

Court Of Appeal

Judges

**THE HON. MR JUSTICE GIANNINO CARUANA DEMAJO
(Acting President)
THE HON. MR JUSTICE JOSEPH R. MICALLEF
THE HON. MR JUSTICE TONIO MALLIA**

Sitting of Thursday 2nd May 2019

Number 1

Application number 106/09 AL

John Grech

v.

**Doctor of Laws Joseph R. Pace (appearing in the name and
on behalf of Christiane Hellermann by virtue of a Decree
of 21st December 2009)**

The Court:

Having seen the sworn application filed by John Grech and dated 1st April,
2009 which reads as follows:

“1. Illi l-istanti u l-imharrka, fi snin passati – senjatament fil-perijodu ta’ bejn is-Sajf tas-sena 2004 sa Frar tas-sena 2008 – kellhom relazzjoni bejniethom;

“2. Illi minn tali msemmija relazzjoni – ghalkemm l-indikati partijiet mhux mizzewgin ma’ xulxin – gew imnissla zewg ulied, ossija t-tifla Nicola Boaz Tui Liam Grech Hellermann, imwieled l-Pieta` Malta fit-13 ta’ Mejju, 2005 [vide “**Dok: X.1**”] u t-tifla Serafina Moana Rosalie Lenya Grech Hellermann, imwiolda l-Pieta` Malta fid-9 ta’ Novembru, 2007 [vide “**Dok: X2**”];

“3. Illi l-imharrka, fix-xahar ta’ Frar tas-sena 2008, harbet minn Malta u magħha hadet liz-zewg tfal minorenni u dan ad insaputa tar-rikorrenti u baqghet għal gimghat ma tikkomunika mar-rikorrenti sakemm finalment gie kkonfermat li kienu l-Germanja. L-intimata giet ripetutamente mitluba tirritorna l-minuri lura Malta izda baqghet tinjora t-talbiet tar-rikorrenti sabiex tirritorna t-tfal Malta, u cioe` fir-residenza abitwali tagħhom.

“4. Illi l-attur, bhala l-missier naturali u bijologiku tal-menzjonati tfal minorenni, għandu d-dritt jeżercita d-drittijiet paterni u parentali versu l-istess, *inter alia*, id-dritt li jkollu l-kura u l-kustodja fuq il-minuri, li jkun partecipi għad-decizjonijiet illi jittiehdu għar-rigward tat-tfal għal dik li hi edukazzjoni sahha, *eccetra* u anke d-dritt intrinseku li hu jkollu access regolari għal uliedu;

“5. Illi minhabba dan l-istat ta’ fatt, ossija li t-tfal minorenni jinsabu mahtufin fil-Germanja, l-istanti ma jista’ jeżercita l-ebda dritt fil-konkret u materjalment, senjatement li jkollu access liberu, ragjonevoli u materjali u regolari versu wliedu li stante li l-imharrka arbitrarjament – mingħajr ebda ordni ta’ Qorti jew awtorita` ohra kompetenti f’Malta – telqet lejn il-Germanja

“6. Illi, in aggjunta mal-precedenti paragrafu, l-htif ta’ dawn it-tfal minn ommhom qed jinibixxi lill-attur milli jkollu l-opportunita` jstabilixxi relazzjoni tajba u soda ma’ wliedu u qed ikun ta’ danni għall-minuri li nhatfu mir-residenza abitwali tagħhom u mhux qed ikollhom opportunita` jstabilixxu relazzjoni sinifikanti ma’ missierhom;

“7. Illi saru d-debiti proceduri ta’ medjazzjoni bejn il-partijiet *de qua*, (fejn l-intimata tramite s-sottomissjoni tagħha għal dawn il-proceduri rrikonoxxiet l-gurisdizzjoni tal-Qrati Maltin) ma rnexxietx u għalhekk, a tenur tad-digriet ta’ din l-Onorabbli Qorti datat it-2 ta’ Frar, 2009 [“*vide* “**Dok: X.3**”], l-istanti qed jirrikorri għall-prezenti proceduri quddiem din l-Onorabbli Qorti sabiex takkordalu, prevja r-rikonoxximent tad-drittijiet tiegħu *qua* l-missier naturali u bijologiku tat-tfal minorenni, d-dritt legali u naturali tiegħu li jkollu l-kura u kustodja tal-minuri.

“8. Illi jigi ulterjorment rilevat mingħajr pregudizzju għas-suespost li r-rikorrenti għandu d-dritt ta’ access regolari għal-uliedu li ma jistax isehh jekk dawn jibghu jirresjedu l-Germanja u b’hekk dawn għandhom dejjem jigu ritornati hawn Malta minn fejn inhatfu sabiex hu jkun jista’ jeżercita dan id-dritt anzi dover”.

