



MALTA

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

**ONOR. IMHALLEF
ROBERT G MANGION**

Seduta tal-15 ta' Lulju, 2014

Citazzjoni Numru. 194/2011

Sworn Application No. 194/2011 RGM

Case list number: 34

A B

vs

C D

The Court,

Plaintiff filed a Sworn Application where she premised that from a relationship between the parties a girl was born on the 29th December 2003, named Chloe; that defendant acknowledged that he was the father of the minor child; that defendant is today married to a third party and has another child; that plaintiff wishes to further her studies in the United States of America and for this purpose

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Qrati tal-Gustizzja

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wishes to relocate both herself and the minor child to the United States for the time she pursues her studies in that country; that defendant is objecting to the relocation of the minor child to the United States of America; that defendant knew from the very outset of their relationship about her plans to further her studies in the United States; that plaintiff is twenty five years of age and wishes to further her studies not only in her interest but also in the interest of the minor child;

Plaintiff requested the Court:

1. To grant plaintiff sole care and custody of the minor child;
2. To declare that defendant has a duty to pay maintenance for the minor child;
3. To establish the amount of maintenance due for the minor child;
4. To order defendant to pay plaintiff maintenance for the minor child;
5. To establish days, times and conditions for the visitation rights of the defendant in favour of the minor child for both instances, when minor child is in Malta and for when the minor child is abroad and in particular for the holidays of Christmas, Easter and summer.

Defendant filed a Sworn Reply raising a number of pleas:

1. That plaintiff's application cannot be considered by the Court since the legal time limit from the date of the Court decree authorising plaintiff to proceed to institute the court case was not respected;
2. That the Court should also take cognizance of another pending court case number 207/2011 filed by defendant on the 27th June 2011;
3. That defendant objects to plaintiff's request to relocate the minor to the United States of America. Defendant declares that in the event that plaintiff decides to go to further her studies in the United States, he is prepared to take over the care and custody of the child during the absence of plaintiff from these Islands; the child is still eight years of age, attends school in Malta, all her friends are in Malta, and the minor's life is established in Malta;
4. That the graphic design course which plaintiff says she wants to follow may be followed either in Malta, or closer to home in another European Union member state;

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5. That defendant does not have the financial means to travel on a regular basis to the United States of America to visit his minor daughter;
6. That the minor child is now of an age where she understands, she has friends and is of an age where she needs stability not only in her family but also stability in her school, teachers and discipline.
7. That defendant objects to plaintiff's request that she be given sole care and custody of the minor child;
8. That since the birth of the minor child, defendant has been paying child support to the mother in the amount of €280.00 per month;
9. That it was not necessary for plaintiff to include in her claims an order for child alimony since defendant was already paying child support and plaintiff's requests were only intended to increase the judicial costs of this case;
10. That defendant objects to plaintiff's request for sole care and custody of the minor child since according to defendant, plaintiff is not capable of taking care of herself and/or the minor child;
11. Plaintiff's request to relocate to the United States of America is opposed since plaintiff has interests in the United States of America and therefore there is the risk that if she is allowed to take the minor child with her, the latter will not return to Malta.

Having seen the reports filed by the Child's Advocate;

By a partial judgment delivered on the 11th December 2012 the Court,

1. Dismissed defendant's first, seventh and tenth plea.
2. Upheld defendant's eight plea.
3. Awarded plaintiff sole care and custody of the minor Chloe.
4. Ordered defendant to pay plaintiff by way of child alimony for the minor Chloe the sum of two hundred and eighty Euros (€280) per month which sum shall increase on a yearly basis

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according to the official Maltese Index of Inflation. Defendant is to continue paying child alimony after Chloe reaches the age of eighteen years in the event that she continues her full-time studies, up to the date she reaches her twenty third birthday.

5. Authorised defendant to exercise rights of access to Chloe on a weekday and on one day of the weekend for three hours at a time

During the course of the case the Court appointed Professor Carmel Cefai and Dott.sa Veronica Ellul as court experts to give their expert opinion whether it would be in the best interest of the minor child to relocate to the United States of America together with her mother either for a period of three years or indefinitely

Dott.sa Veronica Ellul filed a written psychological report¹.

The Court heard the testimony of both Dott.sa Ellul and Professor Cefai.

The Court heard the minor child *in camera*.

Both plaintiff and defendant filed notes of final submissions².

Having seen all the acts of this case and examined all the evidence both documentary as well as oral testimony;

The case was adjourned for final judgment regarding plaintiff's request to relocate for approximately three years together with the minor child to the United States of America in order for plaintiff to pursue her studies.

