwajanza u għandhom l-istess drittijiet, u allura anke skont l-artikolu 2 tal-Kap 16, “jerfgħu responsabbiltajiet indaqs matul iż-żwieġ tagħhom” (Ara Eoll Jennifer Portelli pro et noe vs John Portelli (Rik Nru 2668/1996) deċiża fil-25 ta’ Ġunju 2003).*”

After parents separate, children should not bear the brunt of the situation and should maintain a similar lifestyle to that enjoyed when the parents were together, still based on the principles of Article 20 of Chapter 16.

The right of the child to maintenance is in fact enshrined in Article 27 of the Convention on the Rights of the Child which states:

“1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

²⁷ Decided on the 28th November 2002.

2. *The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.*

3. *States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.*

4. *States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.”*

When deciding on maintenance our Courts are also sensitive to the fact that the party having the custody of the children has less time to dedicate to work and that such party would have limitations with regards to career prospects because of the minors who depend on them. In fact in the case **Marthese Vella pro et noe vs George Vella**²⁸ the Court said: *“Illi din il-Qorti, tghid illi dan hu hekk in principju, però jista’ jkun li jkun hemm kazijiet fejn minhabba c-cirkostanzi tal-kaz, il-genitur li jkun afdat bil-kura u l-kustodja tal-minuri ma jkunx jista’ jahdem u dan minhabba li jkun irid jippresta l-attenzjoni u l-kura tieghu ghat-trobbija ta’ l-imsemmi minuri.”*

²⁸ Decided by the Court of Appeal on the 22nd February 2003.

4. Application of the Legal Principles to the present case

In the present case it emerges that the Parties divorced in 2018 and came to Malta in 2020 where they are today residents on the Islands together with their two sons. Defendant is a member of the diplomatic corps of the Kingdom of Spain and was given a position within the Embassy of the Kingdom of Spain in Malta. It transpires that before the Parties came to Malta, Plaintiff gave Defendant what she calls a temporary power of attorney and what Defendant calls a judgement by the Schoneberg District Court, Family Section in Germany, for the children to reside with Defendant wherever he resides because of Plaintiff's long periods travelling to India. Plaintiff contends that she never relinquished their care and custody.

In April 2021, Defendant filed proceedings before the Civil Court (Family Section), as differently presided, to have the decision of the Schoneberg District Court of 6th May 2020 recognised in Malta. The Family Court decided by means of a judgement of the 29th July 2021 to uphold the applicant's request and ordered that the judgement of the German Court of the 23rd February 2018 be recognised and enforced for all intents and purposes of law, and ordered that the minor G be returned to the father with whom he shall reside. Defendant subsequently lodged an appeal on the 27th August 2021 and on the 9th December 2021 the Court of Appeal overruled the judgement of the First Court and rejected applicant's request for the recognition and enforcement of the document which Plaintiff refers to as a decree issued by the German Court. The mother therefore sought to take back with her the minor G.

Plaintiff started these proceedings on the 6th December 2021, demanding to obtain the care and custody of both her sons and what follows is a battle between the two parents who

completely fail to agree who should be entrusted with the care and custody of their children. It is to be pointed out that at this point the boys are 16 and 14 years of age. It emerges that prior to this case being lodged, pending the above mentioned appeal, when the minors were residing with the father and the mother enjoyed visitation rights, the father was abusing from his right to diplomatic immunity and refusing to give the mother visitation, until a judgement of the Family Court of the 10th September 2021 waived Defendant's right to diplomatic immunity in respect of a warrant of prohibitory injunction. After an incident which happened during supervised visits with the mother on the 8th November 2021 it was agreed that visitation is exercised separately i.e. the minor sons meet their mother separately.

This changed once the Court of Appeal overruled the judgement of the First Court and G returned with the Plaintiff.

Unfortunately, the Defendant is in a state of contumacy in these proceedings and therefore the Court can only consider the evidence brought forward by the mother. One is to point out that this does not in any way imply that the Court will accept what the mother says in her evidence without questions where necessary – the Court still has to evaluate, with the evidence it has before her what is in the best interests of the children. As said in the case before the Court of Appeal in the names **Spiridione sive Dione Farrugia vs Awtoritàtal-Artijiet**²⁹

