CIVIL COURT

(FAMILY SECTION)

MADAM JUSTICE

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

Today the 21st November 2024

Sworn Applic. No.: 47/2023 JPG

Cause No.: 26

P I

v.

And by virtue of decree dated 23rd of June 2023, Dr Martin Fenech and PL Katrina Zammit Cuomo were appointed as Deputy Curators to represent the absent Defendant S Z

The Court;

Having seen the Sworn Application filed by **P I** dated 10th March 2023, a fol 1, which reads as follows:

1. *This sworn application is being filed simultaneously with a separate application in terms of Article 930 of Chapter 12 of the Laws of Malta.*

2. *From the marriage between applicant and S Z which took place on 12th February 2010, two children were born, namely C Z on the x and R Z on Y,*

which makes them x and y years old respectively.

3. *The applicant first arrived in Malta in November of the year 2011 and now resides and works in Malta, while the Defendant left the Maltese Islands in the year 2022. The applicant is not knowledgeable of the Defendant's whereabouts.*

4. *The minors C Z and R Z reside with the applicant in the address W, and are fully reliant on the same applicant.*

5. *By virtue of the decree of this Honourable Court dated 10th January 2023, the applicant was given authorisation to proceed with this sworn application according to Article 930 of Chapter 12 of the Laws of Malta. A legal copy of the above-mentioned decree is herewith attached and marked as* ***'Dok. A'****.*

6. *The applicant's affidavit is herewith attached and marked as* ***'Dok. B'****.*

Therefore, the applicant humbly requests this Honourable Court to:

1. ***Appoint*** *Curators in terms of Article 930 of Chapter 12 of the Laws of Malta in order to represent the absent Defendant S Z.*

2. ***Order*** *the personal separation between the applicant and Defendant and this due to reasons imputable to the latter, as explained above.*

3. ***Declare*** *that the Defendant has forfeited his right to maintenance from the applicant according to Law.*

4. ***Apply*** *against the Defendant the sanctions according to Law including those found under Article 48, 51, 52 and 53 of the Civil Code.*

5. ***Order*** *the dissolution of the community of acquests existent between the parties and the liquidation and division of same in two portions, not necessarily equal portions, which portions will be assigned to each of the parties depending on*

the sanctions mentioned in the previous request, and appoint experts for this purpose as the need arises.

6. ***Declare*** *in a definitive manner that the minors C Z and R Z reside with the applicant P I, the mother, and orders that any State assistance in respect of the minors is payable solely to the applicant to the exclusion of the Defendant father.*

7. ***Declare*** *in a definitive manner that the care and custody of the minor children C Z and R Z shall be entrusted to the applicant mother.*

8. ***Order*** *that the applicant mother shall not require the Defendant's signature or that of any other person in order to apply for or renew the children's identity cards and/or residence permits and/or passports.*

9. ***Order*** *that any applications and renewals of residence permits, identity cards or passports pertaining to the minor children C Z and R Z are signed solely by the applicant mother to the exclusion of the Defendant father.*

With costs against the Defendant.

Having seen that the sworn application and this Court's decree have been duly notified according to law; Having seen that the Deputy Curators failed to file a sworn reply;

Having seen that on the 17th of October 2024, Deputy Curator Dr Martin Fenech declared that he attempted to communicate with Defendant, however there was no response from the Defendant. Therefore, Dr Fenech declared that he had no further evidence to adduce; (vide fol 327);

Considers:

This is a judgment following a request for personal separation made by the Plaintiff, who states that the fault for the irretrievable breakdown of the marriage is solely attributable to the Defendant.

