Court Of Appeal

Judges

THE HON. CHIEF JUSTICE MARK CHETCUTI
THE HON. MR. JUSTICE CHRISTIAN FALZON SCERRI
THE HON. MADAM JUSTICE JOSETTE DEMICOLI

Sitting of Tuesday, 8th of April 2025

Number: 5

Application Number: 38/2017/1 AGV

AB

v.

CB

The Court:

1. This is a judgment following an appeal lodged by CB from a decision delivered by the Civil Court (Family Section) on the 4th of July 2024 in relation to the pronouncement of the parties' personal separation, and the habitual residence, care and custody of the litigants' minor child. The First Court vested the mother with the exclusive care of the parties' minor child and ordered that the custody of the same be vested in both

parents. The Father was ordered to pay monthly maintenance for the minor child. The Community of Acquests was also liquidated.

Introduction:

2. By means of a judgment delivered on the 4th of July 2024, the Civil Court (Family Section) the First Court decided as follows:

> *«1. Partially upholds the first claim and declares and pronounces the personal separation between the parties but rejects Plaintiff's claim since he is the cause that led to the separation and considers him to be responsible for the separation as from 1st March 2016, for the purposes of Section 48 of the Civil Code (Chapter 16).*
>
> *2.Upholds the second claim and authorises the Plaintiff to live separately from Defendant his wife.*
>
> *3.Rejects the third claim.*
>
> *4.Partially upholds the fourth claim and orders that the care of the minor child D shall be granted to the Defendant, whereas there shall be granted joint custody of the minor child. Moreover, the Court orders that the minor child shall continue to reside and be domiciled in Malta, this being the chosen domicile of the parties, in the best interest of the minor child.*
>
> *The Court also orders the notification of the said judgment to the Director of Passports and this in view of its decision regarding the travelling of the minor child with Defendant.*
>
> *The minor child shall reside with Defendant and all arrangements regarding access shall be those as decided by the Said Court under the subtitle Access.*
>
> *Maintenance shall be paid by Plaintiff as decided by the said Court under the subtitle maintenance.*
>
> *5.Rejects the fifth claim*
>
> *6.Rejects the sixth claim since there is a lack of proof in this regard.*
>
> *7.Partially upholds the seventh claim and liquidates the paraphernal*

credits as decided by the said Court in the assignment of assets.

8.Upholds the eight claim and orders the sale of the former matrimonial home, 14, Summer Hill, Douglas Isle of Man, and orders that the proceeds be split between the parties, after having settled the loan due to the bank in question.

9.Upholds the ninth claim and orders the dissolution and liquidation of the community of acquests as decided by the said Court under the subtitle Community of Acquests.

10. Upholds the tenth claim.

All costs, including the mediation costs, are to be borne by Plaintiff.»

3. By means of an application dated 31st July 2024[1] appellant CB lodged an appeal requesting this Court to: (a) vary in part the second request and whilst confirming that the exclusive care of the minor child D be awarded to appellant, and to order that the custody of the minor child is entrusted solely to her and authorises her to take all decisions in respect of health, education and travelling decisions on her own; (b) vary in part the fifth request and to order respondent to pay her various sums of monies namely €2,209.29 representing her share of Ramsey Crookall funds; £1,332.68 representing monies that she paid towards the joint mortgage; €7,679.14 representing monies that appellant paid for the joint mortgage; €1,287.96 representing respondent's share of legal fees paid and €3,000 representing the appellant's share of the rental deposit; (c) to apply against respondent all the dispositions in **Articles 48 *et sequitur***

[1] Appellant CB filed two identical appeal applications on the 31st of July 2024; one from the judgment pronounced in the proceedings with number 38/2017 and one from the proceedings with number 18/2017.

of the Civil Code; and (d) to vary in part the seventh request and whilst confirming the way the paraphernal property was divided, to order that respondent pays appellant the sum of £11,256.73 representing her paraphernal monies held in her bank account before marriage.

4. By means of a reply dated 30th December 2024, the respondent contends that linking together the cause of the breakdown of the marriage and the custody of the child is both legally and factually incorrect, since in both cases, the sequence of events should have been a guiding factor. Whereas the period of time may be relevant to the cause for the breakdown of the marriage, it is not relevant to the issue of custody. He adds that appellant failed to produce any evidence of any major disagreements which in any way affected the daily life of the minor child, disagreements which could have led to custody being assigned to one party. With reference to appellant's monetary claims, he states that with regards to the funds (stocks) held with Ramsey Crookall, of which appellant is due the sum of €2,209.29, respondent agrees that these should be paid to appellant from his share of the monies currently held under the custody of the courts. With reference to the amount of £1,332.68 paid towards the loan, this was paid by appellant during the existence of the community of acquests and as such is not due. This also applies to the amount of €1,655 referred to in paragraph 21 of the appeal application.

5. Respondent also contends that appellant's claim with regards to the amount of £5,132.55 should be rejected. Additionally, respondent added that the sum of €6,024.14 which appellant paid towards the loan repayments, following the termination of the community of acquests, should be paid to her from his share of the monies currently held under the custody of the courts but does not agree with the payment of legal fees in the amount of €1,287.96, since these fees were already split between the parties. Nor does respondent agree with paying the half undivided share of €6,000 regarding the deposit to appellant.