Having seen the sworn reply of defendant whereby she submitted:

“PRELIMINARY AND RESERVED PLEAS

“1. That in first instance she pleads that this Honorable Court has no jurisdiction to hear and decide the matters in issue, for she has the right to be sued in her own and the children’s *country of habitual residence*, Germany, this being an ordinary civil, care and custody case and not otherwise. *Consequently the Court is respectfully asked to declare it has no jurisdiction and to abstain from taking cognizance of the cause, after establishing the relevant facts in the evidence according to law.*

“2. That secondarily and without prejudice to the above jurisdictional plea, it is pleaded also in preliminary instance that the Applicant can not appear – as he did- ‘on behalf of the minor children’ (*nomine*) making them co-applicants against their own mother, without first obtaining Court sanction to act as ‘curator *ad litem*’; something that is not possible as will be explained. Further, the minors have no ‘*locus standi*’ – as such – in the cause whether as Applicants or Respondents being themselves the very ‘object’ of the Demand presented; Further, Tui’s surname should in any case read: ‘Hellermann-Grech’, by consensus and German registration. *For these reasons the children’s names should be deleted from the title of the record.*

“3. That thirdly she pleads that the Affidavit presented by Applicant, as also the affidavits of her witnesses and the documents she is filing, be not deemed filed in ‘submission’ to the local jurisdiction, but *be accepted as filed primarily to assist the Court to consider in first instance the present procedural pleas; saying however* that in the event that this Court decides to claim jurisdiction and proceed with the merits, the mentioned evidence should then respectfully be deemed to form part of and be considered also filed in support of any new pleas she may, with the Court’s permission, file in that context. All documents and affidavits are being produced ‘*animo ritirandi*’, as they may be needed in other fora.

“4. That Respondent fourthly pleads the lack of legal basis of the Applicant’s statement, in paragraph 7 of his *dikjarazzjoni* whereby he alleges that respondent had submitted to the Maltese jurisdiction merely when and because she attended a couple of exploratory mediation attempts in October 2008 held by Julian Sant Fournier, when she had merely agreed so as to give it a try and to make use of lost time owing to her and the children being forced to stay here in Malta until the Court heard and decided upon the Applicant John Grech’s unfair and illegal procedure in requesting a Warrant of Inhibition against her, - which was eventually denied and she was free to return to Germany with the children. *So she humbly requests that this allegation*

of applicant to be ignored or put aside, as being unfounded in fact and law.

“5. *Without prejudice to all the above requests, and in the event that this Honourable Court rejects the procedural pleas and determines to proceed to hear the merits of this case, Respondent reserves the right to contest the action on procedure and merits of the case.*

“6. Respondent respectfully asks that the present pleas be granted, and Applicant be non-suited with costs, whilst requesting his presence before the Court for submission to the relative oath, examination and cross-examination”.

Having seen the ulterior pleas of the defendant, whereby she further submitted:

1. “That these defence pleas are presented in accordance with the defendant’s reservation of additional pleas made without prejudice in para. 5 of her “Preliminary and Reserved Pleas”; and also in view of the fact that although this Honourable Court gave a time limit to plaintiff Grech to reply to her application for permission to file said additional pleas, the said plaintiff has remained silent and his time expired. Thus the Court is respectfully asked to grant the entry of these pleas in the records of the case.

2. “That respondent, with respect, reserves the right to appeal after final judgement from the decision of this Court whereby it deemed that it has jurisdiction to hear this case thus rejecting her first preliminary plea.

3. “That respondent presents these submissions without prejudice to her **second preliminary plea** (of 16.09.2009 Cash No. 597/09/09) **requesting non-suiting** of applicant Grech with costs – for the reasons therein stated, namely the arrogation to himself of the “pretended right” to represent the common minor children of the parties as co-plaintiffs, - whereas these cannot stand in judgement with the father against the mother, as represented, without due and prior authorisation of this Honourable Court which would appoint him as curator ad litem for the minors. A decision on that procedural plea is therefore respectfully requested.

4. “**On the merits of the present case**, the respondent submits as follows:

a. “**Regarding the applicant’s claim** for a declaration that he has the right to exercise parental authority over the two minor children Nicola Boaz Tui Liam and Serafina Moana Rosalie Lenya, both born

out of wedlock to the parties, respondent pleads that such parental authority is not applicant's special prerogative, and the request be only granted in a "shared sense" and not otherwise; and further the defendant pleads that she should be granted the right of major parental authority regarding the minor children on day to day matters both due to their small age and other reasons to be adduced in evidence.

b. "i) **Regarding the applicant's second demand**, that he be allotted the care and custody of the two minor children, respondent asks the Court to reject that demand and, instead, to grant care and custody to the mother, on grounds of their very young age, the full-time availability of respondent to raise them with balance attention and dedication, and, among other reasons, the following: Namely:

"Applicant Grech's real psychological unsuitability to raise these small children by himself on a daily basis and long-term, including – among other things his impatience, irascibility, lack of self-control and certain personal habits; he is likely to cry and lament in front of the children, shout and insult the mother in their presence, even using uncivil language, manipulating the children by telling them their mother is keeping them away from him;

"--instability of character, demonstrated by his erratic behaviour with frequent job-hopping, getting into arguments with employers and colleagues, such as when abandoning a three year job after 1 year in Australia, or wanting to go back to Australia when the parties had not been long in Malta where he'd been applying for jobs from there, and he had just got a job at University ... and other instances which can be proved, since these were not "one-off" things;

"--inconsistency with decision making, such as boarding a plane only to get off before take-off, filing court cases and withdrawing them, and so on; changing countries when he should stay put, etc.

"--unreliability with keeping promises, honouring even signed contracts and upholding values, also, and particularly, when related to his children; and

"--sudden flights of temper and sudden depressive mood-swings that are not, and cannot be, in the children's best interest.

"ii) Further, his request should be rejected also because

(a) "he has many times demonstrated a **tendency to try and alienate** the children from their mother by word and by deed – being prone to the classical 'parental alienation syndrome', and because

(b) **"his full-time work** as a university lecturer **precludes him** from giving the children all the attention and guidance they deserve and need; plus he often **relies a lot on the help** of his elderly mother, who

lives mainly in Australia and came purposely to help him with the minor Tui...and for other reasons to be proven by her own evidence, that of witnesses and circumstantial cogent facts.

