CIVIL COURT

(FAMILY SECTION)

MADAM JUSTICE

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

Today 28th October 2024

Sworn Applic. No.:224 /2020 JPG

Case No.: 19

AA

vs

FA

The Court

Having seen the Sworn Application of AA dated 4th December 2020, a fol 1, which reads as follows:

1. *That the parties married on the fourteenth of October of the year two thousand and seventeen (14.10.2017) from which a minor child HA was born on the X (see marriage certificate and birth certificate hereby attached and marked as Dok A and Dok B respectively);*

2. *That the Defendant is an aggressive and violent person towards the applicant, that in fact she had to leave Denmark for her own safety, as at that time she was pregnant with the minor child;*

3. *That since the Defendant resides in Germany the applicant was authorised by this Honourable Court in the acts of Letter Mediation No 1064/2019 to notify him through*

the Office of the State Advocate in terms of the European Regulation No. 1393/2007 (see. Dok. C);

4. *That the applicant opened mediation procedures and the parties have been authorised to proceed at this instance by virtue of a court decree of this Honourable Court dated twentieth of October of the year two thousand and twenty (20.10.2020)(see court decree hereby attached and marked as Dok D);*

5. *That the facts here declared are known personally by the Plaintiff;*

For these reasons the Plaintiff contends, saving any necessary and opportune decisions, why this Honourable Court should not:

1. *Pronounce the personal separation between the parties on the ground of domestic violence, excesses, cruelty, and threats, amongst other valid grounds at law, committed by the Defendant, and consequently authorises the Plaintiff to live separately from the Defendant;*

2. *Order Defendant be deprived of his parental authority in terms of Articles 154 of the Civil Code, and this in the best interest of the minor children;*

3. *Decides that the exclusive care and custody of the minor child HA be awarded to the Plaintiff and authorises her to take any decisions relating to the minor child, including those relating to the health, religion, issuing of passports, residence permit, travel, and education of the minor child without the Defendant's consent;*

4. *Orders that the minor child resides with the Plaintiff, and orders that the Defendant does not have access towards the minor child according to the Civil Code since he abandoned her;*

5. *Determined and liquidates an adequate amount of maintenance which should be payable by the Defendant to the minor child and which should remain payable until the*

minor child HA reaches the age of eighteen (18) years if the minor child stop pursuing her studies and start working on a full-time basis or payable up to the age of twenty-three (23) years if the minor child decides to pursue her studies on a full-time basis; as well as ordering that the maintenance be deducted directly from the salary or income of Defendant or work of any other benefits that he would be receiving and deposited directly in a bank account that is to be indicated by the Plaintiff and further provides how the said maintenance is to be reviewed and increased yearly so that it reflects the increase in cost of living, as well as ordering that the Plaintiff receives any benefits relating to the minor child, including but not limited to the children's allowance in it's entirety;

6. *Orders the Defendant to pay all health and education expenses of the minor child, including but not limited to uniforms, transport, donations, stationary, private lessons and any other expenses related to the education, including expenses related to extra-curricular activities. In the absence, orders that these expenses are reflected in the sum of maintenance;*

7. *Orders that the Defendant pays arrears of maintenance towards his minor child HA as well as ordering him to pay all arrears of health, education and any extra-curricular expenses;*

8. *Orders the cessation of the existing community of acquests between the parties; liquidates the same community of acquests and orders that the objects forming part therein are divided in two portions as ordered and established by this Honourable Court, which portions are assigned one to the Plaintiff and the other to the Defendant, and this by the appointed experts and by appointing a notary to receive the relative acts and a curator to represent the Defendant if he is contumacious on the same act;*

9. *Orders that the Defendant has given cause to separation as found in article 48 et seq of Chapter 16 of the Laws of Malta and applies against him all the articles or in part the dispositions of article 48, 51 and 66 of the Laws of Malta;*

10. *Declares which are the paraphernal movable and immovable acts of the Plaintiff as will be proven during the case whilst also ordering and condemning the Defendant to restitute to the Plaintiff all her paraphernal things and this in a short and peremptory time given by this Honourable Court;*

11. *Appoints a curator to represent the Defendant in case he is contumacious in the relative acts of division at a time and place as established by this Honourable Court;*

12. *Order the allegation of the Acts of the Letter of Mediation number 1064/19 VZ;*

13. *Authorises the Plaintiff to register the eventual judgment of this Honourable Court in the Public Registry of Malta;*

With costs and interests against the Defendant, including those relating to the Letter of Mediation No. 1064/19 VZ, who is demanded for a reference on oath.

Having seen the Note of the State Advocate dated 1st June 2021 a fol. 35 by means of which the State Advocate exhibited a "Certificate of Service"; Having seen that the Defendant had not been duly served; Having seen that another attempt of service also resulted in the negative; Following a request by the Plaintiff on 13th March 2023 (fol. 158), this Court ordered the appointment of Deputy Curators for the Defendant and thus Dr Sue Mercieca and PL Gillian Muscat were appointed Curators on the 26th of July 2023;

Having seen that the Deputy Curators filed a sworn reply on behalf of the absent Defendant on the 25th October 2023: wherein it was stated that the facts of the case are not known to them and they reserve the right to file exceptions should they establish contact with Defendant. (Vide page 183)

Having heard the depositions given under oath;

Having seen all the documents exhibited and all the case acts;

Having seen that the Deputy Curators failed to produce evidence on behalf of the Defendant and failed to file a note of final submissions in spite of the fact that the Court gave them the faculty to do so;

Considered:

1. The Present Cause:

This is a judgment pronouncing personal separation after a request made by the Plaintiff, who states that the irretrievable breakdown of the parties' marriage is solely attributable to the Defendant, and this due to domestic violence, excesses, cruelty and threats.

