



**QORTI CIVILI
(SEZZJONI TAL-FAMILJA)**

**ONOR. IMHALLEF
NOEL CUSCHIERI**

Seduta ta' l-10 ta' Marzu, 2009

Citazzjoni Numru. 302/2006

Number on list: 26

**A B in his own name
and on behalf of his minor son C
vs
Doctor Beppe Fenech Adami and Legal Procurator
Veronica Rossignaud
deputy curators nominated to represent D B
who is absent from these Islands; and by virtue of
decree given
on the 26th February 2009 these deputy curators have
been removed
from these acts which have been personally assumed
by the said D B**

The Court,

Having seen the sworn application by virtue of which
plaintiff premised that:

1. The parties contracted a civil marriage on the 19th July 2003 (Doc DC1) in Malta, when the parties already had a child together, C, who is six years old and was born in Oldham, Manchester, United Kingdom.
2. The parties' married life has irretrievably broken down due to excesses, cruelty, threats, adultery and desertation committed by the respondent against the plaintiff.
3. The marital problema started on the sixth (6) of July 2005, when the defendant and the parties' minor son C went on holiday to the United Kingdom. They had to return back to Malta on the twentieth (20) of July 2005.
4. These marital problems escalated when the defendant did not return to Malta and remained in the United Kingdom with the couple's son C. The respondent is presently living in Wales together with another English man. She admitted that she met this man in Malta.
5. The plaintiff tried his best to convince the respondent to come back to Malta, at least to see his son.
6. The plaintiff's legal representative also communicated with her and tried to convince her to come back to Malta and she accepted on condition that the plaintiff signs a 'residence form', thus accepting that C is residing in the United Kingdom.
7. He started proceedings in front of these Courts, whereby he was authorised to proceed with a personal separation suit in front of the Family Court. (Dok DC2)
8. The parties' through their respective legal representatives tried to reach an amicable solution, and in fact a 'draft separation agreement' was drawn up. It was agreed that the respondent had to come over to Malta, together with her son, to sign this agreement in June 2006.

9. The respondent, went back to her decision and did not accept the 'draft separation agreement', and insisted that she was not going to visit Malta unless the plaintiff signed a 'residence form' for C.

10. The respondent stopped contacting the plaintiff and her legal representatives.

11. The plaintiff only has the respondent's cellular phone number, and whenever he tries to contact her to speak to his son, she either does not answer, or else she makes up all sort of excuses just to prevent him from speaking to his son.

12. This Court appointed curators to represent D B (Dok. DC4).

13. The plaintiff was authorised by this Court to file this sworn application by means of a decree dated 16th August 2006 (Doc. DC5).

And on the strength of the above is requesting that this Honourable Court to:

1. declare and pronounce the personal separation between the parties for the reasons premised imputable solely to the respondent;

2. declare that the respondent forfeited her right to maintenance.

3. entrust the care and custody of the minor C B to the respondent, saving those reasonable and opportune provisions, in order to guarantee the access of the applicant and this in the best interests of the minor child.

4. declare dissolved the community of acquests existent between the parties.

5. liquidate the same community of acquests which is to be divided into portions not necessarily equal in such manner that, if it be the case, the respondent shall lose all

her rights to half of the acquests made during marriage mostly by the work of the applicant.

6. apply against the respondent, entirely, on in part, the effects contemplated in articles 48, 51, 52 and 53 of Chapter 16 of the Laws of Malta.

7. make any other provision in accordance to the circumstances of the case.

With all legal costs against the respondent who is from now summoned so that a reference to her evidence is made.