“iii) Conversely, in spite of having had to run away from plaintiff’s ugly mood-swings, anger, drinking, aggressive and stubborn attitude and often strange behaviour leading her to an indescribable fear for the children and her person – and his unacceptable insistence – September 2007 – that they return to Australia only a month or so after having come to Malta with a container load of their effects plus he had just been confirmed in a job at Malta University!

“It is pleaded that respondent as a mother has – on the contrary –

(a) “proven her constancy, her loyalty in following Grech to Australia and back,

(b) “shown her parenting skills by giving the children a stable , safe, peaceful, modern and comfortable home in Germany – on her own,

(c) “dutifully provided for Tui’s schooling and social contacts for both children with children of their same age, as well as regular contact with the parents of respondent, who live in proximity to Taunusstein, and healthy outing and visits;

(d) “dedicated her FULL time to their needs – as witnessed by several affidavits already filed; ALSO

(e) “she has also proven her consistency and loyalty to the children’s need to be in touch with their father by having come here to Malta at least three or four times since she left Malta in March 2008 (only to be stopped here by him, quite treacherously, twice, by breach of arrangements on applicant’s part); and she never objected to, or obstructed, the Father from visiting the children in Taunusstein several times in perfect liberty...proving that even if the children stay in Germany as habitual residence under HER care and custody, this need not be an obstacle to parental visits in Germany or Malta and frequent even daily, contact.

“iv) Not so if things were the other way round, for even whilst both parents are in Malta, Applicant has created several difficulties in the sharing of the children, here in Malta, keeping hold of Tui as his residential base in Gharghur after October 7th, 2009, although he had undertaken in a written Court compromise to let him and his sister go back to Germany with the mother on 7th October...an agreement he again broke. *Thus if a role model is needed for the children then surely the father cannot be trusted to fit the bill*, -- whereas the mother has produced sworn evidence not only of her character and motherly care, but of the father’s unreliability as a father. Finally, the comfortable and safe home respondent can offer to the children and the well-organized, disciplined, and environmentally friendly way of life in Taunusstein are

second to none, and it is submitted, offers better environment than the old two-storey house at Gharghur.

c. “The third request of the applicant, that subordinated to his first two requests, namely that in case of joint custody the children should live in Malta, is also opposed unless it is a clear understanding that the children be allowed live habitually in Germany and respondent Hellermann remains the main carer with major parental authority. This Honourable Court is asked to reject the ‘Malta’ request on grounds that the children – even under joint custody – would thus be constrained to live ‘habitually’ with the applicant in Malta and say goodbye to their established life in Germany for almost two years, and to the fact that neither parent wants to live in the other’s country. A decision as requested would definitely alienate the children from their mother (knowing the father’s character) and will be contrary to the best interests of the children, plus would uproot them permanently yet again, and – particularly Tui, who in Taunusstein has plenty of friends his age. Alternatively it would constrain the respondent to uproot, disturbing the children’s better educational prospects and also the completion of her PhD studies in Germany, and including the learning of English, over there. It is important that respondent completes the studies of her PHD for this gives her greater and better paid job prospects in a suitable part-time occupation say in a couple of year when Fina grows older. Tui is showing signs of being confused in the present Maltese habitat, even if he is constantly and most unfairly bribed with expensive gifts like a real boat and a Labrador dog and some expensive toys ... by a father who knows no better but to try to alienate the child from his mother and his many German friends and the maternal grandparents.

d. “The fourth request of applicant is similar to the third one, and keeps on harping on Malta as the children’s base even if any or all of his former requests are declined. Thus the same reasoning applies and the Court is respectfully asked to reject it.

e. “The fifth request namely that respondent be condemned to provide maintenance, it is submitted that even this request should be refused on grounds that, out of the two, the plaintiff is the one able to supply maintenance and is obliged to do so as the bread winner of the two parents. The mother provides full-time care, upbringing, value driven discipline, a sense of balance in life, a careful and consistent education and daily help with understanding and appreciating the need to play, to rest, to stay healthy, to learn things and to study. She provides a nice home and all the essentials of daily living, even of provided by the social service, and the company of friends, family and contact with the father by telephone Skype and visits. Maintenance is due by law whosoever is able and affords to pay it; here the Court is respectfully asked to reject this demand, and condemn the applicant to pay a regular fixed sum to the mother for the two children proportionate to his means, of which he had been so boastful ever since the case started.

f. “Consequent to these points, and any further evidence adduced and to be presented, this Honourable Court is respectfully asked to deny all of the applicant Grech’s request and to grant care, custody and main parental authority to the defendant, in Germany. Saving directives to ensure fair access arrangements. With costs against applicant Grech, who is hereby summoned for the testimonial oath and cross examination”.