2. The Version of the Plaintiff and Evidence brought forward by her:

The Plaintiff testified by means of an **affidavit,** (Vide page 271 et seq.) which affidavit was signed and duly sworn in during the pendency of these proceedings. Plaintiff declared that family members had introduced the parties, that they got engaged and married within two months by an Islamic ritual. Since the Defendant had been granted refugee status in Germany, the parties had to reside in Germany. At first the Defendant used to treat her well but everything changed as soon as she informed him that she was pregnant. She used to feel vulnerable but he used to refuse to take her to see a doctor even though she was all alone without family members in Germany. She recounts how the Defendant used to inform his mum and his sisters about everything that the parties used to do and say between them. She had tried to address the financial situation of the parties given that the income of the Defendant was not sufficient to live on. She had offered that she would go out to work even though she was pregnant but he had taken it badly, had started shouting and saying that he was the man and he knew what he needed to do.

Due to the fact that the Plaintiff had Refugee Status in Malta, she could not apply for secondary protection in Germany and so they had to register their marriage in Malta. Defendant refused to allow Plaintiff to apply for official status in Germany under family reunification but he used to insist with her that she applied for secondary protection and if granted any social benefits, she had to pass these on to his family. He stopped her from continuing her studies or to complete the courses available to learn the German language to fulfil the requirements of the status application. Instead he used to insist with her that she was to stay at home to clean and to cook. He used to laugh at her when he used to see her cry and

she was prohibited from going out on her own. They used to spend a lot of time at home since the Defendant was not even employed.

During her pregnancy, the parties travelled to Denmark to regularize their status situation but the legal problems persisted since the marriage contract had not been registered.

The Plaintiff talked to her sister on how fatigue she was feeling during her pregnancy. Her sister sent her money in order for her to go to the doctor and to purchase vitamins but instead Plaintiff used the money to purchase flight tickets to come to Malta. Upon arrival in Malta, the Plaintiff was admitted into hospital as she was very fragile and thereafter she resided with her family until she gave birth to the child. She testified that the Defendant did not call her to check upon the state of her health and never sent her any money. When they used to speak via phone calls, they used to end up arguing because she was in Malta and he was in Germany. He did not even travel to Malta for the birth of his child. He had told her that he would call her during the birth so that he could be with her during the birth but instead he had slept.

A week after the birth, the Plaintiff's brother had called the Defendant so that arrangements be made for the registration of the child's birth in Malta. The Plaintiff's brother had bought flight tickets for the Defendant to enable him to travel to Malta to register the child. When Defendant was in Malta, the Defendant had told the Plaintiff that he wished that he had never met her and had never married her and that he had only wanted to have sexual relations with her. She had felt she could not resist him due to her fragile condition after the birth but she had felt broken on the inside.

The Plaintiff stated that when the parties used to reside together in Germany, there was another woman, who was divorced and had three (3) children, who used to go to the parties' residence quite frequently and the Defendant and this woman would converse in German so that the Plaintiff could not understand what was being said. The Defendant had told the Plaintiff that he wished he had married this woman instead of her. When they used to go out together, the Defendant used to spend the time talking about this other woman and when the Plaintiff had asked him why he had married her, he had answered her that his mother had taken a liking to the Plaintiff and she had asked him to marry her.

The Plaintiff stated after Defendant had travelled to Malta to register their child, the Defendant had returned after six (6) months. The Plaintiff had told him about her desire to live together as a family, even if they had financial struggles. The family of the Plaintiff were covering all her expenses as well as those of the baby.

The Plaintiff went back to Germany and spent four (4) months which months were very difficult as the Defendant used to insult her and look through her mobile to make sure that she was not in contact with any other man. They used to argue a lot and the minor child used to be terrified from the shouting. Despite the fact that the child was awake and needed attention, the Defendant used to insist on having sexual relations with the Plaintiff. He did not want the Plaintiff to continue with her studies, that they live a stable life as a family and that Plaintiff would leave the house unaccompanied. He never felt that the Plaintiff was good enough as a wife. After this period of time, the Plaintiff was determined to return to Malta. After she returned, the Defendant lost interest in the minor child so much so that the child was being raised by the Plaintiff's family and she calls her maternal grandfather "daddy".

In 2019, the Defendant handed over to the Plaintiff the equivalent of a divorce certificate according to the Islamic religion. After this, the Plaintiff decided to file the present proceedings. The Defendant attended two mediation sessions assisted by his legal counsel and he gave his consent for the minor child to attend childcare and even agreed that he would transfer money. They agreed on access when he would be in Malta but he refused to forward maintenance. The last time that the Plaintiff saw the Defendant was when he attended the last mediation session. After that day, he missed two other sessions and then the mediator recommended the closure of the mediation proceedings.

In February 2021, the minor child of the parties started attending Pembroke Primary School. In the following months, the Plaintiff needs to renew the official documents of the minor child as these would soon expire and she could not do this without the father's signature.