Having seen the sworn reply filed by the deputy curators on the 12th October 2006 declaring that at that stage they were not aware of the facts of the case, reserving the right to present a further reply at a later stage;

Having seen that defendant was served with a copy of the sworn application and the relative documents on the 27th January 2009, with the consequent removal of the deputy curators from the proceedings; and, further, that defendant failed to file an additional sworn reply, though she had filed her affidavit on the 31st January 2008;

Having seen that, though defendant was given an opportunity to produce all her evidence, she produced no further evidence save for the above-mentioned affidavit;

Having seen all the acts of the case, including the affidavits presented;

Having considered;

The Action

That by virtue of the present action plaintiff is requesting this court to declare the personal separation between the parties on the grounds that the marriage has irretrievably broken down due to the reasons contemplated in articles

38, 40 and 41 of Chapter 16 of the Laws of Malta¹; as well as to regulate and provide on matters consequential to the personal separation, including the issue of care and custody of their common son C.

The Facts

That from the evidence produced, the following picture emerges. In December 1998 plaintiff, a Maltese national residing in Malta, started a relationship with defendant, an English national who at the time was also in Malta; soon afterwards, defendant discovered that she was pregnant with their child. In July 1999 they decided to move to the United Kingdom where they lived until April 2003 when the couple decided to return to Malta and establish their residence here.

On the 19 July 2003, after defendant received an annulment from her previous husband, the parties got married, and on July 15, 2004 they eventually bought an apartment in St.Paul's Bay, which was to serve as their matrimonial home in Malta.

Subsequently the parties began to experience matrimonial problems, and on the 6 July 2005 defendant went for a supposedly short stay to the U.K. with their 5-year-old son. However, she failed to return on the 20 July as she had told plaintiff, and instead, remained unlawfully in the UK together with their son; and this, in manifest breach of plaintiff's rights, who under Maltese Law enjoy joint custody rights with defendant over his son.

On being informed by phone that defendant intended to remain in the UK with the boy and establish residence there, plaintiff tried unsuccessfully to persuade defendant to come back to Malta with their son in order to discuss matters and try to reach an amicable settlement, primarily on care and custody of the child, and access rights. Eventually defendant came back to Malta, accompanied by a male friend, to gather her belongings from the matrimonial home, but she left the boy in the UK.

¹ The Civil Code

Plaintiff has submitted all along that he is willing to agree to the child living with defendant in the UK, and that defendant be granted care and custody of the child, however, on condition that he be granted adequate access rights to his child with a view to developing further his relationship with his son. Defendant, though not objecting to plaintiff's visitation rights in the UK, is unwilling to agree to granting plaintiff access of the child in Malta even though for short periods during the school holidays. This appears to be the main obstacle between the parties, which has prevented them from reaching an amicable settlement.

Personal Separation

Plaintiff's version

In short, plaintiff states that his wife used to work from early evening until very late at night in bars, whilst he used to work as a deliveryman during the day, thereby ensuring that their son was continually under their care. In his affidavit plaintiff states that defendant "would frequently go out for the night; this resulted in a fallout between us, due to the fact that I felt it was not good for her to be seen out so much by herself, till the early hours of the morning". He accused defendant of remaining in the bar after closing- time for drinks. He states that when she returned to Malta in June 2006 she came with "her new partner"

Defendant's version

Defendant states that there was a time when she used to work in a particular bar from 6.00 pm until 6.00 am. Then she moved to a local cinema where she used to work between four to seven days a week. "I had to work evenings as A B was working in the daytime, and I had to be there to look after C."

Though she admits to the fact that in June 2006 she came to Malta with a male friend, she categorically states that he "is not my partner nor ever was."

Regarding plaintiff's claim for access to his son in Malta, she states that he is welcome to the United Kingdom to see C, but she has purposely refrained from bringing the boy with her in June 2006, as plaintiff "would not sign anything to state that I had residence of C, and I was genuinely concerned that A B will try to keep C in Malta....[and] I would not be happy with putting C on a plane unaccompanied. [He] knows that he can telephone C."

Having considered further;

That regarding plaintiff's claims, in so far as they are based on the alleged adultery committed by his wife, the Court considers the evidence in this regard to be scarce and insufficient to prove this ground. However, there is satisfactory evidence proving that defendant is guilty of "grievous injury" [offiza gravi] in terms of article 40 aforementioned when frequenting male friends; and although defendant denies this, Amy Cardona, in her affidavit states, that she and defendant had become "very good friends and confidants" and that "while I was on a vacation in the UK in June/July 2006 [defendant] confided in me that she was no longer happy in her marriage with Mr.B, and had decided to stay in the UK with her child. She also stated that she planned to reside in Wales with a man with she had met, while living in Malta."

