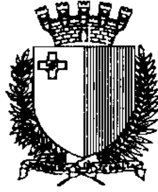

IN THE CIVIL COURT
(FAMILY SECTION)

HON. JUDGE ANTONIO G. VELLA

Sitting of the 7th January 2025
General Application 445/2024

VMAB
Vs
PM

The Court,

Having seen the application of VMAB dated the 16th September 2024 by means of which he submitted:

Respectfully sheweth:-

That this is an application in terms of Act 6 of the Child Abduction and Custody Act (Cap.410) to this Honorable Court to order the respondent to

return the parties minor son to Paris France after the defendant abducted the minor brought him to Malta and informed the school he attends in France that he is being pulled out from school.

That in view of the nature of the case the exponent humbly submits that in the supreme interest of the minor this issue ought to be dealt with urgently as required by the Court Practice and Procedure and Good Orders Rules (S.L.12.09).

That primarily, the exponent declares that the facts of the present case are as follows:

1. That the parties contracted marriage in Las Vegas, Nevada in the United States on 10 July 2008. In June 2009 the parties decided to relocate to Malta where they would reside in this jurisdiction until 2019;

2. That the parties have a minor child together LMB born in Malta on 25 January 2013;

3. That the parties separated de facto in June 2012;

4. That subsequently they appeared on a deed of separation before Notary James Grech on 12 October 2016;

5. That however by deed before Notary James Grech of 29 January 2018, the parties reconciled. However the reconciliation did not

materialize; of the minor it was done in violation of custody rights established by a contract that has legal effect according to the law.

That the authors Lowe Everall and Nicholls in their International Movement of Children Law Practice and Procedure opine as follows regarding the habitual residence of minors:

In proceeding brought by A the European Court of Justice said that the habitual residence of the child for the purposes of the Regulation must be established on the basis of all the circumstances specific to each individual case and in addition to the physical presence of this child in Member state, other factors which must be chosen which are capable of showering that the residence of the child reflects some degree of integration in a school,

That moreover in the judgment in re H minors the House of Lords held to establish that a child has been wrongfully retained within article 3 the complaining parent must prove an event occurring on the specific convention is not a continuing the act of wrongful retention. wrongful retention under the point out to a specific evet as a specific point in time which constitutes the act of wrongful retention.

That it is clear that the minor is habitually resident in France and by agreement between the parties as provided for in the separation contract sanctioned by this Honorable Court. It is clear that the agreement between the parties provides that once the parties returned to France something that has now happened over four years ago- the minor must

continue to live the country until he attains the age of majority. It is clear that the applicant provides of his own free will for the minor and for the respondent (although he is under no obligation to do so) but because the minor attends school and lives his life as a child in that jurisdiction.

That in the circumstances the applicant has no other remedy but to request the intervention of the Honorable Court so that the minor is returned as soon as possible to France.

Therefore, in view of the above the applicant respectfully requested this Honorable Court:

1. That in view of the nature of the case to hear and determine this application expeditiously in terms of Act 11 of Council Regulations no 2201/2003 and of the court practice and Procedure and Good Order Rules;

2 .to order the return of the minor LMB to Paris, France immediately in order to continue attending school there and this is in terms of valid separation contract between the parties and the convention on the civil Aspects of International Child Abduction incorporated in Cap 410 of The Laws of Malta;

3. to establish the necessary arrangement for the minor to be returned to France and;

4. to give such directions so that in the event that the respondent does not carry out the order of return within a short and perentory terms that is prefixed to her there is the assistance of the Police and or the executive officers of the Court and of the social protection servicers.

And this under those provisions that it may consider appropriate and opportune.

With costs including those of the warrant of prohibitory injunction in the same names number 131/2024.

And proceeded to request the Court:

1. That in view of the nature of the case, to hear and determine this application expeditiously in terms of Art. 11 of Council Regulations (EC) No. 2201/2003 and of the Court Practice and Procedure and Good Order Rules;

2. To order the return of the minor LMB to Paris, France immediately in order to continue attending school there and this in terms of the valid separation contract between the parties and the Convention on the Civil Aspects of International Child Abduction incorporated in Cap. 410 of the Laws of Malta;

3. To establish the necessary arrangement for the minor to be returned to France; and

4. To give such directions so that in the event that the respondent does not carry out the order of return within a short and peremptory term that is prefixed to her, there is the assistance of the Police and/or

the executive officers of the Court and/or of the social protection services;

And this under those provisions that it may consider appropriate and opportune.