6. With regards to appellant's third grievance, respondent argues that appellant failed to provide any valid reason to justify the application of **Article 48** against him. Respondent adds that the argument being made by appellant in this regard is frivolous and devoid of any legal merit, as there are no grounds for disturbing the discretion of the First Court, or its appreciation of the evidence given and therefore this grievance should also be rejected. With reference to appellant's fourth grievance, and the sum of £11,256.73 being claimed by appellant, respondent contends that appellant failed to prove that this sum was used for the benefit of the community of acquests.

7. After a comprehensive review of all the case documents, the Court

has concluded that an oral hearing for these appeals was unnecessary. As a result, the Court will promptly hand down judgment in accordance with **Article 152(5) of the Code of Organization and Civil Procedure**.

Considerations:

8. From the records of the case it transpires that AB filed a sworn application on the 15th February 2017 wherein he *inter alia* requested the Court to: (1) declare and pronounce the personal separation between the parties for causes attributable to defendant; (2) authorise him to live separately from defendant; (3) condemn defendant wife to pay an adequate maintenance allowance to plaintiff; (4) vest both parties with joint custody; (5) apply against defendant wife the sanctions envisaged in **Article 48 *et sequitur* of the Civil Code**; (6) condemn defendant to consign all plaintiff's dotal and paraphernal property; (7) liquidate the paraphernal credits held by plaintiff against the community of acquests; (8) authorise the sale of the former matrimonial home, and order that the proceeds are to be split between the parties; (9) dissolve and liquidate the community of acquests.[2]

9. In her sworn reply, dated 19th May 2017, CB refuted Plaintiff's third,

[2] From the acts of the case, it transpires, that CB also filed proceedings for separation against her husband, application number 18/2017 RGM and in fact the two applications were being heard concurrently.

fifth and fourth claims, and contended that their marriage has irretrievably broken due to the husband's behaviour, to the extent that she had to leave the matrimonial home and seek refuge at an alternative residence.

10. By means of the **first ground of appeal**, appellant insists that the First Court erred in its judgment when it assigned joint custody of the minor child and insists that the access times awarded to the father are to be reviewed. Appellant explains that as evidenced from her sworn testimony, she has always been the primary carer of the child, with the father being largely absent in the child's upbringing. She adds that sufficient proof was submitted to demonstrate that indeed communication between the parties always proved to be difficult. In her additional affidavits, appellant testified that it was always very difficult to get in touch with her husband, to the point that she would end up communicating with his girlfriend instead, rendering decision-making a somewhat lengthy process.

11. Appellant insists that the First Court failed to take all this into consideration, together with the fact that in 2023, the father left the island without informing appellant or the minor child as to the reason for said departure. Nor did he inform them of the return date. During said period, there was no communication between the father and the child, and it was only through a criminal court hearing that appellant got to know that her

husband was the subject of a removal order. This according to appellant amounts to irresponsible behaviour, and thus questions how the First Court deemed that the father could be trusted with custody and decision-making powers. Appellant is also perplexed as to how the First Court despite being informed of the father's issues with alcohol, allowed sleepovers. Moreover, appellant contends that the father had opted to exercise access once a week from 2pm till 6pm instead of twice a week, and therefore the child's routine should not be yet again altered.

12. The father on the other hand, contends that it had been proven before the First Court that his drinking problem was limited to a very specific period of time, which was precipitated by an extremely stressful time during his life. This problem predated these proceedings, and dates to *circa* nine (9) years ago, when the minor child was two years old. The child is to date ten (10) years old, and the father overcame this problem many years ago. Appellant did not produce any evidence which even suggests that the father is an alcoholic. Likewise, appellant also failed to produce any evidence of any major disagreements which affected the daily life of the minor child, and which could have led the first court to assign custody solely to appellant. In fact, appellant travelled with the minor on various occasions with respondent's consent, most recently the trip to Austria in the beginning of January 2025, wherein the parties filed a joint note to this effect.

13. The father also underscores that his removal from Malta was the result of an administrative error by Identity Malta, who had communicated the wrong address to the relative authorities. Nevertheless, during this time, respondent had done his utmost to communicate with his son *via* video call. Additionally, respondent contends that there is no reason for the access arrangement recommended by the legal referee and confirmed by the First Court to be altered.

14. From the evidence adduced before the First Court, it transpires that the parties had met online. At the time appellant had just terminated a previous amorous relationship. The parties started cohabiting rather early into the relationship when respondent relocated to the Isle of Man for work purposes. The parties subsequently contracted marriage on the 1st of June 2012, in Italy and from said marriage had a son DB, who was born in Malta on the 24th of September 2014. Shortly prior to their son's birth, the parties had relocated to Malta.

15. Appellant mother's first grievance denounces the First Court's (i) decision to vest both parents with joint custody and (ii) the access arrangement imposed by the said Court.

16. In its deliberations the First Court considered that:

«As to the care and custody of the child D, there are conflicting views as to Plaintiff's sense of responsibility as a father. He states that he worked from home and very gladly spent time looking after his son. He insists that he always ensured that they spent time together, especially over the weekend through it was always challenging due to Defendant's depression who was lethargic and would not want to go out.