Moreover, the fact that defendant has abducted with the parties' common son, and went to live abroad, depriving his father from the daily contact the latter used to enjoy with his only son, constitutes an act of cruelty in terms of the said article 40.

On the strength of the above, the Court concludes that plaintiff is successful in his claim that his marriage with defendant has irretrievably broken down, and this, owing to unlawful conduct on the part of defendant, falling within the said article 40.

Finally, it is relevant to point out that there is no evidence to show that plaintiff is in any way responsible for the

marriage breakdown; so defendant has to bear the full responsibility for the personal separation of the parties.

Care and Custody

The evidence produced leaves no room for doubt that the child was retained illegally outside this country by his mother, both in terms of article 2[11] of Council Regulation [EC] no.2201/2003, and of article 3 of the Convention on the Civil Aspects of International Abduction which forms part of our law under Chapter 410.

When defendant left Malta with C, under the pretext that she was going for a few days stay to see her relatives, the parties had, by virtue of local law, joint custody of the child who at that time was five [5] years old; and the consequent deprivation by defendant of plaintiff having personal daily contact with his son in Malta, is manifestly unlawful and would have constituted a sound basis for the issue of a court decree ordering the return of the child to be placed where he was habitually resident with his parents who had joint custody.

However, plaintiff in view of the disruption of the marriage, and also of his belief that it was not in his son's interests, who was 5 years old at the time, to deprive him of his mother, had consented to her mother being given care and custody of the child whilst residing in the United Kingdom, but, and rightly so, kept insisting on having also direct and personal contact with his son in Malta for a limited period during school holidays. In his sworn statement containing his claims in this regard, plaintiff expresses her wish that, apart from having personal contact when he is in the UK, he is granted access for a whole week every alternate Christmas and every alternate Easter, as well as for a period of two weeks during the summer holidays of the child. He also wishes to have telephonic contact with his son on a regular basis.

In this respect, it is very relevant to point out that, although this Court is not in a position to speak to the child, who by now should be twelve [12] years old, no evidence has been produced showing that the child does

not want contact with his father, or that such contact would be detrimental to his interests. In fact defendant in her affidavit states that plaintiff “is welcome to come to the United Kingdom to see C... [and, plaintiff] knows that he can telephone C.”

As stated above, defendant is reluctant to send the child to Malta for the father’s access, and she “would not be happy with putting C on a plane unaccompanied.” In this regard, however, the court observes that it would not be in the interests of the child to prevent him from having personal contact with his father in Malta and having an opportunity to spend some time with his paternal grandparents. Moreover, as stated in the *United Nations 1989 Convention on the Rights of the Child*, and affirmed in *The Malta Declaration*², “A child should have the opportunity to learn, to know and respect the culture and traditions of both parents.”

On the strength of the above, the Court is hereby granting care and custody of C to his mother who is authorised to live with the child in the United Kingdom, whilst granting to the father access rights to his son as afore-mentioned, that is, that, apart from having personal contact when he is in the UK, he is granted access for a whole week every alternate Christmas and every alternate Easter, as well as for a period of two weeks during the summer holidays of the child. The child, until he reaches the age of fourteen, is to be sent to Malta under special supervision afforded by the airline in question , and all expenses are to be borne by plaintiff.

In addition, plaintiff may make telephonic contact with the child on a daily basis, and defendant is hereby ordered to provide the necessary facilities from her end.