That by means of her sworn reply dated the 2nd October 2024, PM opposed applicant's requests and submitted that:

1. Firstly it is absolutely untrue that the respondent relocated to Paris as declared in clause number 8 of applicants application. The respondent has been residing in Malta continuously for the past eighteen years;

2. Without prejudice to the preceding paragraph and to avoid repetition, the respondent makes broad reference to everything stated in her sworn application numbered 180/24 AJV;

3. Without prejudice to the preceding paragraph this application should be dismissed with costs against the applicant, as there are existing conditions between the parties, ordered by this Honorable Court , that the mother follows ad unguem while the father completely ignores them, even threating the mother that with all the money he has he will hire a platoon of lawyers to break her; this behavior is intolerable and the court must hear the minor under all those conditions allowed by law in order to know where and how he wishes to live. **The mother with unlimited love, only seeks to safeguard**

the best interests of her son, according to the conditions imposed and authorized by this Honorable Court, and will not tolerate any bullying legal or otherwise on the part of the father.

4. Without prejudice to the preceding paragraph , the existing contract between the parties clearly states that the minor child L should continue to reside in Malta with his mother and that he has recently rejoined his father at St. Edward's College which he loves after being arbitrarily taken by the father and forced into boarding school when the same father knew he was unable and did not have the time to take care of his son, so much that this summer he sent him to a boarding tennis club so that applicant could freely travel and enjoy himself and his new girlfriend in Ibiza among others destinations.

5. Without prejudice to the preceding paragraph, the father suffers from serious medical conditions including an autoimmune disease that requires him to be on various strong medications, including morphine which prevent him from looking after the best interests of his son, without assistance. Therefore this Honorable Court should consider whether the substance he is on allow him to exercise, even if limitedly his rights to care and custody as outlined in the separation agreement in absolute absence of the minor`s mother, diverging from what has already been agreed upon and authorized by this Honorable Court;

6. Without prejudice to the preceding paragraph, applicant will be summoned to testify under oath;

So much for the attention of this Honorable Court.

Having seen the parties' testimonies and the documents submitted;

Having seen the Acts;

CONSIDERS

The facts as presented before this Court are as follows:

1. The Parties were lawfully married in Las Vegas, Nevada, United States of America, on the 10th of July 2008.

2. In June 2009, the Parties mutually agreed to relocate to Malta.

3. The Parties subsequently separated de facto in June 2012.

4. Notwithstanding their separation, the Parties' marriage gave rise to the birth of their son, LM B on the 25th of January 2013.

5. The Parties formalized their separation through a public deed executed in the acts of Notary James Grech on the 12th of October 2016. However, they later reconciled and registered their reconciliation by means of another public deed executed in the acts of the same Notary on the 29th of January 2018.

6. The Parties separated once again through a deed of separation, also executed in the acts of Notary James Grech, on the 17th of December 2019.

7. On the 12th of February 2020, the Parties jointly filed an application for divorce before the Maltese Courts. The divorce was subsequently granted by means of a judgment delivered on the 3rd of April 2020.

8. At some point during the separation and divorce proceedings, the Parties mutually agreed that the Minor would attend school in Paris. This arrangement persisted until September 2024, when the Mother, following a visit to the Minor, decided to bring him to Malta to attend school there.

9. On the 5th of September 2024, the Mother filed a sworn application before the Maltese Courts (Application No. 180/24AGV) in the names **PM v VMAB .** In her application, the Mother alleged that her former husband was not adhering to the terms stipulated in the deed of separation. She consequently requested the Court to order the return of the Minor to Malta and to determine matters relating to the care and custody of the Minor.

10. Subsequently, on the 13th of September 2024, the Father initiated these proceedings, requesting this Court to order the return of the Minor, L MB , to Paris.

CONSIDERS:

It is undisputed that, by virtue of the Separation Contract dated the 17th of December 2019, executed in the acts of Notary James Grech, the Parties mutually agreed to the following terms:

"Care and Custody:

(i) The parties are agreeing and accepting that the care and custody of their minor child shall be vested in and shall be exercised by both parents however the child's place of residence will be with the wife;

(…omissis...)

(iv) It is agreed by both parties that if it is decided by both parties that they leave Malta, the child's residence shall be permanently in Paris until the child reaches the age of majority. Neither party shall, under any pretext whatsoever, domicile the child in another country, without prior written consent from the other party. Moreover, if this decision is taken, the minor child is to reside with the father until the wife establishes her place of residence in Paris and settles down in her place of residence so as for it to be ready for the minor child to move in with her. Should the wife decide, for professional reasons, to delay her arrival in Paris, her rights relative to the minor child shall in no way be lost. Furthermore, the Husband undertakes to continue to allow the Wife, should the latter so request, to live in his apartment in Paris until such time as she manages to establish an alternative place of residence.