Plaintiff also accuses Defendant of hindering his relationship and bonding with his son D. He senses that Defendant manipulated and brain washed their son, to the extent that after spending the access time having fun, on getting closer to her residence, the minor child would change and ask Plaintiff to remain silent, showing he feared giving himself away to his mother. This is rebutted by Defendant who states that Plaintiff was totally distant from his son's life and was never there to help so much so that she would take him to day care and then pick him up after work, only to find Plaintiff either in bed or working.

Nevertheless, the Court is convinced that Plaintiff does have at heart the minor child and is capable of looking after him when he is spending time with him. He also shows a great deal of interest in his educational background having also contacted the school to receive updates of all schooling activities.

As has already been considered by this Court in decisions related to the care and custody of a child, the prevailing factors that lead to his decision are those that are advantageous towards the child and above all uphold the interests of the child.

Having been living with his mother throughout all the proceedings and considering that Plaintiff has issues with alcohol and there were episodes of abuse of drugs, it is in the best interest of the minor child D that he be granted in the sole care of the Defendant.

Having also considered that Plaintiff wants to keep himself updated with the child's educational development, the Court feels that this is justifiable. Moreover, the parties themselves did not produce evidence to show that there were major disagreements in issues related to custody of the said minor child. In this respect, the court also agrees with the legal refer Dr Keith Borg's recommendation and confirms that the custody of the minor child shall be a joint one.

> *Furthermore, considering that Defendant is French, the Court orders that the child's residence will be here in Malta and whenever she wants to travel with the said minor child, there has to be agreement with Plaintiff, who must not refuse travelling without reasonable justification…»*

17. The Court observes that the parties presented diametrically opposing versions with regards to the father's involvement and presence in the minor child's childhood and upbringing as a result of the father's alleged alcohol dependency, irresponsibility and his general unreliability. This according to appellant mother, should have deterred the First Court from awarding joint custody, and also from permitting sleepovers with the father on weekends. The Court has also seen that in her most recent affidavit at *fol.* 479 *et sequitur*, when the Covid pandemic started, appellant had agreed to change the day of the access following respondent's request to that effect and that she also always offered respondent some additional days during the Christmas holidays.

18. The Court has thoroughly examined the records of the case and took cognisance of the evidence of appellant's relatives and friends in relation to Respondent's alleged alcohol dependency and his lack of involvement and interest in his child's daily life; in particular the affidavit given by appellant's father and how he explained that after having followed respondent himself, realised that Respondent would use his

walks with the dog as an excuse to stop by the pubs nearby for drinks[3].

19. From a meticulous review of the records, the Court also observed that according to the medical report exhibited at folio 137 *et sequitur* dated 21st April 2011, respondent had conceded that he was consuming up to 100 units per week of alcohol and at the time was already experiencing anxiety and panic attacks. In addition to this, his GGT levels have been somewhat elevated even since 2013 and possibly even prior to that. Moreover, earlier that year, that is in January of 2013, when the parties consulted an obstetrician and gynaecologist, as evidenced from the document at *folio* 147, despite having been given the green light from a fertility perspective, respondent had disclosed that he smoked heavily and also drinks quite heavily on a regular basis.

20. Thus, contrary to that stated by respondent in his appeal application with regards to his drinking problem[4], it is apparent to this Court that this dependency existed from ***even before*** their child was conceived and in fact did not make the couple eligible for funded IVF in the Isle of Man. Respondent's excessive drinking was also discussed

[3] *Vide* affidavit at *fol* 185 of the acts. These testimonies were not subjected to cross-examination.

[4] In his appeal application respondent affirmed that his drinking problem was limited to a very specific period of time, which was precipitated by an extremely stressful time during his life, so much so that this problem predated these proceedings, and dates back to circa nine (9) years ago, when the minor child was two years old. The court has also seen that during his examination on the 14th of March 2022, respondent also denied that he used alcohol as a de-stresser in periods subsequent to the event above indicated.

during appellant's sessions with the Perinatal Mental Health Services within Mater Dei Hospital prior and following their child's birth.

21. On the other hand, the Court is also aware of the fact that respondent suffered from a serious illness which naturally contributed to the damage caused to his liver function. In fact, at the initial stages of the proceedings, Dr Mario Scerri testified *viva voce* on the 15th of June 2017 (at *folio 56 et sequitur)* and with reference to results exhibited in the records of the proceedings at *folio 51 et seq,* explained that the results do not *per se* confirm the father's alcohol dependency or otherwise, as the elevated values could be due to a multitude of factors. Scerri also added that in some individuals any medication can alter the liver function, even over the counter pain killers. The Court also took note of the testimony tendered by Dr Ali Sarfraz who clearly explained that the liver function tests undertaken by respondent determine the presence or otherwise of liver disease, but do not determine the cause[5]. No other recent follow up tests to this effect were submitted before the First Court.

22. As stated by the Court of Appeal in its judgment dated 7th December 2023 in the names of ***Nikita Hili proprio et nomine v. Maximilian Ciantar***, every child possesses an inherent right to nurture a meaningful relationship with the parent they do not reside with. Access to

[5] *Vide* testimony at *fol* 64 *et seq*.

the child however should not be dictated by either parent's convenience. Instead, it should be shaped by what truly serves the child's best interests, placing their emotional well-being and developmental needs at the forefront (see also ***Lara Cassar v. Oliver Bonanno*** delivered by the Court of Appeal on the 19th of April 2012 and ***Joseph Micallef proprio et nomine v. Lesya Micallef nèe Grinishina*** delivered by the Court of Appeal on the fl-14th of December 2018).

