



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

**ONOR. IMHALLEF
NOEL CUSCHIERI**

Seduta tat-28 ta' Jannar, 2010

Citazzjoni Numru. 217/2006

Number on list: 31

**Dr. Karl Briffa in his capacity
of special mandatory of the absentee A B
vs
C D B**

The Court,

Having seen the sworn application filed in the name of A B [Plaintiff] by virtue of which plaintiff premises as follows:

Whereas plaintiff A B married defendant C D B on the 2nd September 1989, from which marriage were conceived two boys E A B who was born on the 25th March 1994 and Michael Joseph B who was born on the 20th March 1998;

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Whereas A B and the defendant C D B obtained a divorce decree from the Colcheser County Court in the United Kingdom dated 4th April 2002, a copy of which decree is being hereby attached and marked as Dok. KB1.

Whereas the care of the mentioned minors was granted to the defendant C D B, no provision was made with respect to the custody and parental rights, which consequently remained to be exercised by the parties jointly;

Whereas the plaintiff A B was granted free access to the mentioned minors;

Whereas in April 2002, the defendant C D B requested the plaintiff A B, who accepted, to grant her his consent to bring the children to Malta and establish their residence here;

Whereas in July 2004, defendant C D B requested the plaintiff A B to grant her his consent for her to take the children to Canada;

Whereas the plaintiff A B refused to grant her his consent to take the children to Canada following the defendant' s refusal to oblige herself by means of a written agreement on the modalities of access and communication between himself and the children;

Whereas in December 2004, the plaintiff A B received a phone call from his children telling him that they were in Canada;

Whereas between January 2005 to date the plaintiff lost contact with the children and t he defendant;

Whereas the plaintiff A B was informed by the Child Abduction Agency in the United Kingdom that the children are presently in Malta;

Whereas the plaintiff A B has to interest to ensure that the children are not taken out of Malta without the consent

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and for him to be guaranteed adequate access and regular contact with the children;

Therefore, the plaintiff humbly requests this Honourable Court to:

1. Declare that the defendant has unilaterally taken the children out of Malta without the consent of the plaintiff A B;
2. Permanently prohibits the defendant from taking or allowing anyone from taking the minors E A B and Michael Joseph B out of Malta;
3. Establishes the adequate access which A B should have of the mentioned minors.

With expenses, inclusive of those relative to the Warrant of Prohibitory Injunction which has been filed simultaneously with this application, against the defendant, which is hereby being referred to oath in terms of law.

Having seen the sworn reply whereby C D B [Defendant] submits: that the plaintiff's requests are unfounded in fact and at law; that at no stage were plaintiff's visitation rights denied to him, or have been prejudiced; that the present action is in reality an attempt made by plaintiff to try to reduce his financial obligations towards their minor children; and that therefore these proceedings are aimed at vexing defendant;

Having seen the Children's Advocate's report;

Having seen all the acts of the proceedings, including the affidavits and the detailed note of submissions presented by each party;

Having spoken to the minor children in chambers on the 3rd November 2009;

Having considered;

The Action

That by virtue of the present action, plaintiff is requesting this Court [1] to declare that defendant had left Malta with the parties' two children, without plaintiff's permission; [2] to impede defendant in future from taking the children out of these Islands; [3] to order in favour of plaintiff adequate access.

On her part defendant is denying that she has impeded plaintiff's access to his children, and affirms that plaintiff's purpose in instituting these proceedings is to try and reduce his maintenance obligations as per Consent Order¹ issued by the Colchester County Court on the 19th March 2002.

The Facts

From the evidence produced, it results that the parties, both English nationals, married on the 2nd September 1989, and from this marriage, they have two children: E A and Michael Joseph, born respectively on the 25th March 1994 and on the 20th March 1998.

On the 4th April 2002 the parties obtained a divorce decree issued by the Colchester County Court, whereby the patrimonial issues between the parties were regulated in the manner agreed by the parties; and also, plaintiff was ordered to effect monthly payments of £300 per each child, to defendant who, as agreed by the parties, was to have the sole physical custody of the children². No express decision as to parental authority was taken by the Court.