Having seen the judgment delivered by the First Hall of the Civil Court on the 3rd October, 2017, which eventually decided the case as follows:

1. “Upholds the first claim and confirms that the plaintiff as the natural and biological father, possesses the right of parental authority over his two minor children, namely over Nicola Boaz Tui Liam Hellermann-Grech “Tui”, born in Pietà (Malta) on the 13th of May, 2005 and Serafina Moana Rosalie Lenya Grech Hellermann “Fina”, born in Pietà (Malta) on the 9th of November, 2007; which right of parental authority is shared with the defendant as the natural mother of the children;

2. “Rejects the second claim;

3. “Upholds the third claim limitedly and whereas the Court declares that the care and custody of the minors Tui and Fina remains joint between the parties, the Court refuses the claim for the minors to reside in Malta. Furthermore, the Court orders that:

a. “The minors’ habitual residence will be in Germany with the mother. The mother is ordered not to change the children’s residence from the town of Taunusstein, except in grave circumstances and with the father’s consent or the approval of this Court.

b. “The minors will continue to attend their current schools. All extraordinary decisions relative to the children’s education will be taken by both parents jointly.

c. “All extraordinary decisions relative to the children’s religion and health will be taken by both parents jointly.

d. “The children’s extra-curricular activities will be limited to three activities for each child. Any extra lessons or therapy required by the children are not to be considered as extra-curricular activities.

e. “The children will continue visiting their father in Malta for half of their school holidays. The children may at this stage travel as unaccompanied minors and be assisted by the airline staff. Should any

parent not agree to this arrangement, he/she is free to accompany the children at his/her own cost.

f. “The mother will be responsible to purchase the flight tickets for the children’s visit to Malta, after the two parties together agree on the exact date of the visit, and this at her own expense.

g. “When in Malta, the children will spend all the time with the father.

h. “The mother is not allowed to take the children out of Germany without the father’s specific consent and likewise the father is not allowed to take the children out of Malta without the mother’s specific consent.

i. “The father is free to visit his children in Germany whenever he wants and as frequent as he likes. However, he is to give at least 21 days’ notice to the mother of his exact date of arrival.

i) “When visiting his children in Germany, for the first seven days, the father is to have access to them from the time they leave the school premises till 7.00pm when he will punctually return them to their residence. During this access time, the father will ensure that the children do their homework and attend all extra-curricular activities to which he will accompany them himself. On Friday and Saturday, the father will not return the children to the mother’s residence but they will sleep at his lodging.

ii) “From the eighth day onwards, the father will have access to the children on Wednesday from 4.00pm till 7.00pm, on Saturdays from 11.00am until Sunday at 10.00am (sleepover), and also on alternate Sundays from 10.00am until 4.00pm. The children are not to miss any of their extra-curricular activities as these are to be kept regular in order for the children to learn the value of commitment and consistency. Should any access time be lost to these extra-curricular activities, the parties will decide when best to replace that time.

j. “The father is to provide each of the children with a mobile phone (unless they already possess one) which is to be used for their day to day communication with him either by way of phone-calls or Skype. The father shall not communicate with each of the children more than two times every day and total communication with each child shall not exceed a thirty minute total. The father needs to understand that whilst keeping in touch with him is vital for the children, they too have their lives and their commitments and longer communication may disrupt the children. The mother is not to interfere in such communication and whenever possible, she should try to be to a different room/area, to give the children and the father their space. The same devices will be used for mother-children communication, when the children are in Malta. The same conditions will apply to this communication. The paternal grandmother, Mrs. Florence Grech, may use the same devices in order

to communicate with her grandchildren. Any other uses of these mobile phones will be at the mother's discretion when the children are in Germany and at the father's discretion when the children are in Malta.

k. "The defendant will take all the necessary measures to ensure that the plaintiff is recognised as being Fina's father within the German legal system, should, to date, this not be the case.

4. "Rejects the fourth claim;

5. "Upholds the fifth claim limitedly to the days that the children spend with the father and orders the defendant to pay the plaintiff that amount as established under the heading "Maintenance" of this judgement".

The said Court delivered its judgment after having made the following considerations:

"The *pendente lite* situation is regulated primarily by means of a decree of this Court dated the 1st December 2009¹ whereby the Court revoked its decision that the minors were not to be removed from Malta *pendente lite*. Therefore the Court allowed that the minors be returned to Germany on the following conditions:

1. "The address of residence of the minors is to be formally registered by means of a note to be presented in the acts of the case and any subsequent change thereto is to be similarly registered.

2. "No other passport is to be obtained for both minors other than the ones already issued to them.

3. "The minors are not to be removed to any other country besides Germany and Malta without the consent of their father or this Court.

4. "Christianne Hellermann is to accompany both minors to Malta for two weeks during summer holidays and one week at another occasion during school holidays at Christmas or Easter. During these periods, John Grech, the father, is to have unlimited access during the daytime.

5. "John Grech is to be allowed unlimited access to both minor children during the daytime at any other time he visits Germany, on condition that these visits do not disrupt school attendance and that

¹ Fol. 638

Christianne Hellermann is given three weeks' notice when such visits are to take place.²

6. "John Grech is to be allowed daily communication with both minors via telephone, internet and Skype and Christiane Hellermann is to provide from her end all the necessary technological equipment to make this communication possible.

7. "As regards contact rights during the current stay in Malta, the father is to have free access to Nicola Boaz Tui Liam during the day and access to Serafina for three hours daily in the presence of the mother. Both minors are to spend all nights with the mother until such time as the said decides to leave Malta, if she so decides.

8. "A decision regarding costs will be included in the final judgement.

"On 9th November 2010³ a decree was given by this Court whereby Christiane Hellermann was ordered to permit the minors to communicate with the father everyday by means of Skype or telephone for a minimum of 20 minutes per day, at least three times a week such communications be by means of Skype.

"This decision was revised by virtue of a decree dated 16th August 2011⁴, whereby this Court ordered that the Skype contact be for 30 minutes and contact by telephone be for forty minutes.