The Plaintiff testified by viva voce before the Court that she met Defendant S Z in S in 2008 and after a year, Defendant started to live with Plaintiff. Plaintiff stated that they got married in 2009 and soon after was pregnant with her first child. Plaintiff stated that she chose to enter a pre-nuptial agreement with Defendant before marriage because she discovered that he had several problems including problems with the bank. During the early part of the marriage Plaintiff also discovered that Defendant did not want to work at all and she had no alternative but to not only to seek employment but to take care of the children on her own. She said that she was always looking for jobs for Defendant however he kept refusing employment. Finally his sister informed him that she was living in Malta with her husband who was working in a restaurant and that Defendant could work with him. Plaintiff stated that this was when the parties decided to come to reside here in Malta. However, a few months into his employment at his sister's restaurant, Defendant started to complain, stating that they were in Malta for nothing and that they did not have a good life. Plaintiff stated that as a result she had to do everything herself - that is all the housework, looking after the children and working full time to be able to feed the family. Plaintiff stated that she found employment as a care worker in hospital whilst Defendant informed her he did not want to keep working. Moreover in 2021 Defendant started using drugs. Plaintiff stated that she did not know how he was paying for the drugs. Whilst Plaintiff was at work, Defendant was suppose to take care of the children. However Defendant spent his time sitting on the sofa watching television and instructing his eldest child CZ to look after his sister. Plaintiff declared that at this moment in time she had informed the Defendant that he had to find employment and find alternative accommodation and that she would help him do this but that the relationship between the parties had irretrievably broken down. It was at this stage that Defendant told Plaintiff that he did not care about her or about the children and left Malta to go and live in S. In the beginning, he used to call the children and leave messages. In May and June 2022 however, Defendant sent a message to his son stating that the child and his entire family was dead to him.

Plaintiff stated that she earns between one thousand two hundred euros (€1200) and one thousand three hundred euros (€1300) a month as a care worker in hospital.

In her affidavit at page 104, Plaintiff confirmed the evidence given viva voce. She stated that Defendant's first job was in a warehouse in P and there after he had a job as a dishwasher. However he was very irresponsible and unreliable and would after decide not to go into work, resulting in the termination of his employment. She confirmed S Z's sister's help and their move to Malta. Plaintiff confirmed the different jobs that Defendant worked at and the termination of the said employment because of his unreliability. She also confirmed how the drug addiction evolved. Plaintiff stated that Defendant was becoming increasingly aggressive, he would talk in his sleep, stating " I'm going to kill you" and became aggressive towards Plaintiff as well as his son C Z. At this time Plaintiff informed the Defendant that she could no longer live with him in this manner and that she was prepared to help him look for an apartment. Defendant replied that he would sleep in a garage. She exhibited an audio recording Dok B16 and the contents thereof scared her so much that she left the house with her children. She also exhibited document P17 correspondence between the parties from March to May 2022. Finally Defendant informed Plaintiff that he was going to return to S. Plaintiff recounted the saga of R Z's non-registration with the Italian Embassy as a result of Defendant's refusal to sign the relevant papers. She also exhibited document PS8 where C Z received an audio message from his father stating **"to me you, your mother and sister are all dead".** Plaintiff confirmed that as a result of Defendant's absence, she has difficulty applying for the children's important documentation, the school applications and that therefore she requires sole care and custody of her children.

Josette Dalmas vid a fol 102A Headmistress of Qawra Primary school stated that the parties second child R Z attended her school and is five years old. She stated that R Z was a very bubbly child and the school has no concerns in her regard. She stated that she always had contact with the mother and that she only met the father once when the elder child was enrolled.

David Debono a fol 137 Assistant Headmaster at Zokrija Secondary School confirmed that C Z attends the school and is in year X he stated that he had never met Defendant nor did

Defendant ever contact him about C Z. He confirmed that it was always Plaintiff who contacted him about the child. He confirmed that C Z attends school regularly and is happy at school.

Lorraine Attard a fol 138E representative of HSBC BANK PLC confirmed that the bank had one account which was opened on the 14 March 2012 and closed on the 15th April 2013.

Vanessa Bonello a fol 140 on behalf of Lombard Bank Plc confirmed that neither party ever had bank accounts with the bank.

Stephen Cachia at page 142 confirmed that Plaintiff has one car registered in her name Dok SC1 and that he exhibited DOK SC3 stating that Defendant had one car registered in his name.

Joshua Attard at page 144 on behalf of BNF BANK PLC confirmed that neither parties hold bank accounts in the aforementioned bank.

Charmaine Psaila at page 146 on behalf of APS BANK confirmed that neither parties hold bank accounts with APS.

Joanne Bartolo at page 148 on behalf of BOV confirmed that Plaintiff has a savings account in her name DOK JB1 and that Defendant also has a bank account in his name DOK JB2.

Jennifer Muscat, representative from Identity Malta at page 303A, confirmed that Defendant had applied for the residence card twice. The first application was on the 22 May 2013 and the second application for the residence card was dated May 2018 which expired on the 17th of May 2023.

