

**CIVIL COURTS
(FAMILY SECTION)**

**MADAM JUSTICE
JACQUELINE PADOVANI GRIMA LL.D., LL.M. (IMLI)**

Hearing of 10th March 2022

Application no. : 211/2020

Case no. : 15

**MSH
Vs
RMH**

The Court:

Having seen the sworn application filed by MSH, dated 23rd November 2020, at page 1 (translation at page 42), wherein it was held:

- 1. Whereas the parties celebrated marriage on the sixth (6th) of January 2000 (Doc MSH1) and the parties have two children, namely SMH, on the Y and FWH, on the Y, the latter still a minor.*
- 2. Whereas the marriage between the parties suffered irretrievable breakdown, and therefore marital life between parties was no longer possible.*
- 3. Whereas the parties have been de facto separated since 1st July 2019, after having lived separately since August 2017, due to reasons related to their son's education in Scotland.*
- 4. Whereas since, the Defendant has established herself in Scotland with the children*

whilst the plaintiff remained residing in Malta, where the family had been living for over seventeen years.

- 5. Whereas plaintiff instituted mediation proceedings and was duly authorized by this Honorable Court to proceed with a separation lawsuit, in virtue of decree number 2082/2020 (Doc MSH2).*

Consequently, the Defendant is to declare why this Honorable Court should not, proceed to deliver judgment and:

- 1. Declare and pronounce the personal separation between the parties due to the fact that the marriage suffered irretrievable breakdown;*
- 2. Declare and order that the main place of residence of the children, will be in Scotland with the Defendant;*
- 3. To declare and grant the care and custody of the minor child FWH to the parties jointly, subject to the free access/visitation rights, to be enjoyed the plaintiff in relation to the said minor child when he is in Scotland or when the said minor child in Malta.*
- 4. To fix a monthly rate of maintenance which the plaintiff is to pay in the interests of the minor child according to law.*
- 5. To order that any and all expenses related to the minor child's education, health and extra curricular activities are borne equally between the parties;*
- 6. To declare dissolved the community of acquests existing between the parties and to order all movables and immovable constituting the said community of acquests to be divided into two portions, not necessarily equal, if necessary further to the liquidation and sale of any immovable property forming part of the community of acquests, and if deemed necessary subject to the appointment of required experts, as well as a notary to publish the relative deed/s and curator/s to appear on behalf of any party who fails to appear on such deed/s.*

7. Order the Defendant to return any paraphernal property pertaining to the plaintiff.

With costs against Defendant who is from this moment summoned to appear before this Court.

Having seen that the application and documents, the decree and notice of hearing have been duly notified according to law;

Having seen that the Court raised ex-officio the matter of the jurisdiction of these Courts and granted the parties sufficient time to tender evidence on the matter and to make final submissions on the same (vide verbal 1st June 2021);

Having seen that Defendant duly notified, failed to file a reply and also failed to attend to hearings scheduled, therefore she is contumacious at law;

Having seen that Defendant was given the faculty to file written submissions in terms of Art 158 (10) of Chapter 12 of the Laws of Malta. (vide page 37)

Having seen that this notwithstanding the Defendant failed to file any written submissions;

Having seen the exhibited documents and all the case acts;

Considers:

Plaintiff testified viva voce on the 1st February 2022 and explained that marriage was contracted on the 6th of January 2000 in Scotland and within a matter of days they moved to Malta and established their home here. He asserts that he has lived in Malta ever since. From this marriage, the parties had two children: SMH who was born in Scotland on the X, that is before the marriage, (in fact they moved to Malta when she was six months old); and FWH, who was born on the Y in Malta and is now sixteen (16) years old.

He adds that initially they lived in rented property in Malta, and later purchased property here. At present, the property in Malta is in their daughter's name which was done at the time when Plaintiff had business difficulties, however they have always lived there and considered the property their family home. Plaintiff also explains that they have also bought property in Scotland.

Plaintiff also confirms that he has lived in Malta ever since the parties established their residence here, a few days after the marriage between the parties.

Considers:

This is a preliminary judgement on whether this Court has jurisdiction to hear and determine the Applicant's requests, following a preliminary plea raised *ex officio* by this Court since from the acts of the case it appears that the Defendant, who as afore-mentioned has established herself in Scotland together with the parties' children, has also initiated judicial proceedings in Edinburgh.

On the plea of lack of jurisdiction, our Courts have held that:

eccezzjoni li kawza ma tkunx ta' gurdizzjoni tal-Qrati ta' Malta hi in effetti eccezzjoni ta' l-inkompetenza tal-Qorti. Bhala tali hi eccezzjoni dilatorja per eccellenza anke jekk il-Qorti tista' tissorleva l-materja ta' nuqqas ta' gurdizzjoni ex officio...¹

The present proceedings are essentially procedures involving the pronouncement of the parties' legal separation, and the dissolution and liquidation of the community of acquests, since it appears that there are no contestations regarding FWH, the minor child, now sixteen (16) years of age, where he ought to reside. Plaintiff contends that the parties agree that FWH's primary residence shall be with his mother in Scotland.