“15. Fi kwalunkwe każ, jinħass xieraq li jiġi ppreċiżat li, kif jirriżulta mill-konsiderazzjonijiet tal-ewwel Qorti, ċertament hija ma qisetx l-kontumaċja tal-konvenuta bħala aċċettazzjoni tat-talbiet attriċi u jingħad ukoll li wara li l-ewwel Qorti qieset il-provi mressqa mill-attur, waslet għall-konklużjoni li kellha biżżejjed provi miġjuba quddiemha sabiex tiddeċiedi li tilqa' t-talbiet tal-attur. Effettivament din il-Qorti rat il-kopja tal-

²⁹ Decided by the Court of Appeal on the 22nd June, 2022 (Applic. Number 1058/19/1 MH).

kuntratt esebit in atti meta originarjament ingħatat il-konċessjoni enfitewtika, permezz tal-kuntratt ta' enfitewsi tal-4 ta' Mejju, 1949, fl-atti tan-Nutar Dr. Paul Pullicino, kif ukoll il-kuntratt ta' diviżjoni tad-19 ta' April, 2018, fl-atti tan-Nutar Dottor Nicholas Briffa, li bih l-attur ġie assenjat l-għalqa in kwistjoni, u ma ssib xejn x'tiċċensura fid-deċiżjoni tal-ewwel Qorti li kienet sodisfatta bil-prova tat-titolu.”

However, once his state of default was declared and confirmed on Appeal, the Defendant cannot now try and bypass this by quoting evidence in his note of submissions, which was not presented in the case because of his state of default, or to documents which were illicitly lodged in these acts in defiance of his state of contumacy, with the legal effects this brings with it. Such documents and such submissions cannot and will not be considered by the Court at this stage, and the Court deplores Defendant's behaviour in this respect.

Now, it has emerged clearly from the evidence adduced that Plaintiff has the well being of her children at heart. This emerges clearly to the Court when one considers that even though she was divorced from Defendant she re located to Malta when he brought their children here. Since she returned to Malta in December 2020 she has constantly fought for them in court, mainly through this present case. When she was abroad she had herself realised that the children were always alone when she used to *face time* them and left to their own devices.

Her psychotherapist describes how Plaintiff manifested emotional upset in a time when she was separated from her children, and how this changed when G went to live with her. When asked directly if there is anything which hinders Plaintiff from being capable of taking care of her children the psychotherapist answers “*Eżatt jien ma rajt l-ebda personality disorder, se nitkellew bil-jargon tiegħi u għaldaqstant hija*

mara normali, equal, taken into consideration, lit-tfal tħobbhom ħafna, għandha ċertu passjoni lejn it-tfal...Kapaċi tieħu ħsiebhom, m'hemm xejn jihhinderjaha."³⁰

The copy of the report of the Directorate of Child Protection Services dated 12th November 2021, drawn up after an incident which happened after the mother had a session of supervised visitation with both her children, shows in a number of ways that the mother is a caring parent who is striving to be a good mother even when she is not being respected. The report states that G was interacting well with his mother and looked happy while F refused to interact and was acting in an aggressive way. He was also very anxious, upset, enraged and highly provocative. When he refused in any way to co operate, his mother exasperated, as she had tried everything, told him to at least put the volume on his mobile down and he refused. She took it away from him and he became physically and verbally abusive.

Throughout the incident, one where the mother was obviously provoked and hurt, the report states that the mother "*tried her best to interact with both children equally although F was continuously pushing her away and provoking her from the start of the SAV.*"³¹ After she had tried everything in her will to interact with her sons by playing the board game that they themselves had brought with them and F kept refusing, "*He then took his phone out of his pocket and although A was not happy about this, she simply asked him to put it away in a very respectful and calm manner.*"³² Therefore in all this provocation she remained composed with him and was trying her very best at being an exemplary mother. F was being rude also with the social workers present. When Plaintiff had tried everything in her will to no avail, she took F's phone and at that point "*F snapped at her and yelled that the phone*

³⁰ Fol. 75.

³¹ Fol. 123.

³² Fol. 125.

belongs to him and that she has no right to take it whatsoever. He even screamed 'don't dare touch me!' This behaviour escalated very quickly and the SSW called the police in the corridor at Appogg, even though SSW's and police tried to separate them to avoid injuries but F yelled even louder and even called his mother an 'asshole' and 'useless' in front of everyone. Both SSW's and the police tried to calm them down however F wouldn't stop and was extremely enraged by the fact that his mother would not give him back his phone."³³

The reaction of the father to all this did not in any way show that he was bothered in the least either by the behaviour of the minor nor with the utter disrespect he showed to his mother or the social workers. Neither can the father's sarcastic comments in this episode go unnoticed.