"Furthermore, the decree relative to the father's access was amended by virtue of a subsequent decree dated the 11th May 2012⁵, whereby this Court ordered that commencing with the summer holidays of 2012, the minors spend half of all holidays exceeding 10 days with their father. The Court also gave directives to the defendant to make available one of the computers that the plaintiff bought for the children, on a daily basis, for their contact with the plaintiff; It also ordered special one-to-one sessions for Fina to establish and consolidate her relationship with her father.

"By virtue of a decree dated 27th June 2012⁶, the Court gave directives relative to the costs of the air fares for the children's travel to and from Malta thus ordering the Mother to accompany the children on one flight of each of their four visits to Malta, however paying only for two flights out of four, the other two flights being paid by the father who also accompanies his children on the other flight for each visit.

² Visits exceeding one week are regulated by a decree dated the 18th December 2009 (fol. 687), whereby from the second week onwards, the plaintiff is to have access to both minors on Wednesday from 3.00pm till 6.00pm, on Saturdays from 11.00am until 4.00pm and also on alternate Sundays from 10.00am until 4.00pm.

³ Fol. 945

⁴ Fol. 1338

⁵ Fol. 1623

⁶ Fol. 1651

“By virtue of a decree dated 25th April 2015⁷, the Court authorised the minors to sleepover with their father on two occasions when he visits them in Germany;

“CARE AND CUSTODY

“This Court is at this stage to decide on the merits of the case, having previously already decided on the preliminary pleas. It is important to point out that this case regards the care and custody of the minors Tui and Fina, and not about their removal from Malta. As stated by the defendant’s mandatory in her notes of final submissions, according to the Convention on the Civil Aspects of International Child Abduction which was signed at The Hague on the 25th October, 1980⁸, notably Article 19 of the same Convention, “*A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.*”

“However, the Court cannot ignore that the children were removed from Malta on 27th February 2008 without the father’s consent. It was without a shadow of a doubt the defendant’s sole decision to take their children, at such a tender age, away from Malta and from their father, to give them a new start in Germany. The fact that the attempts to have the children return to Malta under the Hague Convention (1980) either failed or procedures were withdrawn, does not change the fact that the mother removed the children from their father and from Malta unilaterally, without the father’s consent and thus illegally.

“Whilst the plaintiff rants about this in every note and application presented to this court since the initiation of the case, the defendant brushes off these accusations of abduction lightly with the excuse that she felt cornered and feared for her safety and that of her children. The latter has been found as a lame excuse by the Court who was entrusted with the decision relative to the abduction, and that Court declared the defendant’s actions to be illegal. “*il-Qorti tħoss li din l-allegazzjoni da parti ta’ l-Omm dwar biża u li sabet darha mal-ħajt mingħajr għajnuna f’Malta, u li għalhekk kellha taħrab lejn pajjiżha, hija biss skuża sabiex tnaqqas mill-illegalità ta’ l-azzjoni tagħha.*”⁹ This Court fully agrees with this conclusion and this will consequently affect the Court’s decision relative to costs¹⁰.

“However, with regards the subject of the care and custody of the children, the Court will refuse to take cognisance of any issue other than the best interest of the minors who are now 12 years and almost 10 years old respectively.

⁷ Fol. 1810

⁸ Hereinafter referred to as “The Hague Convention” or “the Convention”, which is ratified by Malta and forms an integral part of Maltese Law in Chapter 410 of the Laws of Malta.

⁹ General Application numbered 29/09 in the names Direttur tad-Dipartiment għal Standards fil-ħarsien Soċjali vs. L-Avukat Dr. Joseph R. Pace noe, fol. 338

¹⁰ But not to the merits of the case

“It has been upheld in our Case-law, that in cases such as this, the Court should consider the best interest of the minors.

.....

“Throughout this eight-year battle for the custody of the children, the Court has never doubted the suitability of either party in their role as parents, notwithstanding that the parties have done their utmost to devalue the other party as an unfit parent in an urge to “win” the sole care and custody of the children, to the extent of requesting the court to appoint psychiatrists to examine each other. However, sole care and custody to either party, is not a “win” situation for the children, who need both parents equally. This Court is generally reluctant to entrust sole care and custody of any minor to any one parent, except in those truly exceptional cases where the involvement of the other parent in the children’s life, is detrimental to that child’s development and upbringing. This is not such a case, and the Court is happy to note that both parents are dedicated, loving and doting and give great priority to their children. Both parents have provided evidence to show their positive involvement in the children’s lives and there is no cause for the Court to disbelieve such evidence.

“The plaintiff has managed to maintain his interest in the lives of the children notwithstanding the obvious obstacles before him, such as the distance and the financial cost to exercise his right of access. One cannot but admire his perseverance in having a good rapport with the children and trying to be there for them daily, not simply as a visitor once in a while.

“The defendant in a few months managed to provide a suitable and safe home for the children. She provides them with healthy food daily, a holistic education with various extra-curricular activities, maintains their social life with children of their age, as well as with their grandparents and was willing to put her studies on hold, in order to bring her children up herself.

“However, both parents, in their zeal to outdo the other, have committed mistakes which were undoubtedly detrimental to the children, and the Court will hereby list a few¹¹ in the hope that these mistakes are not repeated, for the children’s sake.