23. With regards to custody, the jurisprudence of the Maltese Courts has always been consistent in that, issues regarding the care and custody of children are to be solely regulated by the principle of the best interests of the child. The Court of Appeal in its judgment in the names of ***Sylvia Melfi v. Philip Vassallo*** decided on the 25th of November 1998 affirmed 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.»*

24. The Court recognises that in normal circumstances both parents have an important and fundamental role in the upbringing and life of their

children, and therefore none of them should be excluded from the child's care unless there are serious reasons which lead the Court to take such a drastic measure. In fact this has been the stance adopted in the judgment in the names of ***AB v. CD*** decided on the 23rd of February 2018, wherein the Court affirmed that it has the power to entrust the care and custody of a minor solely in the hands of one of the parents if this is the minor's best interests, in accordance with Article 56 of the Civil Code, and that while the parents' rights are relevant considerations, the child's best interests are the Court's primary consideration.

25. This Court has always held that it is generally in the best interest of the child that the child's relationship and rapport with both parents is preserved and protected, irrespectively of the nature of the relationship between that same child's parents. The ideal situation for custody is when both parents share responsibility. However, if there is a lack of communication between them, it becomes challenging, if not impossible, for such an arrangement to serve the best interests of the child. When custody is jointly held, both parents must be willing to collaborate and work together (*vide* ***Lauraine Agius v. Alexei Zammit Douglas*** decided on the 13th of October 2022).

26. This Court also took cognisance of the report filed by the Legal Referee, wherein the Legal Referee opined that the ordinary care of the

minor child should be entrusted to the mother, and that the minor should reside in Malta together with his mother. Moreover, he opined that the custody of the minor should be joint so that the decisions regarding health, education, extra-curricular activities and travelling be taken by both parents. Following a number of questions put forward by appellant, the Legal Referee reiterated that with regards to his recommendation that custody of the child be joint between the parties. The First Court embraced the Legal Referee's opinion on this matter.

27. Now, the Court of Appeal in its judgment of the 25th of April, 2024 in the names of ***Dr Corinne Wood proprio et nomine v. Dr Martin Schranz***, explained that decisions regarding the care and custody of a minor should not be influenced by the strengths or weaknesses of the parties involved. Instead, the focus should solely be on what serves the best interest of the minor. (See also ***JP proprio et nomine v. JP*** decided by the First Hall of the Civil Court on the 25th of June, 2003). While it is ideal for both parents to share the care and custody of their minor children, in situations where there is disagreement between the parents and several complicating issues, a joint custody arrangement becomes impractical. Such a system can lead to unnecessary disruptions in the children's upbringing (*vide* ***MC v. FC*** delivered by the Court of Appeal on the 3rd of October, 2008 and ***AA v. JG*** delivered by the Court of Appeal on the 25th of March, 2021). This is particularly true when urgent health

decisions for minors arise (*vide* ***JB proprio et nomine v. JBM*** delivered by the Court of Appeal on the 21st of October, 2021).

28. After careful consideration of the records of the proceedings and the arguments made by both parties, the Court finds itself concurring with the decision of the First Court and finds that it need not disturb the First Court's discretion in determining the custody and access arrangements. After all, it has been proven that respondent cares for his son and has taken interest in him and is capable of taking care of him.

29. Although this Court is mindful of the fact that respondent downplayed his consumption of alcohol and has also at times been irresponsible *vis-à-vis* his financial obligations towards his son, it also underscores that, in the face of the number of concerns delineated by appellant mother both in her appeal application and before the First Court, appellant remained passive.

30. The Court notes that despite respondent having filed numerous applications requesting authorisation to travel with the minor child, appellant did not avail herself of judicial or non-judicial remedies before the event authorities, to effectively ascertain whether or not appellant's apprehension regarding respondent's sobriety during access was justified, despite having reiterated in her last affidavit at *folio* 479 that she

had noticed that when respondent brings the child back in the evening after access, she noticed that he was slightly impaired possibly due to alcohol consumption. Frankly, this leads the Court to believe that either the appellant was not truly concerned much or else, what she stated was not completely true. Having said this, parents must always keep in mind that they must always set an example to their child. Hence, the Court whilst understanding that during a stressful period, a person may be fragile and vulnerable, the solution is to seek professional help to face anxiety and problems in the proper manner.

31. Thus and for these reasons, this ground of appeal is being rejected.

32. The rest of the appellant's grievances deal with the liquidation of the assets of the parties. Now, the First Court decided as follows:

> «***Community of Acquests:***
>
> *The Court agrees with the liquidation and assignment of the said assets and liabilities as recommended by the legal referee Dr Keith Borg as follows: -*
>
> *A. The immovable property 13, Summerhill, Douglas, Isle of Man, including all movables found within the said house, has to be sold on the open market at a value agreed to the parties after engaging the services of an agency unless they agree otherwise. From the proceeds of the sale, the loan with the Santander bank has to be settled and the remaining proceeds are to be divided equally between the parties.*
> *B. Any funds(stocks) held with Ramsey Crookall have to be divided equally between the parties.*
> *C. The life insurance with Royal Sun Alliance has to be surrendered and divided equally between the parties.*
> *D. The vehicle Nissan Qashqai bearing registration number FCF 918 shall*

be assigned to Defendant, whereas vehicle Renault Clio bearing registration number VIC 331 shall be assigned to Plaintiff. For such intends and purposes a car dealer needs to be appointed to value the said vehicles in which case, the difference in value is to be settled from the proceeds of the sale of the immovable on the Isle of Man to the spouse to whom it is due.