(v) It is agreed that if one of the parties breach the above indicated clause (iv), he or she will lose care and custody of the child and it will then be the other parent/party who will have care and custody of the same child, who is thus obliging himself and to keep the Child's residence in Paris, giving absolutely same rights of access to the other party as here referred to as rights of access in the following clauses."

CONSIDERS FURTHER:

In light of the prevailing facts of this case this Court deems it pertinent to assess whether the arrangements agreed upon in the Separation Contract dated 17th December 2019 were adhered to in practice and whether subsequent actions and decisions by both parties indicate a modification of the child's actual residence.

While the agreement expressly stated that the child's residence would become Paris only upon relocation of the parents and subject to specific conditions, it is evident from the facts that both parties took active steps to implement this arrangement. These steps include the joint decision to enroll L in a Parisian school and the Mother's continued involvement in the process, as evidenced by her participation in meetings and formalising the school registration.

Given these developments, the issue of **habitual residence** requires evaluation based not solely on the formal terms of the contract but also on the **actual conduct and circumstances** that materialized thereafter.

CONSIDERS FURTHER:

Habitual Residence of the Minor

Although no universally accepted definition exists as to what constitutes "habitual residence," the concept is recognized in various legal systems and under international law. It is, however, a factual determination that depends on the specific circumstances of each case.

On the matter of a change in habitual residence,[1] it has been established that:

"The [UK] courts have repeatedly followed the judgment of Lord Scarman in R vs Barnet holding … that both [concepts of ordinary residence and habitual residence] refer to the person's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life, for the time being, whether of short or long duration" [and] "The burden of proof is upon the person seeking to show a change of habitual residence to establish this."[2]

Notwithstanding the terms of the separation contract and the fact that the Mother never left the Maltese Islands permanently, it is evident that the Mother agreed to Leonard attending school in Paris, commencing from the scholastic year 2020–2021. In fact, the Mother was always copied in

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[1] See **Dr. Karl Briffa in his capacity of special mandatory of the absentee A B vs C D B,** decided by the **Family Court** on the **28th January 2010**

[2] Ref. Private International Law – Cheshire, North & Fawcett – 14th edition

all related correspondence and never objected to his enrollment abroad. Moreover, she signed his enrollment form on the 9th of April 2020 and attended a meeting with the school in France where Leonard's admission was confirmed.

It is undisputed that LM B attended the "Ecole Jeannine Manuel" in Paris, France, from the scholastic year 2020–2021 until September 2024. The Defendant Mother subsequently returned to Malta with the minor and, by means of an email dated the 8th of September 2024, informed the school that Leonard *"will unfortunately not be able to attend school for this academic year."*

Based on the developments outlined by the Parties in their testimony, corroborated by supporting documentation, it is evident that a change in the habitual residence of the child occurred. Irrespective of the provisions of the separation contract, LMB ' s habitual residence has been in France for the past three and a half years.

CONSIDERS FURTHER

The Convention on the Civil Aspects of International Child Abduction provides the following:

Article 3

The removal or the retention of a child is to be considered wrongful where –

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Furthermore, Article 13 of the Convention provides:

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that-

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

It is undisputed that when the Mother unilaterally returned to Malta with Leonard and informed the Father via email on 8 September 2024, she had already initiated legal proceedings in Malta. At that time, both parents jointly held custodial rights, established by an agreement with legal effect under the relevant State law.

As elucidated in the decision in the names "**Direttur tad-Dipartiment ghal Standards fil-Harsien Socjali vs Michael Caruana**" decided by the Court of Appeal on the 3rd August 2008:

"……il-Qorti tinnota li r-regolament in kwistjoni jolqot kemm wrongful removal kif ukoll wrongful retention, b'din tal-ahhar tavvera ruhha meta minuri li jkun barra mill-pajjiz tar-residenza ordinarja tieghu ghal perjodu temporanju, ma jigix ritornat lura f'gheluq dak il-perjodu. Il-protezzjoni, f'kull kaz, ghandha tintalab minn min ikollu "drittijiet ta' kustodja"............