“Undoubtedly the greatest fault with the defendant was her unilateral decision to take the children away from the home and the country where they were being brought up, as this reveals her innate disposition to believe that the father’s contribution to the children’s lives is unnecessary or superfluous when this is definitely not the case. Even if various children manage to thrive without a father, the “ideal” situation

¹¹ This is by no means an exhaustive list.

for children is to have the support and love of both parents. To add insult to injury, she accuses the plaintiff of wanting to alienate the children from her, when it was she who alienated them from him.

“Another unhappy situation is the rigidity adopted by the defendant when the plaintiff visits the children in Germany in that she’d rather entrust the children with a babysitter, rather than with their father, because it’s beyond his access time. Or that the children miss on time with their father in order not to miss playtime with friends.

“The defendant laments of the age gap between the plaintiff and the children since the plaintiff has turned 60 years old and tries to use her younger age to score points in being better suited to raise the children. The age gap was something that she was quite aware of when conceiving the children and did not seem to bother her at that stage, so the Court finds it rather unfair to use it against him now in order to prove his unworthiness. Notwithstanding the noticeable age gap, the plaintiff has well-adjusted to parenthood and to child-rearing and he never used this age gap to grant any advantage or to seek to minimise his responsibilities towards his offspring. On the contrary, he manages to find the enthusiasm to play with the children, take them out and engage them in interesting activities.

“On the other hand, there is concrete evidence to show that plaintiff tries to brainwash the children about the “evil mother” who took the children away from him. Even if he was and is still hurt by her action of tearing him apart from their beloved children, he is an adult and should control that these emotions and outbursts which darken the mother do not occur in the children’s presence. The mother is a pillar in the children’s life and it is not in the children’s best interest to portray her as bad or wicked as this will rock the core and foundation of the children’s feeling of security.

“Also his tendency to bribe the children with bigger toys, a pony, a dog, a boat, should they live in Malta is despicable, as the choice of country of residence is far from being the children’s decision. If the parents can’t decide such a major issue between themselves, each having their valid reasons, such decision is definitely not to lie with the children, especially when they were still so young. In the circumstances, the father would have played a much better role by showing the children that Germany is an equally good place to be as Malta. Some activities which they do in Germany, they can’t do in Malta and vice-versa.

“The ugly incident at the airport when the children were to leave Malta in December 2009 should have been avoided by the plaintiff, if he acted more maturely and said his goodbyes without much fuss and drama. The Court sees no fault in the defendant’s decision to be accompanied by a friend at the airport, following the heated courtroom debate as to whether they should leave or not. To date, eight years later, he still is unable to say goodbye to his children on Skype, showing that he can’t

overcome his hurt feelings in order to see what the children need such as their dinner, their bath and their sleep.

“Having said all this, notwithstanding having highlighted these negative aspects in both parties’ behaviour, the Court also points out that the parties in no way wished to maliciously harm their children, but behaved like this out of their own hurt and disillusion. The Court is pointing them out, from the point of view of an objective outsider and solely in the hope that such behaviour is not repeated, for the children’s sake.

“Having said all this, there is no reason at law or in fact why any of the two parties should be deprived of their parental authority and care and custody of the children. Thus, it is the court’s decision that the care and custody of Tui and Fina remains joint between the parties.

“Regarding the minors’ place of residence, the Court deems it to be in the best interest of the children, not to uproot them from their stable lifestyle in Germany. To do so, would only serve to destabilise the minors and impair their development. The minors have established their lives and education in Taunusstein, they have their friends there and a good routine. Their house is suitable and there is no doubt that the children are happy. The Court clearly sees no benefit in removing the children from Germany, after nine years of living there, practically all of their lives, and considering that the father’s rights have been safeguarded throughout these years and will continue to be safeguarded. It is important however, for both children, since they are also Maltese nationals to keep visiting Malta, and to be adduced with the Maltese culture and Maltese way of life. There is equally no doubt that the children are happy when in Malta at their Gharghur residence and with their Maltese friends and acquaintances.

“The Court will therefore set a number of orders with the aim of striking a balance between these various interests and also to guide the parties on those matters which proved to be issues between them throughout the case.

a. “The minors’ habitual residence will be in Germany with the mother. The mother is ordered not to change the children’s residence from the town of Taunusstein, except in grave circumstances and with the father’s consent or the approval of this Court.

b. “The minors will continue to attend their current schools. All extraordinary decisions relative to the children’s education will be taken by both parents jointly.

c. “All extraordinary decisions relative to the children’s religion and health will be taken by both parents jointly.

- d. “The children’s extra-curricular activities will be limited to three activities for each child. Any extra lessons or therapy required by the children are not to be considered as extra-curricular activities.
- e. “The children will continue visiting their father in Malta for half of their school holidays. The children may at this stage travel as unaccompanied minors and be assisted by the airline staff. Should any parent not agree to this arrangement, he/she is free to accompany the children at his/her own cost.
- f. “The mother will be responsible to purchase the flight tickets for the children’s visit to Malta, after the two parties together agree on the exact date of the visit and this at her own expense.
- g. “When in Malta, the children will spend all the time with the father.
- h. “The mother is not allowed to take the children out of Germany without the father’s specific consent and likewise the father is not allowed to take the children out of Malta without the mother’s specific consent.
- i. “The father is free to visit his children in Germany whenever he wants and as frequent as he likes. However, he is to give at least 21 days’ notice to the mother of his exact date of arrival.
- i) “When visiting his children in Germany, for the first seven days, the father is to have access to them from the time they leave the school premises till 7.00pm when he will punctually return them to their residence. During this access time, the father will ensure that the children do their homework and attend all extra-curricular activities to which he will accompany them himself. On Friday and Saturday, the father will not return the children to the mother’s residence but they will sleep at his lodging.
- ii) “From the eighth day onwards, the father will have access to the children on Wednesday from 4.00pm till 7.00pm, on Saturdays from 11.00am until Sunday at 10.00am (sleepover), and also on alternate Sundays from 10.00am until 4.00pm. The children are not to miss any of their extra-curricular activities as these are to be kept regular in order for the children to learn the value of commitment and consistency. Should any access time be lost to these extra-curricular activities, the parties will decide when best to replace that time.
- j. “The father is to provide each of the children with a mobile phone (unless they already possess one) which is to be used for their day to day communication with him either by way of phone-calls or Skype. The father shall not communicate with each of the children more than two times every day and total communication with each child shall not exceed a thirty minute total. The father needs to understand that whilst keeping in touch with him is vital for the children, they too have their