E. Monetary Claims made by Defendant are well founded and supported by the relevant documentations: -

i. The sum of GBP 14,508.07 representing proceeds withdrawn by Plaintiff in excess of his half share from the joint accounts held with Barclays Bank;

ii. The sum of GBP 2,700,00 lent to Plaintiff by Defendant before marriage;

iii. The sum of GBP 16,286.00 which sum represents the difference of funds deposited by both parties before marriage into their joint account held at Barclays Bank;

iv. The sum of GBP 10, 092.00 which sum represents the different difference of funds deposited by both parties before marriage into their joint account held at Barclays Bank.

F. The Court rejects Defendant's claims for the following sums of money since they were not sufficiently proved, namely the sum of GBP 1,332.68 paid towards a loan, the sum of GBP 5,164.48, the excess payments made by Defendant towards the marriage expenses, the sum of GBP 5,132.55 the difference of payments effected by Defendant towards honeymoon expenses, the sum of GBP 7,750.95 money paid by Defendant towards Plaintiff's holiday expenses.

G. Bank Accounts

- *Defendant shall be assigned the bank account held in her name with Bank of Valletta plc bearing number 40022738349 as well as the bank account held in her name with Bank of Valletta plc bearing number 40022936426.*
- *Plaintiff shall be assigned the bank account held in his name with Bank of Valletta plc bearing number 400232241372.*
- *With regards to any joint accounts held in foreign bank accounts the account shall be closed down and the funds divided equally between the parties.*
- *Any money deposited in court is to be returned to that spouse to whom the said money is due.»*

33. The **second ground** of appeal contains two grievances. In the first part appellant disagrees with the First Court's decision to reject her

request to apply the sanctions envisaged in **Article 48 *et seq* of the Civil Code** against respondent. Appellant contends that despite the fact that the First Court found the husband responsible for the breakdown of the marriage, the Court did not apply these sanctions with regard to respondent. Appellant adds that as a result of respondent's behaviour, she had to seek psychological help. There is no reason why the First Court subsequently denied her request to apply the dispositions contained in **Article 48 *et sequitur* of the Civil Code** against respondent.

34. With respect to the first aspect of this second ground of appeal, which respondent addresses in his reply under the sub heading "Third grievance", he affirms that appellant failed to provide any valid reason to justify the application of **Article 48**. He adds that appellant's reasoning which seems to suggest that the application of **Article 48** should be applied once a party is deemed to be responsible for the breakdown of the marriage, is incorrect, and it is precisely why the legislator created the distinction in the application of **Article 48** when dealing with the grounds mentioned in **Articles 39, 41** and **51 of the Civil Code**.

35. The Court notes that in the operative section of the appeal judgment in the proceedings with number 18/2017 in the names ***CB v. AB***, the First Court rejected appellant's sixth request, namely: *"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 Chapter 16 of the Laws of Malta."

36. In its considerations, the First Court held that:

> *«There were also issues of gambling, although this emerges as being inevitable considering that Plaintiff works in the gaming industry. The Evidence produced in this regard, does not indicate that there were serious gambling problems that could be detrimental to the marriage.*
>
> *Having considered all the above, the Court agrees with the conclusions reached by the legal referee Dr Keith Borg that Plaintiff is considered to be responsible for the breakdown of the marriage because of cruelty (sevizzi) and all other grounds have not been proven.»*

37. It has been stated by the Court of Appeal in the judgment in the names of ***AM v. MM*** that in cases of abandonment or adultery, the sanctions found in **Article 48 of the Civil Code** are applicable *ex lege*. For other reasons, however, it is up to the Court's discretion to determine whether the party responsible for the breakdown of the marriage should face these sanctions (*vide* **Article 51 of the Civil Code**, ***MC v. GC*** decided by the Court of Appeal on the 6th of September 2010 and ***IV pro et noe v. AV*** delivered by the Court of Appeal on the 8th of October 2020). While the husband's conviction for serious assault against his wife is indeed a grave matter, it does not necessarily impose the consequences outlined in **Article 48 of the Civil Code**. Such legal repercussions cannot be presumed by mere conviction alone.

38. As a preliminary observation, the Court notes that no appeal was lodged from that part of the appealed judgment which declared respondent responsible for the breakdown of the marriage solely due to cruelty, in appellant's regards, since the other grounds contemplated in Article 40 of the Civil Code were not sufficiently proven. The Court has also seen that despite the fact that during the course of the proceedings before the First Court mention of recreational drug abuse on the part of both parties was mentioned, as was gambling, both the legal referee and the First Court concluded that it was respondent's alcohol dependence that led to the breakdown of the marriage. However, although the legal referee recommended the application of the sanctions envisaged in **Articles *48 et sequitur***, the First Court did not deem this opportune.