Subsequent to the divorce decree, and in the same month, plaintiff accepted defendant's request to bring the children to Malta with a view to establishing their residence here. At that time, plaintiff had a good relationship with his children; and, besides, defendant assured him that he could contact them at any time. She

¹ Vol.1 fol.8

² Vol.1 fols.14 – “Statement of Arrangement for Children”.

also agreed that, owing to plaintiff's phobia of travelling by air, she would take the children to England for personal contact with their father. Plaintiff confirms that there were regular phone calls every week and exchange of emails.

On her part, defendant states that, the fact that she has relatives in Malta, and that she could "finance" herself; as well as the fact that at that time she considered the cost of living in Malta to be cheaper than that in the UK, prompted her to take this decision. Besides, the children were familiar with the Island, and they have relatives here.

Things ran smoothly for some time, until plaintiff began to slacken on his maintenance obligation, as a result of which, it became difficult for him to exercise contact with his children. The situation took a turn for the worse, when defendant requested plaintiff's consent to be able to take the children with her to Canada with the purpose of settling there.

Defendant explains that, through a subsequent relationship she had with a Canadian national, she had the opportunity to start a new and better life, with the children, in Canada with a better standard of living and with more prospects for the children's future.

Plaintiff's initial reaction was to give his consent, but insisted that a written agreement³ be made with a view to guaranteeing his access rights towards the children, and also to reducing the amount of the maintenance bond.

He explains, that, unlike Malta, Canada is a big country, and he was afraid that his access rights would be prejudiced. Moreover, since the issue of the court decree, he had lost his job, and, as he was earning less from his new job, he could no longer afford to pay the whole amount established by the UK Court.

Defendant, on her part, was unwilling to enter into an agreement to that effect, and, instead, insisted that the

³ Vol.1 fol. 52

matter of maintenance remain regulated by the court decree. As a result, plaintiff refused to give his consent to the children leaving Malta for Canada.

However, this notwithstanding, defendant, after seeking legal advice left, for Canada with the children on the 27th July 2004.

Plaintiff states that he came to know that his children were in Canada through a phone call he received from the latter around December 2004; after which, telephone contact ceased, and plaintiff was unaware of the whereabouts of his children, until the children were traced by the Child Abduction Unit in London, following a request made by him. Eventually defendant came back to Malta with the children, where they are still residing.

Defendant gives a different version of the facts, following their arrival in Canada. She holds that plaintiff knew that they were in Canada, and that contact with the children was made by telephone, and she that had no intention of denying plaintiff's access rights. But, she explains that the maintenance payments ceased on the 13th December 2004, and from then onwards, contact ceased on the part of plaintiff. In her own words: "Due to maintenance monies ceasing in January 2005, for no apparent reason, telephone contact was no longer affordable [on her part]"⁴

Defendant explains that subsequently, since plaintiff was not willing to give his consent to the children staying in Canada, and after being contacted by the Child Abduction Agency, she resigned herself to the fact that it was going to be very difficult for them to stay in Canada, and so they returned to Malta in June of that same year.

Defendant also states that, as a result of plaintiff's actions, "the children have suffered financially and emotionally due to [plaintiff's] selfishness. [His] line of action has resulted in the children expressing their wish not to have any association or contact with him [as] they have missed out

⁴ Vol.1 fol.136

on a life-time opportunity to be educated and live in a country which has been quoted as being the best country in the world to live in.”⁵

This feeling of resentment by the children was expressed by them to the Children’s Advocate, as well as in their conversation with this Court. The children feel let down by their father’s failing to honour his maintenance obligations.

On his part, plaintiff states that “All I am looking for is to talk to my children on a regular basis, and through an agreement, to see them as often as I can.”⁶ More specifically, “What I would like to have is a phone call with the children once a week, and to see them once a year.”⁷ He asserts that “There was a connection between payments and access, and when I was not paying maintenance, I was denied access. When I started paying maintenance, access was re-established.”⁸

Defendant denies that she had any intention of alienating the children from their father; but “my priorities are to put food on the children’s table and a roof over their head. In addition, household bills, and general living, including clothing, uniforms and medicine have to be financed.”⁹ Defendant also explains that at present she is unable to work, as she has another child. She insists that, irrespective of plaintiff’s financial difficulties, he “has a court order to maintain the children per month each.”