lives and their commitments and longer communication may disrupt the children. The mother is not to interfere in such communication and whenever possible, she should try to be in a different room/area to give the children and the father their space. The same devices will be used for mother-children communication, when the children are in Malta. The same conditions will apply to this communication. The paternal grandmother, Mrs. Florence Grech, may use the same devices in order to communicate with her grandchildren. Any other uses of these mobile phones will be at the mother's discretion when the children are in Germany and at the father's discretion when the children are in Malta.

k. "The defendant will take all the necessary measures to ensure that the plaintiff is recognised as being Fina's father within the German legal system, should, to date, this not be the case.

"MAINTENANCE

"In his fifth claim, the plaintiff requests that the defendant pays maintenance for the minors. Little importance has been given to this issue by the parties and notwithstanding the voluminous records of the case, the evidence in this regard is scarce. The parties also decline to give the issue barely any mention in their note of final submissions.

"The plaintiff currently pays the defendant an amount of maintenance that is established according to the German social service. In fact, it appears that the German authorities have ordered the plaintiff to pay such maintenance to the mother.

"The Court, in principle, agrees that the plaintiff pays maintenance for the children since it has been established by means of the present judgement that the minor's habitual residence will continue to be in Germany. The Court does not have the power to review or amend such an order, since the order did not emanate from the Court but from an independent authority. Nor does it have the desire to amend the order, since the parties have no issues about it. The Court will however provide for those weeks that the minors visit the father.

"Under Maltese law, both parents are to contribute equally towards the maintenance of their children, regard being had to their respective means. Reference is made to the relevant sections of the law¹²:

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

"3B. (1) Marriage imposes on both spouses the obligation to look after, maintain, instruct and educate the children of the marriage taking into account the abilities, natural inclinations and aspirations of the children.

¹² The Civil Code – Chapter 16 of the Laws of Malta

“20. (1) Maintenance shall be due in proportion to the want of the person claiming it and the means of the person liable thereto.

(2) In examining whether the claimant can otherwise provide for his own maintenance, regard shall also be had to his ability to exercise some profession, art, or trade.

“The Court is aware that the plaintiff is a University lecturer. The defendant has however not revealed her income to this Court since she obtained her Ph.D. in April 2013¹³ Whatever her current income is, there is no doubt that the defendant has the potential to generate a good income even if she works for reduced hours due to her commitment in the children’s upbringing. Thus it is the opinion of the Court that at this stage, the defendant is in a position to pay maintenance for her children solely for those weeks when the children are in Malta.

“The Court is not aware if during these weeks, the father is exempted from paying maintenance to the mother. If he is exempted, than the defendant, for the time that the children spend in Malta, is to pay the plaintiff a sum equal to what she receives from him.

“If however he is not exempted from paying the maintenance to the defendant, and must still pay even if the children are with him, then he shall so continue to pay the maintenance as ordered (as already said the Court has no authority to review that order), however, in such an eventuality, the defendant is to pay the plaintiff double the amount of what she receives from the plaintiff.

“The reasoning relative to the mother’s potential to generate a good income motivates also the Court’s decision as aforesaid to order that from the present, the defendant is to pay the flights for the children to visit their father. Apart from this, the Court also keeps in mind the fact that these visits are a direct consequence of the defendant’s unilateral decision to take the children out of Malta and away from the father, therefore it is only fair that now that she has the she potential to earn a good income, she finances these access visits, after years of being financed in the greater part by the father.

Having seen the appeal application of defendant through which, for reasons submitted, she requested that this Court:

“1. --revoke the head of the judgement in the final sentence of the appealed Judgement insofar as these are entirely *awarded* against Defendant Christiane Hellerman, and award the said Costs of the Case, instead, upon the Plaintiff John Grech as being – in practice – the true

¹³ Fol. 1709

Party Cast in terms of law, having failed in two of his five demands and only got another two demands in his favour limitedly, or – as a minimum – reform said head of judgement (*without prejudice to the above request*) ordering that costs be shared proportionately or remaining 'bla taxxa' between the parties by the application of the provisions of article 231(1) and/or (3) of chapter twelve (12) Laws of Malta;

"2. --revoke the head of judgement in para. 5, page 36 of the "Decisis" – which allocated Double Maintenance (by cross reference to the section headed "Maintenance" at page 31 et sequitur) against defendant Hellermann for the periods when the parties' two minor children exercise their access rights in Malta;

"3. --reform the head of judgement in para. 3(f) of page 33 of the "Decisis" whereby defendant Hellermann is ordered to pay for all the mandated flights to Malta which the two (2) minors have to undertake in order to visit their father in Malta during half of their school holidays; and this by *reinstating the previous arrangement* decreed by the First Court on 27th June 2012 (see page 22 Judgement) whereby each of the Parties pays for half (1/2) of the necessary flights, in a rotating pattern.