Together with her affidavit, the Plaintiff exhibited a copy of the application for refugee status (fol. 276) which status had been rejected. However the Plaintiff was granted Subsidiary Protection until it would be safe for her to return to Syria without any risk. She also exhibited a copy of the written consent of the Defendant so that the minor child of the parties attend nursery school in Malta. (Vide page 278)

The Plaintiff testified before this Court in the sitting of the 29th February 2024 (fol. 280 et seq.) and confirmed the above mentioned testimony, stating that the Defendant was residing in Germany and was receiving social benefits that amounted to around four hundred euro (€400) per month. In the course of her testimony the Plaintiff testified that when she was in Germany, the Defendant had wanted to have sexual relations with her immediately on her arrival, he forced her to have sexual relations with him and had left their one-year old child outside of the room, crying. As soon as they were done, the Plaintiff pushed him away and went running to her child to calm her down.

In order to substantiate her version, the Plaintiff presented the following evidence:

1) The testimony of Dr Christopher Spiteri in representation of T*ransport Malta – Land Transport Directorate*, (fol. 189) exhibited a copy of the records of the parties that showed that the parties neither have nor ever had any vehicles registered on their names.

2) The testimony of Johanna Bartolo, in representation of *Bank of Valletta p.l.c.* (fol. 266) who confirmed that neither of the parties had any banking relations with the bank she represented.

3) The testimony of Joshua Attard, in representation of BNF Bank p.l.c., (fol. 264) who confirmed that neither of the parties had any banking relations with the bank he represented;

4) The testimony of Lindsay Cachia, in representation of APS Bank p.l.c., (fol. 189) who confirmed that neither of the parties had any banking relations with the bank she represented;

5) The testimony of Lorraine Attard, in representation of HSBC Bank Malta p.l.c., (fol. 194 et seq.) who exhibited a copy of the statements of a bank account held in the name of the Plaintiff. These statements show cash deposits in minimal amounts that would then be withdrawn in the days after or spent so the balance remained minimal. From March 2020 to August 2021 (fol. 213) there were deposits made by governmental entities entitled "stipends". As from February 2022 onwards there are deposits made by cheques (fol. 218) in the amount of around a thousand euro (€1000).

6) The testimony of Louis Buhagiar, in representation of Jobsplus, who testified (fol. 245) and exhibited the employment history of the Plaintiff which shows only one employment as a child care worker with the same entity as from February 2022. The witness confirmed that Jobsplus did not have any records relating to the Plaintiff. (fol. 259).

3. Legal doctrine applicable to this cause:

In relation to excesses, it has been established that these consist of:

> ***"tutti quegli atti di violenza che eccedono ogni misura e che possono mettere in pericolo la vita del coniuge". Baudry Lacantinerie jghallem illi "Gli eccessi sono atti di violenza compiuti da uno dei coniugi verso l'altro e che possono porre in pericolo la salute e per fino la vita della vittima."***

In the judgment in the names ***Josephine Bonello pro et noe vs John Bonello*** decided by the First Hall Civil Court on 12th November 1999, and cited with approval by this Court otherwise presided, it was held as follows:

> ***"fil-fehma tal-Qorti, il-fatt li r-raġel iċaħħad lil martu minn manteniment xieraq u jkun xħiħ magħha f`dan ir-rigward, b`mod li jwassalha biex tirrikorri għal għand il-familjari tagħha għall-flus jew għal strataġemmi bħal ma jidher li wettqet l-attriċi, jammonta għall-leċċessi fis-sens tal-artikolu 40 tal-Kodiċi Ċivili"[1].***

In regard to cruelty, this was defined as follows:

> ***"dawk l-atti abitwali li joffendu l-persuna u l-animu tal-konjugi li lilu huma diretti, u li jaslu biex joholqu ezarcerbazzjoni f'dak il-konjugi hekk offiz, u avverzjoni profonda ghall-konjugi l-iehor li jikkommetti dawk l-atti." Filfatt, Baudry Lacantinerie jghallem illi "Le sevizie rappresentano una attenuazione***

[1] "in the opinion of his Court, the fact that a husband denies his wife from adequate maintenance and is a miser with her in this regard, in a way that leads her to resort to her family for money or for strategies as it seems that the Plaintiff appears to have undertaken, amounts to excesses in the sense of article 40 of the Civil Code."

degli eccessi. Consistono in cattivi trattamenti, in vie di fatto che, pur senza minacciare la vita o la salute, rendono pero' insopportabile la coabitazione". Fis-sentenza fl-ismijiet Maria Mifsud vs Vincenzo Mifsud deciza mill-Prim'Awla tal-Qorti Civili fit-30 ta' Gunju 1961 intqal illi "Certi fatti, kliem u modi ta' azzjoni jew atteggjamenti illi jistghu jirrendu l-hajja komuni insopportabbli, huma ritenuti mid-dottrina bhala sevizzi."[2]

It has been held that:

"…mhux kull nuqqas da parti ta' konjuġi versu l-konjuġi l-ieħor jwassal għall-sevizzi, minaċċi jew inġurja gravi fit-termini tal-Artikolu tal-Kodiċi Civili u huma biss dawk in-nuqqasijiet li, magħmula ripetutament u abitwalment, iweġġgħu u jferu lill-konjuġi sal-grad li l-konvivenza matrimonjali ssir waħda diffiċli u insapportabbli. Kif jinsab ritenut fil-ġurisprudenza patria: "Per sevizie nel senso della legge s'intendono atti abituali di crudelta' che offendono la persona o 1 Fadda, Giurisprudenza, Art.150, para. 214. 2 Trattato Teorico Pratico di Diritto Civile, Delle Persone, Vol.IV, para. 35. 3 Giuseppa Agius vs Pacifiko Agius, Qorti tal-Appell Civili, deciza 10 ta' Dic cembru 1951. 4 Trattato Teorico Pratico di Diritto Civile, Delle Persone, Vol.IV, para. 35. Rik.nru: 265/2018 JPG 11 l'animo di colui e sono diretti al punto da ingenerare in lui perturbazione, un dolore ed un aversione verso chi commette tali atti. [PA Camilleri utrinque, 16 Marzu 1898]."[3]

[2] "those habitual acts that offend the person and the spirit of the spouse towards whom they are directed, and that lead to create exacerbation in that offended spouse, and a deep aversion towards the other spouse that commits those acts." In fact, Baudry Lacantinerie teaches that "Acts of cruelty represent an attenuation from excesses. They consist in cruel treatment, in ways of dealing that, without threatening the life or the health, they make cohabitation unbearable." In the judgment in the names Maria Mifsud vs Vincenzo Mifsud decided by the First Hall, Civil Court on 30th June 1961 it was said that "Certain acts, words and ways of acting and behavious that can cause cohabitation to be unbearable, have been held in legal doctrine to be cruelty."

[3] "...not every fault on the part of the spouse towards the other spouse leads to the presence of cruelty, threats or grievous injury in terms of the articles of the Civil Code and they are only those lackings that, done repeatedly and habitually, hurt and injur the spouse to the state that matrimonial cohabitation becomes difficult and unbearable. As has been retained in our jurisprudence: "For cruelty in the legal sense, it is meant habitual acts of cruelty that offend the person or 1 Fadda, Jurisprudence, Art.150, para. 214. 2 Theoretical Practical Treatise on Civil Law, of Persons, Vol.IV, para. 35. 3 Giuseppa Agius vs Pacifiko Agius, Qorti tal-Appell Civili, decided 10 December 1951. 4 Theoretical and Practical Treatise on Civil Law, Delle Persons, Vol.IV, para. 35. Applic No 265/2018 JPG 11 the spirit of which they are directed to the point of generating disturbance, pain and an aversion towards who committed those acts (PA Camilleri utrinque, 16th March 1898)."

The Court has seen that in the judgment in the names ***Emanuela sive Lilly Montebello vs John Mary sive Jimmy Montebello*** decided by the Court of Appeal on 25th November 2016, it was stated that:

> ***"Dan il-komportament abitwali [b'referenza ghal vjolenza fizika u morali] da parti tal-intimat, li eventwalment wassal ghat-tifrik taz-zwieg bejn il-partijiet, jikkwalifika bhala 'sevizzi' fit-termini tal-Artikolu 40 tal-Kodici Civili, stante li minhabba l-persistenza tieghu rrenda difficli hafna ghar-rikorrenti l-konvivenza matrimonjali. Minn barra dan, il-fatt li dan il-komportament tal-intimat kien beda jigi ezercitat sa mill-bidu tal-hajja konjugali fil-konfront tar-rikorrenti li minn naha taghha kienet tissaporti dan il-komportament ta' zewgha filwaqt li, minkejja dan l-agir abitwali ta' zewgha, kienet assumiet wahedha l-oneru tat-trobbija tat-tfal taghhom, jattira fil-konfront tal-intimat l-applikazzjoni tal-Artikolu 48 [1] [a] [c] [d] tal-Kodici Civili."***[4]

In regards to grievous offences, in the judgment in the names ***Marthese Vella pro et noe vs George Vella*** decided by the First Hall, Civil Court on 28th February 2003, it was stated that:

> ***"l-ingurji gravi ma gewx specifikament dezinjati mid-duttrina, imma l-karattru generali taghhom gie dejjem imholli fis-sagacja u l-kuxjenza ta' l-Imhallef sabiex jivvalutahom."***[5]

This Court has seen that in the judgment in the names **AB vs CB** decided on the 28th June 2018, this Court otherwise presided had considerd that the fact that the Plaintiff's husband used to leave her without money, and the fact that he was guilty of emotional abuse due to various offences and insults uttered by him against his wife, resulted in his being found at

[4] "This habitual behaviour (with reference to physical or moral violence) by the Defendant, that eventually led to the breakdown of the marriage between the parties, qualifies as 'cruelty' in terms of Article 40 of the Civil Code, given that due to its persistence, it made matrimonial cohabitation very difficult for the Plaintiff. Apart from this, the fact that this behaviour of the Defendant was being shown towards the Plaintiff from the start of the conjugal life and that from her end, she endured this behaviour of her husband whilst assuming on her own the responsibility of the raising of their children, leads to the application of article 48 (1)(a) (c) (d) of the Civil Code."

[5] "grievous offences have not been specifically delignated by doctrine, by their character in general has always been left up to the discretion and the conscience of the Judge to evaluate them."

fault of cruelty and grievous offences against his wife and therefore responsible for the breakdown of the marriage.