It is this attitude that lends further credibility to Plaintiff's allegations that Defendant would refuse to take F for visitation, claiming diplomatic immunity. The mother says in her affidavit that she used to go and wait nonetheless in the hope that he brings the minors, almost at his mercy of doing so. In her affidavit she says "*For the first 14 sessions, over a depressing period of two long months, I went to Appogg twice a week only to find that C was refusing to bring my children to see me despite the court order. I would take the bus from Mellieha and need to return home, lasting three hours or more, twice a week. I knew full-well that there was a good chance that I would be going for nothing but my desire to see my boys was naturally overpowering. I sat there alone for 30 minutes each time, waiting. It was heart-breaking.*"³⁴ This was definitely not the behaviour of a father who wanted to best for his children as otherwise he would do much better than to show such disrespect and almost cruelty towards the mother.

³³ Fol. 125.

³⁴ Fol. 109.

In his note of submissions, Defendant says that by claiming diplomatic immunity he was just invoking his rights at law, however the law is not intended to be used and abused of to keep children away from their parents for no good reason (if Defendant had any concern about the mother's ability to take care of her children this concern was catered for as these were supervised visits). Furthermore, the least he could have done is to advise the mother from beforehand that he was not bringing the children. No wonder then the mother says that when F started visiting his mother again he was arrogant with her and when they had to catch the bus he said *"I'm not poor like you and I don't ride the fucking bus."*³⁵ It is clear that the attitude of the father was being reflected on the behaviour of the children even towards their mother when there is no doubt she was trying to do her best for her children. This same attitude of the father is reflected in a write up which G wrote after the latter went over to his dad for the first time on the 14 February 2022 when after the visit he wrote the following:

"I walked into my dad's house with Claire, our therapist. My dad awkwardly greeted me. Then the maid made me feel uncomfortable, saying, "didn't you miss us" over and over again, which felt intrusive. Then my dad asked me to talk upstairs, leaving Claire alone downstairs for 90 minutes with the maid. When we sat down, my dad started questioning why I left that day and how I hurt his feelings, and F's, and my grandparents, and H's. It felt like a guilt trip. He said I ruined his Christmas and proceeded to tell me if I think I would get friends if I acted like that. He then called me my mums little spy. Saying I was old enough to make my own decision. I asked him whether he thought I was forced to live with my mum. He said yes that some part mummy made me live with her and told me, "do you know who paid for your school in Spain in Germany and Malta? It's me!" He said the embassy did not pay for school, but it came out of his own pocket. After that lecture, he told me he would get my gifts. He came back

³⁵ Fol. 111.

*with one half-empty bag, which was strange since I had asked for a keyboard piano then he told me he was only going to give me these little gifts and the only way I would get my other gifts was if I called and apologised to my grandparents for leaving and apologise to H, his girlfriend. Then we had to have a group reunion with my grandparents, him and H, Only then I would only get my other gifts, and I could only use them when I saw him at his house. I asked about my birthday gifts. He told me the same. Then asked why he or F wasn't invited to my birthday party. Then he started to do the same thing again, making me feel small and bad. It was a horrible and painful 90 minutes. I was very uncomfortable, then we went downstairs, and I put my shoes on. Before leaving he asked me to kiss him."*³⁶

Unfortunately, there seems to be a pattern that Plaintiff invokes his rights at the expense of others, with the result that both Plaintiff and his own sons are at his mercy and their welfare compromised. In fact he did not think twice about not paying the school fees with the result that his sons were out of school for a number of days. If there was a dispute with the mother, this was not going to be solved by putting it on the children, embarrassing them and keeping them away from school for a number of days. This incident is confirmed by Ms K L, Director of Wellbeing at Verdala International School³⁷ and from the emails of the Financial Controller exhibited.³⁸ He also went so far as "*entering into a restricted aread and blocking the passage of 25 busses and 300 kids who ere on their way home. The situation persisted for 15 to 30 mins and a number of minor were left scared due to the behaviour shown.*"³⁹ In fact the minor G himself shows fear in the messages exhibited where he repeats to his mother that she should not show his father that he is speaking to her.⁴⁰ It is

³⁶ Fol. 111.

³⁷ Sitting of the 4th May 2022 a. fol. 130.

³⁸ Fol. 44.

³⁹ Email by Head of School a. fol. 194.