"WITH COSTS of both instances against the Appealed Party."

Having seen the reply filed by plaintiff by virtue of which, for reasons submitted, he requested that:

"the decision of this Honourable Court decided on the 3rd October 2017 in the above captioned names to be confirmed in toto, with the costs of both instances against the appellant Doctor of Laws Joseph R. Pace (appearing in the name and on behalf of Christiane Hellermann by virtue of a Decree of 21st December 2009)".

Having heard submission by the parties to the proceedings;

Having seen the acts of the case and all documents submitted;

Now considers;

This is a case intended to provide for the care and custody of the two children which the parties had when in a relationship between 2004 and 2008. The children today are approximately 14 and 12 years old respectively, and both were born in Malta. When this relationship ended, the mother absconded from the island and went to settle in her native country, Germany. Procedures to have the children returned to Malta do not seem to have had a positive outcome.

Plaintiff, the father of the children, filed this case to be given care and custody of the children, or alternatively, to have joint care and custody with their mother, with the children residing in Malta, or alternatively, to award him the right of exercising his rights of access over the two minor children, again in Malta.

The first Court decided to award the parents joint custody of the two children, but refused to order that these reside in Malta. It provided, however, directions as to how the father was to exercise access in Malta. It ordered the costs to be borne by the mother.

The mother appealed from this judgment and raised three points: (i) that she should not bear all the costs; (ii) that she should not pay what she described as “double maintenance” when the parties’ two children

exercise their right of access in Malta; and (ii) that she should not pay all the costs required for the children to travel to Malta to be with their father.

This Court, having considered the facts of the case, tends to agree with the court of first instance in burdening costs on the mother. The parties met in Vienna, but during their four year relationship they basically lived in Malta, except for some thirteen months when they lived in Sydney, Australia. For all intents and purposes the parties had intended to settle in Malta and there was no intention of taking up residence abroad. The children were born in Malta and for the first few years and months they were brought up in Malta. When the relationship turned sour, they tried, in Malta, to patch up their differences but, when reconciliation failed, the mother packed her bags and returned to Germany with the children, without the father's consent.

This court can understand the reaction of the mother but does not condone it. A foreigner in Malta who feels "scared", as she put it, by acts of her partner, would want to go back "home" where her family is situated, but if the situation worried her, she should have sought remedies according to law and not run off with the children, thus depriving them of immediate contact with their father. It was her sudden travel to Germany that exposed the children to an unstable life and, to a certain extent, an uncertain future. This unilateral act on her part forced the father to resort

to these proceedings, which have resulted in a long-winded and expensive process. The father had to spend a lot of time and expense to retain contact with his children; it is thus only fair that costs of the proceedings be borne by the party who initiated all this trouble.

The German courts, before which the mother took her case, noted that her declaration that she had no choice but to remove the children from their home in Malta was unwarranted and the children's removal from their habitual residence was illicit. After all these years of bickering, the first court decided it would be in the best interest of the children if they were to remain in Germany, where they are now settled and have their residence; this does not diminish the responsibility of the mother for these lengthy proceedings.

As to the issue of maintenance, the first court did not really provide for "double maintenance", but ordered that if, while the children are in Malta, the mother receives maintenance from the father, this is to be paid back. While the children are in Malta, she is ordered to pay by way of maintenance for the children a sum equal to the sum which, while the children are in Germany, she receives from the father. While the children are in Malta, the father shall be incurring children's expenses related to food, clothing, health and other matters, and hence it is the duty of the

mother to share costs with him – just like he does when the children are with the mother in Germany.

Further, as the father rightly points out, the children when in Malta have no pre-established routine, such as they enjoy in Germany, with the father needing to take time off from work in order to ease the children into enjoying their time spent in Malta. This could mean additional expenses which would not, perhaps, have been necessary had the children habitually resided in Malta.

As to payment of the flights to and from Malta, this Court appreciates the reasoning of the first court which ordered these to be paid by the mother as they are a direct consequence of the mother's unilateral decision to take the children out of Malta and away from their father. However, having decided not to uproot the children from their now stable life in Germany, it appears to this Court that it would be fair for the travelling expenses to be shared by the parents. Their retention in Germany is now being decided in the interest of the children, and not because of what the parents might have done in the past. As care and custody is to remain joint, the cost of the flight tickets to and from Malta is to be shared.

For all of the above reasons, this Court upholds only in part the appeal application of Dr Joseph R. Pace *nomine*, and while rejecting his first two

requests, upholds his third request and reforms the judgment of the first Court by modifying decision 3(f) and orders instead that the costs of the flight tickets for the children's visit to Malta be shared equally between the parties; it confirms the rest of the judgment.

Costs at first instance are to be paid as ordered by the first Court, while costs of the appeal stage are to be paid as to one third ($\frac{1}{3}$) by the plaintiff father, and two thirds ($\frac{2}{3}$) by the defendant mother, represented by the said Dr Joseph R. Pace.

Giannino Caruana Demajo
Acting President

Joseph R. Micallef
Judge

Tonio Mallia
Judge

Deputy Registrar
mb