Adultery is also another reason for separation under Maltese law and in fact, the Civil Code stipulates in article 38 as follows:

> ***Either of the spouses may demand separation on the ground of adultery on the part of the other spouse".***

The matter revolves around the evidence of the same adultery and if the person alleging the adultery, can in fact provide actual proof of it. At this stage, the Court makes reference to the cause in the names **Maria Dolores sive Doris Scicluna vs. Anthony Scicluna** wherein it was held that:

> ***"L-adulterju minn dejjem ġie meqjus bħala l- kawżali l-aktar gravi li għaliha l-liġi tawtorizza s-separazzjoni personali. Huwa ormai pacificu fid-dottrina u fil-ġurisprudenza li l-adulterju jista' jkun pruvat permezz ta' indizzji u preżunzjonijiet, purche' dawn ikunu gravi, preċiżi u konkordanti, b'mod li ma jħallu ebda dubju f'min għandu jiġġudika". (Vide ukoll Rita Spiteri vs Avukat Dr Albert V Grech et noe)***[6]

It was held that given that this cause is one of the most grievous, Maltese Courts insist on a restrictive interpretation.

Deliberates:

The record shows that the parties contracted an arranged marriage on the fourteenth of October of the year two thousand and seventeen (14/10/2017) after having known each other

[6] Adultery has always been held as the most grievous cause upon which the law grants personal separation. It is by now accepted in legal doctrine and in jurisprudence that adultery can be proven by means of clues and presumptions as long as these are grave, precise and concordant, in a way that leaves no doubt in who should judge". (See also Rita Spiteri vs Lawyer Dr Albert V Grech et noe)"

only for two months. They immediately moved to Germany since the Defendant had legal status as a refugee in Germany, not in Malta. Once there, the Plaintiff fell pregnant with the daughter of the parties and the Defendant lost interest in her and started treating her badly. Due to her vulnerable condition, the Plaintiff returned to Malta and gave birth to the daughter of the parties on the twentieth of February of the year two thousand and twenty (20/02/2020). The Plaintiff returned to Germany to give their marriage another go but the Defendant was more interested in another divorced woman rather than the Plaintiff and used to leave the Plaintiff without money. He also subjected her to emotional and sexual abuse and controlling behaviour in that she could not go out or continue her studies or learn German in order to rectify her status in Germany.

Fault for the Breakdown of the Marriage

The Plaintiff is requesting by means of this cause that this Court pronounces separation from the Defendant for reasons attributable at law to the Defendant. This Court makes reference to the testimony of the Plaintiff whereby she stated that the Defendant handed her a document which was equivalent to a divorce under Islamic religion. Had this document been duly filed and had the force of probity, then the marriage of the parties would be declared as terminated. However this Court has not been provided with a legal copy of such document and therefore cannot rely on the authenticity and validity of the same. For this reason, this Court will proceed with the determination of all requests of the Plaintiff including that of pronouncing personal separation.

That this Court has examined closely all the acts filed in this cause and the testimonies brought forward.

Apart from Plaintiff's affidavit duly signed and sworn in during the pendency of the case, Plaintiff testified on oath before this Court and reiterated most of the facts that she had outlined in her affidavit.

The Court took note of the fact that Plaintiff's testimony is not corroborated by other witnesses since the only witnesses produced were those relating to the consistency of the community of acquests present between the parties. Moreover, the Deputy Curators

appointed to represent the absent Defendant failed to produce any evidence on his behalf, or question any of the evidence produced by the Plaintiff. Therefore, this Court will determine this cause based solely on the limited evidence brought forward by the Plaintiff.

Having said that, this Court has no doubt that the Defendant was not present in the child's life given that all attempts to serve him proved to be negative and thus the lack of contact and lack of interest on his part to be part of the child's life is amply evident to this Court. Defendant's lack of interest in the judicial proceedings relating to his child and his indifference to his parental duties is illustrated by the fact that the Defendant attended two mediation sittings and then ignored the rest of the proceedings. He would have been informed of the date of the third sitting during the second sitting and therefore his default remains inexcusable and shows his indifference to all his parental obligations under article 3B of Cap. 16 of the Laws of Malta. Given this failure, this Court will proceed to uphold the requests of the Plaintiff for exclusive care and custody of the child of the parties and this in the child's interest.

Personal separation caused by adultery, cruelty and abandonment, according to the articles of the Civil Code, have harsh, mandatory consequences. These are applied against the spouse that is held responsible for the breakdown of the marriage in terms of article 48 of the Civil Code. Whereas with other causes of separation, the Court has discretion in applying articles 51 and 52 of the Civil Code, it is not so with these grounds for separation. In the present cause, this Court is convinced of the abandonment and the cruelty shown by the Defendant and thus this Court has no discretion in applying the harsh consequences of the law. Therefore this Court will apply the sanctions under article 48 of the Civil Code against the Defendant.

Community of Acquests:

From the evidence adduced, no joint movable or immovables property result which require the assignment or transfer of ownership between the parties. The Defendant lives on social benefit in Germany and the Plaintiff lives with her family in Malta. The parties never owned a residence, never owned any vehicles and none of the bank representatives that testified in these proceedings filed any joint bank accounts of the parties. Hence this Court is terminating

the community of acquests operative between the parties for all intents and purposes at law declaring that there are no properties or assets to be divided by this Court.

Care and custody

The Plaintiff is requesting that she is entrusted with the exclusive care and custody of the minor child of the parties, HA.