The Considerations of the Court

[1] From the above, it clearly emerges that there is a close tie between the access-issue and the failure on the part of plaintiff to satisfy fully his maintenance obligations as per the UK Court decree. In fact, the former is a consequence of the latter. It appears obvious to this Court that, when maintenance payments stop, access is

⁵ Vol.1 fol.138

⁶ Vol.1 fol. 31

⁷ Vol.1 fol.109

⁸ Vol.1 fol.108

⁹ Vol.1 fol.132

stopped by defendant, as being “no longer affordable”. In this respect, it is very relevant to observe that, just as plaintiff has a right, qua father of his children, to exercise contact and visitation rights, he has also an obligation to continue supplying maintenance in the amount ordered by the UK Court; and, unless the parties agree otherwise, any change in the quantum of maintenance, based on a change in his circumstances, is to be obtained by plaintiff by following the proper judicial procedures. On the other hand, whilst defendant has the legal right to insist on plaintiff's observance of the maintenance order, she has also the duty to guarantee plaintiff's access rights according to law, whilst addressing her husband's violation of his maintenance obligation through the courts.

[2] In the case at issue, it results that, after the divorce decree was obtained in April 2002, the parties had agreed that defendant was to take the children to Malta to establish their residence here. In fact, prior to moving to Canada in July 2004, defendant and the children lived in Malta for a period exceeding two years. These circumstances brought about a change in the habitual residence of the children, who were born in the UK from parents who are English nationals, and, prior to coming to Malta, had lived in the UK.

Therefore, it follows that, when the children were brought to Malta, and prior to their going to Canada, the law applicable was Maltese Law.

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

the person seeking to show a change of habitual residence to establish this.”¹⁰

On the merits of the case, the Court further observes that, since on April 2002 the children had acquired a new habitual residence, in Malta, and that therefore the applicable law, prior to their moving to Canada, governing the relation between them and their parents, was Maltese Law, then defendant's actions when taking the children out of this country in July 2004 with a view to settling in Canada, have to be examined in the light of the norms of Maltese Law governing parental responsibility.

According to article 5 of the 1980 Hague Convention, incorporated into our law by the Child Abduction and Custody Act¹¹ “rights of custody, shall include rights relating to the care of the person of the child, and in particular, the right to determine the child's place of residence.” ; The Convention also states that these rights “may arise in particular by operation of law, or by reason of a judicial or administrative action, or by reason of an agreement having legal effect under the law of that State [of the child's habitual residence immediately before removal.]”

In this case, it results from the evidence that [1] during the divorce proceedings the parties had agreed that the mother should have exclusive physical custody of the children; and that [2] immediately after the divorce decree, they agreed, on defendant's request, that the children were to reside in Malta with their mother. Plaintiff had accepted in writing defendant's request.¹² Therefore, once both parties were in agreement on this issue, neither of the two, could validly change the children's residence, without the consent of the other party or the competent court's authorization.

¹⁰ Ref. Private International Law – Cheshire, North & Fawcett – 14th edition [court's emphasis]

¹¹ Chapter 410 of the Laws of Malta

¹² Fol.143

On the issue of the plaintiff's consent, notwithstanding defendant's arguments to the contrary, this Court is inclined to regard plaintiff's version of the facts as more credible, and that substantially it represents a true version of the facts. There is no doubt in the mind of this Court, that defendant's move to Canada with the children was against the express wishes of the plaintiff. In fact, before taking the plunge, defendant had sought legal advice with a view to attempting to bypass plaintiff's consent; however eventually, the lack of consent on the part of plaintiff proved to be a serious obstacle to defendant's stay in Canada, and as a result in June 2005 she had to return, with the children, to Malta where they still reside.