39. As mentioned above, the grounds mentioned in article 40 of the Civil Code bestow the Court with a discretion to either apply *in toto* the sanctions in **Article *48 et seq* of the Civil Code** or to apply the same in part or not to apply the sanctions therein contemplated at all. After careful assessment, the Court does not find that the First Court was erroneous in the exercise of its discretion on this matter.

40. In this respect this Court has seen that the First Court in fact in its judgment recognised that respondent has: "at heart the minor child and

is capable of looking after him when he is spending time with him", and that respondent also made arrangements to receive all the relative schooling updates. This Court's review of this grievance would have been different had appellant produced proof that as a consequence of respondent's alcohol dependency she and the minor were left wanting for basic necessities, as this Court has seen oftentimes; however, it appears to this Court that throughout the marriage, the parties and the child, resided in a rented house with pool and garden facilities, and the minor child always attended a private nursery.

41. Thus and in light of the above considerations, this part of the second grievance is also being rejected.

42. In the **second limb of this second grievance**, appellant attests her disagreement with regards to the liquidation and assignment of the parties' assets and liabilities in point B of the appeal judgment, and partly to the liquidation and assignment in point F and G. Appellant adds that the First Court also failed to address and decide on some of appellant's claims.

43. For the sake of clarity, the Court shall be addressing each claim separately:

(i) Point B: The Ramsey Crookall Stocks

44. With regards to the stocks held with Ramsey Crookall, the First Court ordered that <u>any funds (stocks held with Ramsey Crookall must be divided equally between the parties.</u>

45. Appellant contends that whilst she agrees with the Court's decision, the First Court ought to have ordered respondent to pay the appellant her share of the funds in question, since these have been sold, and respondent received the sum of €4,418.57 from the sale. Appellant affirms that given that these funds have already been liquidated, and the proceeds were received by respondent, respondent should be ordered to pay her share, and that said sum is to be deducted from the respondent's share of the money that is deposited in court. In his reply, respondent concedes that appellant is due the sum of €2,209.29 and that these monies should be paid to her from his share of the monies currently held under the custody of the courts. **Thus, and in view of the above, the Court orders that said sum of €2,209.29 is to be paid to appellant from respondent's share of the monies currently held under the custody and authority of the courts.**

(ii) <u>Point F: Sums of money claimed by Appellant</u>

46. With regards to the above, the First Court in its deliberations held that:

> *«F. The Court rejects Defendant's claims for the following sums of money, since they were not sufficiently proved, namely the sum of GBP 1332.68 paid towards a loan, the sum of GBP 5164.48 the excess payments made by Defendant towards the marriage expenses, the sum of GBP 5132.55, the difference of payments effected by Defendant towards honeymoon expenses, the sum of GBP 7,750.95 money paid by Defendant towards Plaintiff's holiday expenses.»*

47. Appellant affirms that she agrees in part with the First Court's decision, and this save for the sum of GBP 1,332.68, which she paid towards the loan. In its decision the Court held that no proof was submitted in this regard. Appellant makes reference to the statements submitted, namely Doc AP 4, wherein it is proven that up until the 3rd of November 2017, appellant paid the mentioned sum towards the mortgage and insurance, since the rental income perceived from the Isle of Man property was not sufficient. Appellant adds that in cross-examination on the 23rd of July 2019 respondent confirmed that he was informed that appellant was paying the sum of GBP 350 monthly and also claimed that he was also effecting mortgage payments. Respondent attests that as concluded by both the legal referee and the First Court, this amount was paid by appellant during the existence of the community of acquests and as such is not due.

48. The Court notes that the First Court delivered a judgment *in parte* on the 25th of February, 2021 whereby it ordered the cessation of the community of acquests between the parties in terms of **Article 55(1) of the Civil Code**.

49. The Legal Referee in his report affirmed:

> *«is-somma ta' GBP 1332.68 f'rifużjoni ta' somom imħallsa minnha kontra s-self bankarju; l-esponenti jħoss li din il-pretensjoni ma għandhiex mis-sewwa. Dan abbażi ta' dak deċiz mill-Qorti tal-Appell fil-kawza fl-ismijiet **AP v. MP** fejn ġie insenjat illi: "L-appellant jilmenta wkoll mill-fatt li l-Ewwel Qorti naqset li tagħti widen għall-pretensjoni ta' rifużjoni ta nofs l-ammonti kollha minnu imħallsa kontra l-passiv bankarju tal-komunjoni tal-akkwisti favur il-Bank Banif." L-appellant jistrieħ ħafna f'dan l-aspett fuq sentenza mogħtija minn din il-Qorti fl-ismijiet **A v. A** (30 ta' Ottubru 2015) madankollu għal darb'oħra jiċċita kawża li fiha l-partijiet stess kienu ftehmu fuq dan l-aspett, fil-kawża odjerna ma kien hemm ebda ftehim simili u kif sewwa rrispondiet l-appellata, il-flus li qed jgħid li ħallas l-appellant fir-rigward kienu wkoll tal-komunjoni u għalhekk effettivament u legalment il-komunjoni ġà ħallset dak il-passiv. Kwindi l-aggravju mhuwiex fondat.»*

50. On the subject matter, in the case in the names of ***CG v. LG*** decided by the Court of Appeal on the 3rd of December 2010 held that:

> *«L-attriċi tgħid ukoll li l-bilanċ fuq is-self li għad fadal ma huwiex ta' €20,970, li fuqu l-Ewwel Qorti ħadmet meta qalet li l-attriċi trid tħallas sehemha ta' €10,485, imma biss ta' €14,412. Jidher li, fil-fatt, hekk hu, iżda din il-prova nġiebet a konjizzjoni tal-Qorti f'dan l-istadju tal-appell, għax l-Ewwel Qorti kellha biss statement li jindika bilanċ dovut lill-bank ta' €20,970. Il-konvenut ma jiċħadx dan il bilanċ, (u minħabba f'hekk biss dak id-dokument qed jiġi aċċettat bħala prova), però, jissottometti li l-ħlasijiet li saru lill-bank akkont ta' dan id-dejn saru minnu biss, u kwindi martu m'għandhiex tieħu vantaġġ minn dan. Jibqa' l-fatt, però, li l-ħlasijiet saru meta l-komunjoni tal-akkwisti ma kienitx għada xolta, u l-ħlasijiet saru għall-benefiċċju taż-żewġ partijiet u minn assi li teknikament kienu jifformaw parti mill-kommunjoni tal-akkwisti li sal-lum kienet għada viġenti bejn il-partijiet.»*

51. Similarly, the Court of Appeal in ***YB v. CB*** decided on the 25th of June 2010 opined that:

> *«Ovvjament, il-konvenut m'għandux dritt li jingħata lura l-ħlasijiet li hu jgħid li għamel fid-dar u biex iħallas lura s-self; il-ħlasijiet saru minn flus il-komunjoni tal-akkwisti, għax dak kollu li daħħal il-konvenut mill-impjieg*

> *tiegħu wara ż-żwieġ kien jidħol fil-komunjoni u kwindi dawk il-ħlasijiet saru minn fondi tal-komun.»*

52. The jurisprudence on the matter is clear and this Court concurs with the First Court's decision. Therefore, the amount reclaimed is not due. The Court believes that the same applies to the amount of €1,655 claimed by appellant.

53. With regards to the amount of €6,024.14 the Court notes that there is agreement that this sum should be paid to appellant from respondent's share of the monies currently held under the custody of the courts.

54. However, with regards to the amount of €1,287.96 representing respondent's share of legal fees due to Patterson Law for the sale of the joint property, respondent contends that said fees were already split between the parties. Dok ABX2 at *folio* 503 is an invoice issued by Patterson Property Law to appellant, evidencing that the amount indicated was paid by Appellant and was received on the 15th of June 2022. This payment was effected from a BOV bank account from account with number 40022738349. The Court notes that despite respondent's claim that these were equally divided between the parties, no documentation to this effect was produced. Thus, and for this reason, the Court orders that the sum of €1,287.96 is to be reimbursed to appellant by respondent. The Court orders that should the amount deposited under

the authority of this Court be sufficient, said amount is to be paid from the amount so deposited.

55. With regards to the claim regarding the rental deposit, appellant is claiming her share of €3,000. She affirms that the full amount of the deposit amount of €6,000 was returned by the landlord to the respondent. Respondent on the other hand affirmed that the monies in question were used to honour the joint obligations of the parties *vis-à-vis* the pool and garden. The Court notes that during his testimony tendered on the 23rd of July 2019, respondent confirmed that the deposit was returned to him in full in cash. However, no mention as to what expenses he had paid from the deposit is evident from the testimony, despite it was referred to in his reply to the appeal application. The law of evidence in civil proceedings dictates that he who alleges must prove. The Court notes that respondent produced no proof of having affected payment for any house related expenses from said deposit. The Court notes that in his additional note at *folio* 530 *et sequitur* of the acts, the Legal Referee with reference to a question put forth by appellant on the matter, confirmed that that appellant is to be paid her share of €3,000. Thus, the Court orders that €3,000, are to be paid to appellant and are to be deducted from respondent's share of the money held under the Court's authority.

(iii) ***Point G: The sum deposited in Court***

56. Appellant's grievance with regards to point G is in relation to the amount of monies deposited under the authority of the Court. Appellant requests the Court to declare that the sum being held is jointly owned by the parties, and thus appellant may be authorised to withdraw the whole amount deposited, representing her share of €21,512.23 and the remaining sum in order for her to be partly compensated for the sums that she is due to receive from respondent.

57. The Court notes that by means of a schedule of deposit with number 43/2016, the sum of €142, 601.19 was originally deposited under the authority of the court. However, throughout the course of the proceedings different amounts were withdrawn to finance the joint mortgage with Santander Bank. The remaining balance amounts to €43,024.46, thus each party is entitled to €21,512.23. The Court concurs with appellant insofar that it authorises Plaintiff to withdraw her share, and to withdraw from respondent's share solely and up to the amount that in accordance with this judgment and that of the First Court has been ordered to be paid to her from respondent's share of said amount.

58. By means of the **third grievance**, appellant objects to the First Court's failure to take into consideration a paraphernal claim made by appellant, namely her request to be compensated the sum of GBP 11,256.73, which she had in her Barclay's bank account prior to the

parties' marriage, as evidence by document AP 09 at *folio 42* of her affidavit. Appellant affirms that this claim was not addressed by the Legal Referee and reference to this was also made by appellant in her note of submissions.