Christie Cremona page 304 confirmed that Plaintiff used to work at Casa Arkati and Casa San Paolo and this around over eleven (11) years ago at that time she used to view the relationship between the parties as a healthy one. However she noted that Defendant was very possessive and did not allow his wife to go out with her friends or attend work gatherings. Therefore she used to often visit Plaintiff in her home. In the latter part of their relationship, Defendant's behaviour changed. The witness Cremona had, in the meantime, become a police officer and Defendant would question her on whether he could legally carry a flick knife. Moreover she had seen that Defendant kept a metal pipe in his car and when asked about it, he informed her that he kept it in case of an emergency. She confirmed that Defendant used to be lounging on the sofa hardly talking to anyone. She stated that the last time she saw Defendant was when she received a telephone call from Plaintiff who was very perturbed and agitated. The next day Plaintiff went home accompanied by three police officers to pick up her personal belongings.

PC2281 at page 325 from the Immigration Registry stated that no records regarding S Z were found, since any travel to and from a Schengen area would not result in any paper trail.

The Curators Dr Martin Fenech informed the Court that he attempted to communicate with Defendant on the mobile numbers given to him by Plaintiff and through Facebook, however Defendant never replied. Therefore, Dr Martin Fenech on behalf of Defendant, informed the Court that he has no evidence to produce.

1. 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 stratażemmi 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 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-konjugġi l-iehor jwassal għall-sevizzi, minaċċi jew inġurja gravi fit-termini tal-Artikolu tal-Kodiċi***

[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."

[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."

> ***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]

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,***

[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)."

> ***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 considered 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, led him to being found at fault of causing cruelty and grievous offences against his wife and therefore he had to shoulder responsibility for the breakdown of the marriage.

Deliberates:

From the evidence adduced by the Plaintiff, it is abundantly evident that the marriage between the parties was one where Plaintiff was constrained to work round the clock both in full time employment and with all the responsibilities of caring for the children and housework in order to keep the family financially viable, keep a roof over their heads and food on the table. She was also solely responsible for taking care of the child since Defendant allergic to any form of employment and refused to work. The few jobs he held where short lived, and Defendant's employment would be promptly terminated because of his unreliability. A few years into the marriage Defendant developed a drug addiction which changed his personality and made him aggressive, volatile and dangerous towards his wife and children.

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[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."

When Plaintiff finally decided to terminate the marriage, Defendant up and left the Maltese Islands and went to reside in S. He sent a message to his son C Z who today is X years of age that he, his mother and sister were dead to him. All attempts, at contacting Defendant to produce his evidence were futile.

The Court in the light of the evidence adduced, finds that the breakdown of this marriage is imputable to the Defendant who failed utterly and repeatedly in his duties as husband to Plaintiff and as father to his young children.

Community of Acquests:

From the evidence adduced, this Court is morally convinced that the parties owned no joint immovable property which require the assignment or transfer of ownership between the parties. Defendant abandoned the family and now lives in S whilst the Plaintiff lives in rented accommodation. The parties never owned a residence, but each owned a vehicle.

None of the bank representatives filed or exhibited any joint bank accounts of the parties. Hence this Court is terminating the community of acquests active between the parties for all effects and purposes at law declaring that there is no immovable property requiring division by this same Court.

Care and custody

The Plaintiff is requesting that she is entrusted with the exclusive care and custody of the minor children of the parties, C Z and R Z.

It has been established in our jurisprudence that in situations similar to this the ***best interest of the minor*** has to prevail above everything**.** [6] In the cause ***Jennifer Portelli pro.et noe. vs. John Portelli***[7] 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[8].***

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 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..."[9]***

[6] Emphasis by this Court.

[7] Decided on 25/06/2003 by the First Hall, Civil Court Applic No. 2668/1996/2RCP.

[8] 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.

[9] "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…"

That in the cause in the names ***Susan Ellen Lawless vs. Il Reverendo George Lawless***[10]**,** 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.[11] 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:[12]

> ***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.***[13]

Legally, reference is made to the cause in the names ***Cedric Caruana vs Nicolette Mifsud***[14] wherein the Court emphasised that where children are involved:

> **'*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***

[10] Decided by the First Hall, Civil Court on 8th December 1858.
[11] Cap 16 of the Laws of Malta.
[12] Vide Sworn Application 268/11AL.
[13] "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."
[14] Decided by the Court of Appeal on 4/3/2014.