Also, it must be pointed out that the fact that plaintiff had continued to effect maintenance payments during the first months of the children's stay in Canada, does not, per se, and in the circumstances, amount to acquiescence or consent on his part to his children settling there, since his obligation to effect payment of maintenance is not in any way linked to their place of residence; and his legal duty to maintain his children continues to subsist till the decree in question remains in vigore, irrespective of the children's place of residence. Besides, it is evident from the evidence produced, that only by paying maintenance was he allowed telephone contact with his children.

Finally, it is not amiss to point out, that, had defendant followed to the letter the legal advice given her by her lawyer before leaving Canada, the situation would probably have turned out differently, and in her favour, since plaintiff's actions were mainly directed at securing contact with his children. In his evidence, her lawyer states that, his advice to defendant at that time was in the sense that "So long as she honoured her obligation of access" and take the children to England for personal contact with their father, it should make no difference for plaintiff where the children were residing, whether in Malta or in Canada, once she had exclusive physical custody. However, defendant decided to stop access in January 2005

[3] In her note of submissions, defendant states that this Court lacks jurisdiction to decide this case; and that the divorce decree has not been registered in Malta; and therefore, defendant “claims that the Civil Court [Family Section] has no competence on the matter” which falls within the competence of the First Hall of The Civil Court.

In this respect, this Court makes the following observations:

[a] The merits of this case concern chiefly the plaintiff’s inability to exercise his access rights qua father of the children. This matter plainly falls within the competence of this Court in terms of regulation 4 of the Schedule contained in Legal Notice 9 of 2004 granting the Family Court jurisdiction to deal, inter alia, with matters falling under Titles 1, II and IV of the Civil Code, the last Title [IV] dealing specifically with parental authority, whilst Title 1 deals also with care and custody.

[b] Besides, it should be evidently clear that care and custody, as well as maintenance issues regarding the children, do not arise from the fact of the marriage or divorce of the parents, but from the status of parenthood. Therefore, these duties are placed on the parties, solely in their capacity as parents.

[c] Regarding her last submission, defendant argues that that plaintiff’s third request “cannot be acceded to by this Court as it is null and void in view of the fact that any demand regarding access has to be in accordance with the provisions of regulation 9 of Legal Notice 397/2003.” In short, before making this request plaintiff should have commenced mediation proceedings.

In the respect, this Court observes that the issue between the parties is not the father’s right of access to his children, nor the modality of such access. In fact, when maintenance payments have been effected, there was no problem as to access. The point at issue in this case is plaintiff’s contention that defendant is putting obstacles depriving him of the exercise of his right of access whenever he falls short of his maintenance obligation.

Access

On the strength of the above it is the view of this Court that plaintiff's access is to continue to be exercised in the manner agreed between them, that is, that he be able to contact his children by phone at least once a week, and that personal contact be given him at least once a year. In the circumstances, and also taking into consideration the maintenance problem between the parties, it is advisable that Malta be the designated place where direct contact is to take place between the plaintiff and his children, unless of course the parties agree otherwise in writing.

The problem that arises at this stage, is the children's reluctance to make contact with their father. In this respect, the Court is of the opinion that, in the interests of the children, personal contact with his second son Michael be given to plaintiff until the child reaches the age of majority, whilst contact with his first son A, who by now is 15 years old, be discretionary on the part of the latter. Unfortunately, the situation of constant friction which has existed between their parents, over a relevant period of time, has affected negatively the children's perception of their father. The latter's failure in being regular in fulfilling his maintenance obligations has contributed to this, in no small measure.

Decide

For the above reasons the Court decides this case by acceding to plaintiff's requests; and, whilst declaring that in July 2004 defendant had unilaterally taken the children out of Malta without plaintiff's consent, prohibits defendant from taking or allowing anyone to take the children E A B and Michael Joseph B out of these Islands, without plaintiff's written consent, or court authorization to this effect; and confirms plaintiff's visitation rights in the sense above established under the section entitled 'Access'.

In the circumstances, since the failure on the part of defendant was due to the failure on the part of plaintiff to effect maintenance payments thereby causing financial

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hardship to defendant and the children, the costs of these proceedings are being apportioned as follows: three fourths [3/4] are to be borne by defendant, whilst the remaining one fourth [1/4] is to be borne by plaintiff.

< Sentenza Finali >

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