“The general approach in determining this issue has been well summarised by ***Dyson LJ in Hunter v. Murrow (Abduction: Rights of Custody).*** *The first task, the so called ‘domestic law question’, is to establish what rights, if any, the applicant had under the law of the state in which the child was habitually resident immediately before his or her removal or retention. This question is determined in accordance with the domestic law of that State and involves deciding what rights are recognised by that law and how these rights are characterised. The second task, the so-called ‘Convention question’, is to determine whether those rights are properly to be categorised as ‘rights of custody’. This is a matter of international law and depends upon the application of the autonomous meaning of the phrase ‘rights of custody’ as understood by the English courts.” …jew, fil-kaz taghna, mill-qrati ta' Malta.”*

For these reasons, this Court is finding PM, guilty of wrongfully removing LMB from Paris, France.

CONSIDERS FURTHER:

The Court must now consider whether returning the Minor to Paris poses "*a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation*."

In her reply dated 2 October 2024, the Mother alleges that "*the Father suffers from serious medical conditions, including an autoimmune disease requiring various strong medications, including morphine, which prevent*

him from adequately caring for his son without assistance. Therefore, this Honorable Court should consider whether his medication regimen allows him to exercise his care and custody rights, as outlined in the separation agreement, in the absence of the minor's mother, diverging from the agreed and authorized terms."

The Mother has not provided evidence to support these claims, mentioning them only once during her testimony. She did not clarify whether these health conditions developed after the separation agreement or existed prior, leaving the Court without sufficient information or evidence.

No evidence has been presented indicating that returning the Minor to Paris would subject him to grave risk, physical or psychological harm, or place him in an intolerable situation, as contemplated by the Convention.

Reference is made to the British High Court of Justice – Family Section judgment in **Re E (Children Abduction Custody Appeal) [2011] 2 FLR 578**:

"First, the burden of proof lies with the party opposing the child's return to substantiate one of the exceptions, with the standard of proof being the ordinary balance of probabilities. The court will be mindful of the limitations inherent in the summary nature of the Hague Convention process, where oral evidence and cross-examination are rare.

Second, the risk to the child must be grave, characterized by a level of seriousness beyond a mere real risk. A relatively low risk of severe harm

may be deemed grave, while a higher risk level might be required for less serious harm.

Third, 'physical or psychological harm' gains context from the alternative 'or otherwise placed in an intolerable situation.' 'Intolerable' implies a situation a child should not be expected to endure, encompassing abuse or neglect, including exposure to the abuse of another parent.

Fourth, Article 13(b) focuses on the future situation upon the child's return, considering protective measures to prevent exposure to an intolerable situation."

The Court of Appeal in its judgment delivered on the **3rd December 2010** in the names **Direttur ghal Standards fil-Harsien Socjali vs Anita Maria Horry** stated:-

"biex minuri ma jintbghatx lura jrid ikun hemm ragunijiet gravi u impellenti li jiggustifikaw decizjoni simili. Kif intqal fl-kaz Re: H (Children) (Abduction) deciza mill-Qori tal-Appell fl-Ingilterra: The threshold to be crossed when an article 13 (b) defence is raised is a high one and difficult to surmount. Hence the courts in this country have always adopted a strict view of Article 13 (b). The risk must be grave and the harm must be serious. The courts are also anxious that the wrongdoer should not benefit from the wrong: that is, that the person removing the children should not be able to rely on the consequences of that removal to create a risk of harm or an intolerable situation on return. This is summed up, after a review of the authorities, in the words of Ward LJ in re C (Abduction: Grave Risk of Psychological Harm) [1999] 1 FLR 1145, 1154 cited by the judge in the present case:- "There is, therefore an established line of authority that the

court should require clear and compelling evidence of the grave risk of harm or other intolerability which is measured as substantial. not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which allows an unwelcome return to the jurisdiction of the court of habitual residence."

Therefore the Mother's plea is hereby being rejected.

CONCLUSION:

This Court thus considers that:

1. It has been conclusively established that the minor, LMB was wrongfully removed from Paris, France, by his mother.
2. France is determined to be the state of habitual residence for LMB.
3. No exceptions under Article 13 of the Hague Convention on the Civil Aspects of International Child Abduction have been substantiated.

THEREFORE, the Court is hereby rejecting the Mother's pleas and acceding to the Father's requests and consequently:

1. Orders the immediate return of LMB to Paris, France accompanied by his Father with the aid and intervention of the Central Authority of Malta;

2. Consequently revokes the warrant of prohibitory injunction numbered 131/2024 which was acceded to on the 3rd October 2024 and authorises the Father to withdraw the Minor's passport to be able to travel back to Paris, France with the said minor;

3. Recommends that in the child's best interests, the two parents initiate international mediation proceedings with the participation of Family Mediators from the two jurisdictions.

With costs against respondent.

Judge Antonio G. Vella

Maria Concetta Gauci
Registrar