It has been established in our jurisprudence that in situations similar to this the ***best interest of the minor*** has to prevail above everything**.** [7] In the cause ***Jennifer Portelli pro.et noe. vs. John Portelli***[8] it was established that:

> ***Jinghad illi l-kura tat-tfal komuni [tal-mizzewgin], sew fil-ligi antika u sew fil-ligi vigenti, kif ukoll fil-gurisprudenza estera u f'dik lokali hija regolata mill-principju tal-aqwa utilita' u l-akbar vantagg ghall-interess tal-istess tfal li c-cirkustanzi tal-kaz u l-koefficjenti tal-fatti partikulari tal-mument ikunu jissuggerixxu. Illi in konsegwenza, ir-regola sovrana fuq enuncjata ghandha tipprevali dwar il-kustodja u l-edukazzjoni tat-tfal komuni tal-mizzewgin sew meta jisseparaw ruhhom ġudizzjarjament, sew meta jiġu biex jisseparaw konsenswalment[9].***

In the judgment in the names ***Maria Dolores sive Doris Scicluna vs Anthony Scicluna*** decided by the First Hall, Civil Court on the 27th November 2003, it was held that:

> ***"apparti l-ħsieb ta' ordni morali u dak ta' ordni legali, li għandhom setgħa fil-materja ta' kura u kustodja tat-tfal in ġenerali, il-prinċipju dominanti 'in subjecta materia', li jiddetermina normalment u ġeneralment il-kwistjonijiet***

[7] Emphasis by this Court.
[8] Decided on 25/06/2003 by the First Hall, Civil Court Applic No. 2668/1996/2RCP.
[9] It has to be stated that the care of the children in common (of the spouses), whether under the old law or whether under the current applicable law, as well as foreign jurisprudence and in the local one, it is regulated by the principle of the highest need and the highest advantage in the interest of the children the circumstances of the case and the coefficients of the particular facts of the moment would suggest. As a consequence, the supreme rule hereabove stipulated should prevail regarding the custody and the education of the common children of the spouses both when they separate judicially, as well as when they separate consensually.

> ***bħal din insorta f'dina l-kawża, huwa dak tal-aktar utilita' u dak tal-aqwa vantaġġ u nteress tal-istess minuri fl- isfond taċ-ċirkostanzi personali u 'de facto' li jkunu jirriżultaw mill-provi tal-każ li jrid jiġi riżolut..."[10]***

That in the cause in the names ***Susan Ellen Lawless vs. Il Reverendo George Lawless[11],*** the Court had stated that:

> ***La cura ed educazione dei figli, nel caso che la moglie non continua ad abitara col marito, deve essere commessa ed affidata a colui frai u conjugi che si rinconoscera piu atto ed idoneo a curarli ed educarli, avuto riguardo alla lora eta' ed a tutte le circostanza del caso sotto quei provvedimenti che si reputino spedienti pel vantaggio di tali figli.***

The Court thus has the authority to entrust only one of the parents with the care and custody of the minor children, if it results to be in the best interest of the same children, and this according to article 56 of the Civil Code.[12] As this Court had the opportunity to state several times, the interest of the children is supreme to the rights of the parents. In the judgment of this Court otherwise presided in the names ***Frances Farrugia vs. Duncan Caruana***, decided on 31st May 2017, this Court stated:[13]

> ***Il-Qorti tirrileva illi filwaqt li dejjem taghti piz ghad-dritijiet tal-genituri, l-interess supreme li zzomm quddiemha huwa dejjem dak tal-minuri kif anke mghallma mill-gurisprudenza kostanti taghna hawn 'il fuq iccitata.[14]***

Legally, reference is made to the cause in the names ***Cedric Caruana vs Nicolette Mifsud[15]*** wherein the Court emphasised that where children are involved:

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[10] "apart from the thought of moral order and that of legal order, that have authority in the subject of care and custody of the children in general, the dominant principle 'in subjecta materia', that normally and generally determines matters like those in this cause, is that of the highest utility and that of the best advantage and interest of the same minors in light of the personal circumstances and 'de facto' that result from the evidence of the case that has to be resolved…"

[11] Decided by the First Hall, Civil Court on 8th December 1858.
[12] Cap 16 of the Laws of Malta.
[13] Vide Sworn Application 268/11AL.
[14] "The Court holds that whilst it always gives weight to the rights of the parents, the supreme interest that it has to hold primarily before it is that of the minors as is also taught by the constant local jurisprudence here cited."
[15] Decided by the Court of Appeal on 4/3/2014.

> **'*huwa ta' applikazzjoni assoluta l-Artiklu 149 tal-Kap 16 li jaghti poter lill-Qorti taghti kwalsiasi ordni fl-interess suprem tal-minuri. Fil-fehma tal-Qorti, l-Artiklu 149 tal-Kap 16 jaghmilha cara illi fejn jikkoncerna l-interess suprem tal-minuri, idejn il-Qorti m'hiex imxekla b'regoli stretti ta' procedura… fejn jidhlu d-drittijiet u l-interess suprem tal-minuri il-Qrati taghna ghandhom diskrezzjoni wiesgha hafna…. Addirittura l-Qorti tal-Familja ghandha s-setgha li tiehu kull provvediment fl-ahjar interess tal-minuri.*'[16]**

In the words of the Court of Appeal in the judgment in the names: ***L Darmanin vs Annalise Cassar***:[17]