> ***diskrezzjoni wiesgha hafna…. Addirittura l-Qorti tal-Familja ghandha s-setgha li tiehu kull provvediment fl-ahjar interess tal-minuri.*** **'**[15]

In the words of the Court of Appeal in the judgment in the names: ***L Darmanin vs Annalise Cassar***:[16]

> *"…….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".***[17]

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 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.***

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[15] 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."

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

[17] 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."

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.[18] 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."[19]***

The Court, taking into consideration Defendant's complete disregard to the well-being his children, his abrupt abandonment of his family in Malta, his lack of any financial contribution to the needs of his children together with the vindictive refusal to sign the referral documents for his daughter R Z's registration with the I Embassy, and Defendant's drug addiction, illustrate amply that Defendant is an unfit parent.

Therefore, in the children's best interests, the Court awards exclusive care and custody of C Z and R Z to the Plaintiff who shall, alone and without the consent, signature or presence of the Defendant, take all decisions regarding the said children, both ordinary and extraordinary, relating to the education, health, travel, and shall sign all applications regarding passports and renewal thereof , identity cards and registration cards and renewal thereof regarding the children without the consent, signature or presence of the Defendant.

Maintenance towards the needs of the child:

The legal principle surrounding maintenance towards children is based on article 7(1) of the

[18] Emphasis by this Court.

[19] "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."

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-mežżi 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).***[20]

In the case Portelli Jennifer pro et noe vs Portelli John (Applic. No. 2668/1996) decied 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-mežzi tiegħu, ikkalkulati skont id- dispozizzjonijiet tal-Artikolu 20 tal-istess Kap u l-bżonnijiet tal-minuri, u fl-interess tal-istess minuri."***[21]

In the light of the above mentioned jurisprudence, in the light of the fact that Plaintiff earns between one thousand two hundred euros (€1200) and one thousand three hundred euros (€1300) euros per month, and taking into account Defendant's track record in his employment history, and the needs of two young children, the Court orders that Defendant to pay a maintenance allowance for each child in the amount of two hundred and fifty euros (€250) every month that is (€500) five hundred every month for the two children which allowance includes Defendant's share of the health and educational expenses of the said children.

[20] "……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)."

[21] "….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 maintenance allowance shall increase every year according to the Cost of Living Index. This maintenance allowance shall be deducted from Defendant's salary, pension or welfare benefits and shall be paid into Plaintiff's bank account of her choice.

DECIDE

For these reasons, this Court declares and decides the requests of the Plaintiff in the following manner:

1. **Abstains from taking cognisance of the first request as this has already been decreed;**

2. **Accedes to the second request and orders the personal separation between the Plaintiff and Defendant and this due to reasons attributed to the Defendant;**

3. **Declares that the Defendant has forfeited his right to maintenance from the Plaintiff according to Law;**

4. **Applies against the Defendant the sanctions according to Law including those found under Article 48, 51, 52 and 53 of the Civil Code;**

5. **Order the dissolution and the liquidation of the community of acquests existent between the parties; Declares that the parties do not own any joint immovable property; orders that each party shall retain the bank accounts that are registered in his or her names; that each party shall retain the ownership of the vehicle registered in his or her name and that she or he shall be solely responsible for any dues, fines and debts accruing on the respective vehicle;**

6. **Declares that the minors C Z and R Z reside with the applicant P I, the mother, and orders that any State Assistance in respect of the minors is payable solely to the Plaintiff to the exclusion of the Defendant father;**

7. **Declare that the care and custody of the minor children C Z and R Z shall be entrusted exclusively to the Plaintiff;**

8. **Order that the Plaintiff shall not require the Defendant's signature or presence or that of any other person, in order to apply for or renew the children's identity cards and/or residence permits and/or passports;**

9. **Order that any applications and renewals of residence permits, identity cards or passports pertaining to the minor children C Z and R Z shall be signed solely by the Plaintiff to the exclusion of the Defendant father;**

Expenses shall be borne by the Defendant but shall be paid provisionally by the Plaintiff.

Read in open Court.

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

Lorraine Dalli
Deputy Registrar