⁴⁰ Messages exhibited with Plaintiff's affidavit a. fol. 115.

clear that Defendant further uses his position to put pressure in the situation and this also emerges from the transcript of evidence of Steve Libreri⁴¹ exhibited by Plaintiff whereby Mr Libreri confirms that they were contacted by the Spanish Agency and the Ministry for Foreign Affairs to give the case priority.

Added to this is the reaction Defendant shows to how authorities deal with situations. After the incident at Appogg whereby F was being abusive towards his mother all the father had to say, sarcastically, to the social workers was “*so couldn't you handle this situation?*” with no inkling towards showing some type of concern regarding his son's behaviour and where this is stemming from. It nearly seems that Defendant was proud of such reprehensible behaviour. Same for the situation at school. In one of his replies, Defendant refers to the “*mishandling of the situation by the school authorities*”. Rebelling against the authorities, as was also done in these proceedings, when Defendant is late with deadlines or does not obtain what he wants definitely does not help his own sons learn to deal with situations in life and handling them maturely and does not arm them with the right tools in humbly tackling situations which they may come across in life. Defendant also refuses to refer his son F to a professional seeing that he was diagnosed with a disorder and that his behaviour was difficult and Dr Claire Francica herself who Plaintiff says was appointed by him, had suggested this.

Furthermore, the Court cannot ignore the testimony of Steve Libreri, from which results that Defendant was not averse of abusing his position as a diplomat, and use the services of the Embassy he worked for, in order to exert pressure and demand that the minor G be brought to the Embassy, under

⁴¹ Evidence of Steve Libreri, Director of the Child Protection Services, exhibited with Plaintiff's affidavit a. fol. 114.

the pretext that said minor was a Spanish citizen, and so the Embassy wished to see him.

Given all the above, the Court has no hesitation in concluding that Defendant is manipulative, using the minor children in his personal battle with ex-wife, plaintiff, and clearly does not have the best interests of the children at heart. From the evidence adduced, the Court is furthermore convinced that Defendant has influenced and exerted pressure on the children, using money and his spending power as his leverage over the children, including refusing to pay school fees, with the consequence that the children were booted out of school until fees were settled.

As stated time and again, joint care and custody in these type of cases is far from ideal, especially in this case where the parents are at such different wavelengths and many times also residing in different countries. In the case **Miriam Cauchi pro et noe vs Francis Cauchi**,⁴² the Court of Appeal stated that *“tiskarta t-talba għall-kustodja kongunta għax, bhala sistema, mhux prattikabbli meta l-genituri ma jtkellmux bejniethom”*. This reasoning was elaborated in the case **Scott Schembri vs Dorianne Polidano**,⁴³ where the Court insisted that *“filwaqt li tiddikjara li taqbel ma’ tali pronunzjament izzid illi l-istess principju japplika fejn iz-zewg genituri m’humieq kapaci jtkellmu b’mod civili ma’ xulxin li l-kura u kustodja ma għandhiex tkun kongunta għaliex immankabilment tkun sors ta’ litigji ulterjuri b’detriment serju għall-benessere tal-minuri”*

The case continues saying *“Li wiehed jgħid li f’din il-kawza l-partijiet mhux jiftehemu huwa “understatement”. Il-Qorti tara li jekk tikkonferma d-decizjoni tal-ewwel Qorti f’dan l-aspett tkun qed tagħti lok għal hafna disgwid li ma jfisser xejn għajr hsara lill-minuri, speċjalment jekk kif jista’ jigri fil-hajja ta’ kull*

⁴² Decided on the 3rd October 2008 (App. Number. 2463/1999/1).

⁴³ Decided by the Civil Court (Family Section) on the 30th April 2015 (Sworn Applic. Number 277/2012 RGM).

bniedem ikun hemm bzonn ta' decizjonijiet mgħagħla u urgenti f'dan ir-rigward. Certament għalhekk tali sitwazzjoni ma hija prattikabbli xejn fil-kaz in ezami.”

In the case **AB vs CD**⁴⁴ in fact the Court said that *“Il-Qorti għaldaqstant, għandha s-setgħa illi jekk ikun fl-añjar interess tal-minuri, tafda wieñed biss mill-ġenituri bil-kura u l-kustodja tal-minuri u dana ai termini tal-Artikolu 56 tal-Kodiċi Ċivili.*

Furthermore, the Court does not believe that it is healthy for the children to be separated. The siblings in this case have passed through enough turmoil because of their parents' squabbles and have had to suffer in that they were not only separated but have suffered sibling rivalry in the situation. Plaintiff's lawyer, in his oral submissions, confirms that the minors are now on good terms together. In the ECHR case in the names **Mustafa and Armagan Akin vs Turkey**⁴⁵ the Court stated that *“In the present case the Court considers that the decision of the Ödemiş Court separating the two siblings constituted an interference with the applicants' right to respect for their family life. It not only prevented the two siblings from seeing each other, but also made it impossible for the first applicant to enjoy the company of both his children at the same time.”* Therefore it is emphasised that the right of the child to their family life is shown to be respected with a decision not to separate siblings.