From the acts of the case it appears that the parties had contracted marriage on the 6th of January of the year 2000. The said marriage was registered in the district of Peebles, Scotland. It appears that Defendant has subsequently established herself in Scotland together with the parties' children, while Plaintiff continued to reside in Malta where the family had been living for over seventeen (17) years. ‘

The Court observes that notwithstanding the fact that Defendant has been duly served and notified with the acts of the case on the 27th of October 2021, in accordance with the prescribed laws, she has failed to submit a sworn reply and has also failed to appear before this Court as presided.

¹ [Appell Civili, Raymond Calleja vs L-Avukat Dottor Raymond Pace et noe, 31 ta' Jannar 1996, Kollez. Vol. LXXX.ii.320].

Thus, by virtue of this Court's decree, as handed down during the sitting of the 1st February 2022, Defendant is contumacious.

From the acts of the proceedings, it transpires that Plaintiff had filed for mediation proceedings on the 23rd June 2020 and subsequently, was authorised to proceed with the filing of a sworn application, which was in fact filed on the 23rd of November 2020. Thus, in light of the fact that these proceedings were filed prior to the 31st December 2020², these proceedings still fall within the scope of Regulation 2201/2003, namely the Brussels II Regulation. The Court also observes that Defendant in the proceedings *de quo*, filed proceedings in Edinburgh and following a motion filed by the Plaintiff in the current proceedings dated the 15th of September 2020, the Scottish Courts in accordance with Article 19³ of the Brussels II Regulation, agreed to:

“sist[s] the cause pending determination of the proceedings first seised in respect of Council Regulation (EC No 2201/2003 as between the parties in the Family Court in Malta...”

(Vide doc MH1 at page 28 and 29 et seq..)

The *prior temporis* rule in paragraph 1 of article 19, seeks to avoid the multiplicity of proceedings and irreconcilable judgments by stipulating that the second seised court is to stay proceedings. This permits this Court as presided to examine and determine whether it has jurisdiction. Thus, at this stage, this Court must examine whether it is competent to determine the case in accordance with Article 3 of the Regulation.

The grounds for determining the jurisdiction of a State's court to rule on divorce, legal separation and marriage annulment are adopted according to the principle of a genuine connection between the involving person(s) and the Member State and are contemplated in Article 3 of the Regulation,

² Vide [<https://dawsoncornwell.com/en/international/brexit.html>] accessed 1st March 2022.

³ Vide Article 19: (1) *Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.*

(2) *Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.*

(3) *Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court. In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised.*

with the grounds in Article 3 paragraph 1 set out as alternatives:

1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State

(a) in whose territory:

- the spouses are habitually resident, or***
- the spouses were last habitually resident, insofar as one of them still resides there, or***
- the Respondent is habitually resident, or***
- in the event of a joint application, either of the spouses is habitually resident, or***
- the Applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or***
- the Applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her ‘domicile’ there;***

(b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the ‘domicile’ of both spouses.

2. For the purpose of this Regulation, ‘domicile’ shall have the same meaning as it has under the legal systems of the United Kingdom and Ireland.

The Courts of a Member State have jurisdiction if the habitual residence of both spouses or one of the spouses at the time of the application is connected to its territory in one of the following manners:

- both spouses are habitually resident of the Member State or
- both spouses were last habitually resident of the Member State and one of them still resides there, or

- the Respondent, thus the counterpart of the Applicant, is a habitually resident of the Member State, or
- in the event of a joint application, either of the spouses is habitually resident, or
- the Applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
- the Applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her 'domicile' there.

From the acts of the case it transpires that the Plaintiff was born in England, while Defendant was born in Scotland. Following their *de facto* separation, it appears that while Defendant established herself back in Scotland together with the parties' minor children, Plaintiff remained residing in Malta, where the family had been living for over seventeen (17) years. From the documentation exhibited by the Plaintiff, it appears that the Plaintiff has been paying Social Security Contributions and Taxes here in Malta since 2011. It also appears from the tax forms exhibited that the parties filed a joint computation, and have also received deductions for school fees paid to private schools, clearly indicating that the parties' children attended school in Malta.

Plaintiff also testified on oath and confirmed that ever since the parties moved to Malta following their marriage, he has always lived in Malta.

Thus, from the evidence adduced, it appears that the parties' habitual residence falls within the scope of the second indent, which contemplates situations where the couple were habitually resident in the same Member State, in this case Malta, but after the marital crisis only one of them retains his/her habitual residence in that Member State. As it appears the parties together with their children were as a family habitually resident in Malta, and it is only after the marital crises that Defendant left Malta for Scotland, it is this Court's considered opinion that there is thus a considerable and sufficient connection with Malta. Additionally the Court also affirms that the facts of the case also fall within the scope **of the fifth indent**, which provides that the Courts of the Member State where the Applicant is habitually resident, have jurisdiction to determine the matter, provided that the Applicant resided in that Member State for at least a year immediately

before the application was made. Moreover, it is this Court's considered opinion that Plaintiff who has lived, worked and brought up his family here in Malta, since the year 2000, is also domiciled in Malta, a domicile within the meaning of, and as understood by the legal system of the United Kingdom.

Therefore and in light of the above considerations, this Court finds that it has jurisdiction to determine the proceedings as initiated by Plaintiff on the basis of Article 3(1)(a), indent two (2), five (5) and six (6), and orders the case to proceed accordingly.

Read.

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

Christabelle Cassar

Deputy Registrar