Maintenance

² agreed to in the Malta Judicial Conference on Cross-Frontier Family Law Issues held in March 2004

Although defendant failed to file a sworn reply based on the merits and a counter claim, yet in her affidavit she requested that plaintiff be ordered to pay maintenance for his son. On this issue, local case law, has interpreted article 149 of Chapter 16 in the sense that where care and custody is granted to one parent, the other person may be ordered to pay maintenance for the child, even though no formal request has been by the former.³

On the strength of the above, and after taking into account that plaintiff works as a deliveryman earning a weekly wage of €149, whilst defendant has “an NVQ in painting and decorating obtained in the United Kingdom.”⁴ and so has the necessary qualifications to earn income and contribute to the needs of their son, the Court fixes plaintiff's contribution to the maintenance of his son, in the amount equivalent in pounds sterling to the sum of €117 per month, and consequently hereby orders plaintiff to pay to defendant by way of maintenance for his minor son C, the said amount, until the child reaches the age of 18 years.

Community of Acquests

Since the parties got married in Malta the property acquired by them during marriage is regulated by the provisions falling under the heading “Of The Community of Acquests” of Chapter 16. Accordingly, as long as this regime remains in force, everything acquired by then during the marriage is deemed to belong to both in equal shares, and all debts paid during the marriage, even if paid by one party only, are deemed to have been paid by both parties.

On this aspect of the case, the only evidence produced is the sworn statement presented by plaintiff, which has not been contested by defendant, save for the part referring to the division of the assets.

³ First Hall Civil Court: *Catherine Borg vs Raymond Borg* 22 July 2002. In addition, article 149 states that: “Notwithstanding any other provision of this Code, the court may, upon good cause being shown, give such directions as regards the person or the property of a minor as it may deem appropriate in the best interests of the child.”

⁴ Defendant's affidavit

The acquests comprise both movable and immovable property. It results that when the parties bought apartment number seven [7] Scallop Flats Triq il-Gifen St.Paul's Bay by virtue of deed published on the 15 July 2004, the place contained also items of furniture which plaintiff enlisted under item [9]⁵ amounting to approximately € 2013. By virtue of the same deed, the parties took a bank loan [HSBC] amounting to LM15,900, whilst plaintiff's father loaned them the sum of LM8,000.

It results that it was plaintiff who used to effect most of the loan payments, and also, continued making payments even after defendant left the matrimonial home on the 6 July 2005 which date the Court is considering to be the date giving rise to the personal separation by defendant, for purposes of article 48[1][c] of Chapter 16. Therefore, all loan payments made by the parties, or either of them, from the date of the deed till the 6 July 2005 are deemed to have been made by both parties, whilst payments made by plaintiff after that date are to be deemed made by him only; and the latter are considered to be debts owing to him by the community of acquests, together with the sum of €18,635 owing to plaintiff's father.

On the strength of the above, the Court orders that the above apartment, which has been valued by Architect Mario Borg on the 19 July 2007 for €74,540, together with the movables contained therein, be sold on the open market within a period of one year for the price of not less than the above sum, and in default, after the lapse of the above period, it will be sold by judicial auction.

The proceeds of the sale are to then be divided into two equal portions, after deducting from them:

- [1] all bank debts remaining on the property,
- [2] the amount of all the payments made by plaintiff after the 6th July 2005 is which to be assigned to him, and
- [3] the sum of €18,635 owed to plaintiff's father.

⁵ Fol.37

Then, one portion is to be assigned to plaintiff, whilst the other portion is assigned to defendant.

The plaintiff is authorized to continue residing in the said apartment until the sale of the premises.

Decide

For the above reasons, the Court accedes to plaintiff's request, and:

[1] declares the personal separation between the parties for reasons attributable only to defendant;

[2] accedes to the second request;

[3] accedes to the third request in the terms above indicated and established under the heading "Care and Custody" together with plaintiff's obligation to contribute to his son's maintenance in the terms indicated and established under the heading "Maintenance";

[4] accedes to the fourth and fifth request and dissolves the community of acquests existing between the parties, and assigns the assets, active and passive, as above indicated and established under the heading "Community of Acquests";

[5] accedes to the sixth request in toto.

All judicial costs are to be borne by defendant.

< Sentenza Finali >

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