Having seen the evidence adduced before it, the Court in fact feels that both minors should reside with the mother here in Malta where they have now settled at school, and with their mother who definitely has their best interests at heart. The children should not be relocated once again with the father and it is the father who should make the time to visit them and exercise visitation. The children would benefit from a settled

⁴⁴ Decided by the Civil Court (Family Section) on the 23rd February 2018 (Sworn Applic. Number 39/17).

⁴⁵ Application Number 4694/03, 6th April 2010.

life with their mother and the mother who should see to their every need and exercise care and custody according to law. The Court has reached this conclusion on the basis of what it deems to be in the best interest of the child, and following its evaluation of both parties in this judgment. Furthermore, the mother seems to have a stable job, whereas Defendants profession does not keep him rooted in one place, and such instability would be detrimental for the wellbeing of the children.

The Court feels that the mother should have exclusive care and custody and should take ordinary decisions alone while she should seek the consent of the father for extraordinary decisions as long as he remains in Malta. Should Defendant relocate, Plaintiff should take ordinary and extraordinary decisions herself without seeking consent from Defendant.

Now, Plaintiff, in her second demand, demands alimony for the minor children. The Court, however, notes that no evidence has been adduced as to the needs of the children, and the income of both parties.

In the circumstances, the Court shall liquidate this amount to be three hundred (300) Euro for each child, until said child reaches the age of eighteen (18), or the age of twenty three (23) if he continues studying, or until such date a child may begin to work, if before the ages of eighteen (18), or the age of twenty three (23). In addition, Parties are to divide between them costs relating to the children's health, whereas educational costs shall be shouldered by the Defendant.

DECISION:

The Court hereby decides to:

1. Uphold the first demand, and awards the care and custody of the minor children unto the Plaintiff with their habitual residence being established in Malta, and further determines that Defendant shall enjoy visitation with the following modalities:

Tuesdays and Thursdays from 6.30pm to 8pm
Alternate Saturdays or Sundays, from 11am to 6pm

Should the children have any activities which clash with the times of visitation, the mother has to agree with the father on an alternative day for visitation to be availed of.

Orders that the passports of the minors be lodged in the Registry of this Court and should either party intend to travel with either or both minor children such party shall seek authorisation of this Court for such travel.

2. Upholds the second demand and liquidates maintenance for which Defendant is liable to the amount of three hundred (300) Euro for each child, until said child reaches the age of eighteen (18), or the age of twenty three (23) if he continues studying on a full time basis, or until such date a child may begin to work, if before the ages of eighteen (18), or the age of twenty three (23). In addition, parties are to divide between them costs relating to the children's health, whereas educational costs shall be shouldered by the Defendant, which are exigible by the party shouldering the cost from the other party by means of an even informal call for recovery, and upon presentation of the relative receipts.
3. Upholds the third demand, and decides that on the special occasions listed below, visitation shall be

carried out as follows, with an alternation in the second year, unless otherwise provided:

- a) *Father's Day – always with the father from 11am to 6pm;*
- b) *Mother's Day – always with the mother;*
- c) *Christmas Eve and Christmas Day – Christmas Eve with the father from 4pm to 11pm, Christmas Day with the mother;*
- d) *New Year's Eve and New Year's Day – New Year's Eve with the mother, New Year's Day with the father from 11am to 6pm;*
- e) *Easter Sunday, for the first year, visitation in favour of the father between 11am and 4pm;*
- f) *The father's birthday - always with the father from 11am to 6pm;*
- g) *The mother's birthday - always with the mother;*
- h) *The child's birthday – visitation in favour of the father between 11am and 3pm if the birthday is on a weekend, school or public holiday, otherwise between 6pm and 9pm, if the birthday is on a weekday which is not a school holiday for the first year, and then again every alternate year;*
- i) *Public holidays – always with the mother, save if it happens to be the birthday of one of the children.*

All costs of these proceedings to be charged unto Defendant.