> *".....meta tigi biex tiddeciedi dwar kura u kustodja ta' minuru, il-Qorti ma ghandhiex* ***tkun iddettata u kondizzjonata mil-meriti u dimeriti tal-partijiet 'ut sic' izda biss x'inhu l-ahhjar interess tal-minuri".[18]***

This Court makes reference to the pronouncement of the Court of Appeal (Superior Jurisdiction) in its judgment delivered on 25th November 1998 in the names ***Sylvia Melfi vs. Philip Vassallo*** wherein it held that:

> ***In this case the Court must seek to do what is in the sole interest of the minor child in its decision whether the care and custody of the child should be given to one parent or the other the Court must solely be guided by what is most beneficial to the child [...] 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***

[16] Vide A sive BC vs D sive EC decided 30/6/2015 u Joseph Micallef vs Lesya Micallef decided 14/12/2018. 'it is absolutely applicable article 149 of Cap. 16 that gives power to this Court to give whatever orders it would hold to be in the supreme interest of the minors. In the opinion of this Court, Article 149 of the Cap. 16 makes it clear that where the supreme interest of minors is concerned, the hands of the Court are not to be hindered by strict rules of procedure… where rights of children and their supreme interests are involved, our Courts have very wide discretion … So much so that the Family Court has the power to give any order in the best interest of the minor."

[17] Decided by the Court of Appeal on 31st of October 2014.

[18] Emphasis of this Court.

"…. When it comes to decide upon the care and custody of the minors, this Court should not be constrained and conditioned by the merits and demerits of the parties 'ut sic' but only by the best interest of the minors."

> ***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.***

That this Court makes its own in particular the thinking of the Court of Appeal in the cause in the names ***Miriam Cauchi vs Francis Cauchi*** decided on 3rd October 2008 wherein it was correctly observed that:

> ***"Din il-Qorti tibda biex taghmilha cara li, fejn jidhlu minuri, m'hemmx dritt ghall-access, izda obbligu tal-genituri li t-tnejn jikkontribwixxu ghall-izvilupp tal-minuri li, ghal dan il-ghan, jehtigilha jkollha kuntatt ma' ommha u anke ma' missierha. Kwindi lil min jigi fdat bil-kura tal-minuri u kif jigi provdut l-access jiddependi mill-htigijiet tat-tifla u mhux mill-interess tal-genituri.[19] Huma l-genituri li jridu jakkomodaw lit-tfal, u mhux viceversa. L-importanti hu l-istabilita' emozzjonali tat-tifla, u li din jkollha kuntatt mal-genituri taghha bl-anqas disturb possibbli."[20]***

After this Court considered the fact that the Defendant was not present for the birth of his daughter; that it was only after Plaintiff's brother paid for Defendant's air ticket that Defendant travelled to Malta to register the child; that Defendant left after a few days, only to return to Malta to visit the child after six (6) months; did not remain in contact in other ways with the Plaintiff and the child; that he did not contribute towards the child's needs; ignored attending the rest of the mediation proceedings; and failed in any other manner to seek access to his daughter throughout the past years; contributes to Defendant's abject failure in fulfilling his responsibilities under article 3B of Cap. 16 of the Laws of Malta. Thus given that the child has never had any relationship with her father, it would not be in the best interest of the child for this Court to establish a right of access for the father which would enable him

[19] Emphasis by this Court.

[20] "This Court starts by making it clear that, where minors are involved, there is no right of access, but a responsibility of the parents for both of them to contribute towards the development of the minors that, for this objective, require contact with her mother as well as with her father. Therefore who is entrusted with the care of the minor and how access is determined depends on the needs of the child and not on the interest of the parents. It is the parents that need to accommodate the children, and not the other way round. The important thing is the emotional stability of the child, and that she has contact with her parents with the least disturbance possible."

to exercise this right should he happen to be in Malta. Therefore, the father's right of access to his child shall remain suspended. Should the Defendant become interested in seeking a meaningful relationship with his daughter, it would be incumbent on him to seek Psychological Therapy through the therapeutic support of child psychologist, for a minimum period of six (6) months at his own expense, so as to be guided by such professional on establishing contact with his daughter that would be in the child's best interests.

Maintenance towards the needs of the child:

The legal principle surrounding maintenance towards children is based on article 7(1) of the Civil Code which stipulates as follows:

> ***7. (1) Parents are bound to look after, maintain, instruct and educate their children in the manner laid down in article 3B of this Code.***

As results from the articles of the Law, both parents have the same responsibility towards their children, and thus both parents have to contribute towards the raising of their children. The obligation of both parents towards their children is determined according to the means of each of the parents, calculated according to the needs determined in article 20 of the Civil Code.

Article 20 of the Civil Code 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.***

(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.