59. Respondent argued that appellant failed to prove that this sum was used for the benefit of the community of acquests and that in order to successfully claim a paraphernal credit, appellant had to not only prove the existence of this sum prior to the marriage but also to prove that it was used for the benefit of the community.

60. On this subject-matter, the Court of Appeal in its judgment delivered on the 16th of March, 2023 in the names of ***VB v. JB*** has reiterated that all acquisitions made during the marriage are presumed at law to belong to the community. Therefore, whoever claims that there are paraphernal claims against the community of acquisitions must prove them.

61. In her note of submissions, appellant stated that upon marriage, she had the above-indicated amount in her Barclays account as evidenced by Doc AP 09. No mention is made of the number pertaining to said account in the note of submissions. Similarly, in her affidavit at *folio 324,* appellant reiterates that before she got married, she had GBP

11,256.73 in her own personal current Barclays account and again refers to Doc AP 09.

62. Document AP 09 at *folio 358* of the records of the case with number 18/2017AGV consists of two documents: a document which seems to have been compiled by appellant and consists of three pages indicating a list of expenses paid for between May 2011 and June 2012 relative to the payment of holiday expenses, the parties' engagement, wedding and honeymoon related expenses. Although the heading of this document indicates: "C Current Account - Barclays" no indication of the relative account number is evident. The second document pertaining to Doc AP 09 is a series of bank issued statements pertaining to an account with number 83129764 with sort code 20-26-74. The year of the said transactions seems to have been indicated in pen by appellant, as belonging to the year 2011 and 2012, however, the document *per se* does not indicate the year of the transactions it details. Neither is a name indicated on said statements.

63. In her note of submissions, reference to Doc AP 09 is also made with reference to another paraphernal claim advanced by appellant for the amount of GBP 10,328.95 as evident from fol 556 of the records, which amount appellant claims was utilised for the wedding.

64. **Article 1331(2) of the Civil Code** provides that:

> *«Each one of the spouses has a right to be reimbursed with any sum of money or the value of anything which has been taken from his or her paraphernal property where such money or thing was spent or* ***consumed in connection with a debt or an investment of the community of acquests» (Emphasis of this Court)***

65. In proceedings with number 964/2002 decided on the 22nd of February 2007 it was held that: *«Illi rigward l-partita [b] taħt l-intestatura "Krediti parafernali" [fol.289], il-Qorti tosserva li s-somma ta' Lm2,000 li nħarġet mill-attriċi qabel iż-żwieġ sabiex isir it-tieġ u s-safra, ma jidħolx fil-parametri ta' l-Artikolu 1331[2] tal-Kap.16, stante li ma tistax titqies bħala li intużat in konnessjoni ma' "dejn jew investment tal-komunjoni ta' l-akkwisti.»*

66. From a thorough examination of the appeal application, the note of submissions, and appellant's affidavit, the Court noticed that appellant (perhaps intentionally), failed to specify whether such claim is being directed at respondent or whether she is claiming that such amount is to be reimbursed from the community of acquests and for this reason, it is this Court's considered opinion that it should not take further cognisance of this grievance.

67. The Court, however, *obiter* affirms that it concurs with the considerations made in the above-cited decision, namely that the monies appellant is claiming, were not spent or consumed in connection with a debt or an investment of the community of acquests, and therefore no

reimbursement is due from the community of acquests.

Decision:

For these reasons, the Court:

(i) Rejects the first and third grievance in their entirety;

(ii) Rejects the first limb of the second grievance;

(iii) Upholds the second limb of the second grievance insofar as compatible with the considerations made above and varies the judgment of the First Court insofar as compatible with the considerations made above, namely by:

(a) Ordering that with regards to the investment held with *Ramsey Crook all*, the said sum of two thousand, two hundred and nine Euro and twenty nine cents (€2,209.29) is to be paid to appellant from respondent's share of the monies currently held under the custody and authority of the courts;

(b) Ordering that in light of the agreement evidenced in the acts, the amount of six thousand and twenty four Euro and fourteen cents (€6,024.14) is to be paid to appellant from respondent's share of the monies

currently held under the custody of the courts;

(c) Ordering that the sum of one thousand, two hundred and eighty seven Euro and ninety six cents (€1,287.96) is to be reimbursed to appellant by respondent, which sum represents respondent's shares of legal fees relating to the sale of the property in Isle of Man. In this regard the Court orders that should the amount deposited under the authority of this Court be sufficient, said amount is to be paid from the amount so deposited;

(d) Ordering that the sum of three thousand Euro (€3,000), is to be paid to appellant and is to be deducted from respondent's share of the money held under the Court's authority, which amount represents appellant's share from the rental deposit;

(e) Authorizing appellant to withdraw her share from the money deposited under the authority of the Court, and to withdraw from respondent's share solely and up to the amount that in accordance with this judgment and that of the First Court has been ordered to be paid to her from respondent's share of said amount.

(iv) The Court confirms the rest of the judgment of the First Court.

Two-thirds ($^2/_3$) of the costs are to be borne by Appellant, whereas respondent is to bear the remaining third ($^1/_3$).

Mark Chetcuti Chief Justice	Christian Falzon Scerri Judge	Josette Demicoli Judge

Deputy Registrar
ss