As held in our jurisprudence:

.....Il-Qorti dejjem irriteniet illi l-ġenituri ma jistgħux jabdikaw mir-responsabilita` tagħhom li jmantnu lil uliedhom materjalment, hu kemm hu l-introjtu tagħhom. Dejjem kienet tal-fehma illi kull ġenitur għandu l-obbligu li jmantni lil uliedu anke jekk il-meżżi tiegħu huma baxxi jew jinsab diżokkupat. Il-Qorti ma tista qatt taċċetta li persuna ġġib it-tfal fid-dinja u titlaq kull responsabbilta` tagħhom fuq il-ġenitur l-iehor jew inkella fuq l-istat." (Ara Tiziana Caruana vs Redent Muscat (272/2018) deċiża mill-Prim' Awla Qorti Ċivili fl-24 ta' Ġunju 2019; Liza Spiteri vs Luke Farrugia (219/2018) deċiża mill-Prim' Awla Qorti Ċivili fit-2 ta' Ottubru 2019).[21]

In the case **Portelli Jennifer pro et noe vs Portelli John** (Applic. No. 2668/1996) decided by the First Hall, Civil Court on 2nd October 2003, it was held that:

".....l-obbligu taż-żewg ġenituri lejn l-ulied jibqa' bażikament l-istess dettat kull wieħed skont il-meżzi tiegħu, ikkalkulati skont id- dispozizzjonijiet tal-Artikolu 20 tal-istess Kap u l-bżonnijiet tal-minuri, u fl-interess tal-istess minuri."[22]

[21] "……The Court always held that the parents cannot abdicate from their responsibility to maintain their children materially, no matter how much their income is. It was always of the opinion that every parent has the obligation to maintain his children even if his means are low or he is unemployed. This Court can never accept that a person brings children into this world and leaves all responsibility onto the other parent or else on the State. (See Tiziana Caruana vs Redent Muscat (272/2018) decided by the First Hall, Civil Court on the 24th of June 2019; Liza Spiteri vs Luke Farrugia (219/2018) decided by the First Hall, Civil Court on 2nd October 2019)."

[22] "….the obligation of both parents towards their children remains basically the same, each dictated by the means of that parent, calculated according to the dispositions of Article 20 of the same Cap and the needs of the minor, and in the interest of the same minor."

This Court acknowledges that the Plaintiff did not submit any account of the expenses related to the raising of her daughter and anything relating to her means. However this Court has seen that Plaintiff's income is a little in excess of one thousand euros a month (€1000) after deducting tax and this as resulted from the statements of her HSBC bank account. The Court considers that the child has been raised by the Plaintiff on her own, with the help of her family. On the other hand, this Court was informed by the same Plaintiff that the Defendant lives in Germany on social benefits provided to him which amount around four hundred euro (€400) every month. This Court orders the Defendant to pay the amount of two hundred euro (€200) on the first day of each month towards the needs of his daughter which maintenance should be deducted directly from the social benefits allocated to the Defendant and paid directly to the Plaintiff's bank account of her choosing. This amount shall increase every year according to the cost of living index. This monthly maintenance allowance shall remain due until the child attains eighteen (18) years of age or until the age of twenty-three (23) should the child remain in full-time education.

DECIDE

For these reasons, this Court determines and decides Plaintiff's requests in the following manner:

1. **Upholds the first request and pronounces the personal separation between the parties attributing the fault for the breakdown of their marriage solely to the Defendant in committing domestic violence, excesses, cruelty and threats towards the Plaintiff and consequently authorises the Plaintiff to live separately from the Defendant;**

2. **Rejects the second request;**

3. **Upholds the third request and entrusts the care and custody of the minor child HA exclusively onto the Plaintiff, authorising the same Plaintiff to take all decisions, ordinary and extraordinary, relating to the minor child, including those relating to the health, religion, issuing of and renewal of passports, residence permit, travel, and education of the minor child, on**

her own without the need for the consent, signature or presence of the Defendant.

4. **Upholds the fourth request and orders that the minor child shall reside with the Plaintiff and suspends the Defendant access towards the minor child as a result of his abandonment unless and until he has undergone six (6) months of Psychological Therapy at his expense to re-establish his relationship with his daughter if this is deemed to be in the child best interests.**

5. **Upholds the fifth request and orders that the Defendant is to pay the amount of two hundred euro (€200) on the first day of each month towards the needs of his daughter which maintenance shall be deducted directly from the social benefit allocated to the Defendant and paid directly to Plaintiff's bank account of her choosing. This amount shall increase every year according to the cost of living index. The Defendant has to continue paying such maintenance until the minor child HA attains the age of eighteen (18) years if the minor child stops pursuing her studies and starts working on a full-time basis or payable up to the age of twenty-three (23) years should the minor child decide to pursue her studies on a full-time basis;**

6. **Upholds the sixth request limitedly and orders the Defendant to pay half of the health and education expenses of the minor child, including but not limited to uniforms, transport, donations, stationary, private lessons and any other expenses related to the education, including expenses related to extra-curricular activities.**

7. **Upholds the seventh request;**

8. **Upholds the eight request, orders the cessation of the existing community of acquests between the parties and liquidates the same. The record shows that the parties, do not own any joint movable or immovable property and thus there is no need for the assignment of portions between the parties. This Court however, orders that the bank account held solely in Plaintiff's name shall be assigned in its entirety to the Plaintiff.**

9. **Upholds the ninth request, and declares that Defendant is at fault for the breakdown of the marriage between the parties and thus this Court orders the application of the sanctions found under Articles 48 et seqq. of Chapter 16 of the Laws of Malta against the Defendant.**

10. **Rejects the tenth request since no evidence was adduced relating to any paraphernal property of either of the parties.**

11. **Abstains from taking further cognisance of the eleventh request;**

12. **Abstains from taking further cognisance of the twelfth request since this was ordered during the sitting held on 27th June 2024;**

13. **Upholds the thirteenth request;**

The Court orders that all costs shall be borne by Defendant but shall provisionally paid by the Plaintiff.

Read in open court.

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

Lorraine Dalli
Deputy Registrar