EVIDENCE OF PLAINTIFF.

¹ Fol. 504

² Fol. 547 and Fol 595

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In her affidavit plaintiff explains that she is twenty five years of age, has both American and Maltese citizenship and was raised in Malta. Although she graduated in psychology from the University of Malta, she wants to pursue here studies in graphic design in the United States of America. She was brought up by a Maltese father and an American mother. During her childhood she travelled to the Unites States almost every summer, spending the summer months at the grandparents' home there and living next to many other relatives. She describes this as her second home. "I always knew that when I was old enough I would want to spend some time studying or living in this place which holds a part of my identity."

At fifteen her older brother, left Malta and went to a boarding school in Canada, attended several top universities and now has a very successful career in Belgium.

When she was sixteen years of age she met defendant, who was almost twenty five years of age, an Italian with a job and a car which she describes as "a typical Italian intensely romantic guy". They met through the internet. She says that he knew she wanted to follow her studies abroad before they met in person as she informed him during their chatting. However once they started dating he took control of her life and managed to alienate her from all her friends and her family. Her mother had even booked a place for her at the university abroad where her brother was studying but defendant managed to turn her around.

She explains that at that time defendant swore to her that he was sterile. Their relationship was not harmonious and plaintiff decided that it was best to terminate it. However immediately she terminated their relationship, she found out that she was pregnant with his child.

Defendant eventually went on to marry another woman in Malta and has another daughter. However he refuses to allow plaintiff's daughter to accompany plaintiff to the States. Plaintiff recalls that this state of affairs prevented her from travelling to the States with her daughter to visit her mother who was terminally ill and who eventually died.

Plaintiff summarises her concerns as follows: "I find it absurd that in this day and age a man can get a 16 year old pregnant through lies and malicious intent, fully aware of her dreams for the future, and then go on to restrict her future possibilities and dreams while he goes on pleasantly with his life. If I were able to travel relatively freely and pursue my studies and career-goals overseas, I also would definitely be coming back to Malta regularly for her to spend time with her father as well as her grandfather and aunts I have in Malta, since I never have had a problem for her to spend time with her father for her own benefit."

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She describes herself as being stuck working mundane office jobs with very low pay since a qualification in psychology did not open any opportunities here in Malta. She contends that her whole life has been put on hold until her daughter turns eighteen years of age.

Plaintiff's father, Emmanuel B, describes defendants' domineering and jealous character. Since the minor was born, plaintiff parents had supported plaintiff to provide the minor with the best education possible. They paid for the girl's education at a private school. The child alimony paid by defendant was hardly enough to cater for the minor's daily needs let alone for the minor's financial needs to attend a private school.

In their evidence by affidavit produced by plaintiff, Rebecca Atkinson and Katrina Farrugia recount episodes to corroborate parts of plaintiff's testimony.

On his part defendant filed an affidavit stating that he is prepared to assume the care and custody of the minor child until she becomes of majority age. With his wife he can raise his child together with the one year old child he has from his marriage.

He expressed his worries that in the event that plaintiff is allowed to go to the United States with their child, she may in future change her plans and refuse to return to Malta. Defendant claims he does not have the funds, time, and energy to pursue international abduction proceedings in the United States.

He contests plaintiff's claims, and insists that such a move at this time is not in the best interest of the child. "The child requires stability and requires constant and daily affection and discipline and education, which I feel it is in the best interest of my child that my child continues attending ***** School, because this is not the right moment to unsettle the child".³

As regards the course that plaintiff would like to pursue in the States, defendant has this to say: "Courses of graphic designing can be pursued anywhere in Europe including Malta and I am truly and genuinely and honestly not convinced about A's wishes. I do know as a fact, because I went out with A B for some months, that A loves the USA, has great aunts and great uncles in the USA, want to live in the USA and wants to remain in the USA. This is my concern because A may have genuine requests now, but these genuine requests may change and may become more serious, placing me in

³ Fol. 50

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a very difficult legal and factual situation, and placing all the more my child in an upbringing which may not be so healthy for my child, Chloe needs mum just as she needs dad.”⁴

Defendant also voices his concerns about what will happen to the child while plaintiff is attending college or university. With whom will she stay? He asks. She will be placed in the care of unknown third parties. The child will end up with children coming from different backgrounds and upbringings.

“Once again I have no difficulty in raising Chloe. I have no difficulty in giving A the requisite access to Chloe when she is in Malta and I have no difficulty to take Chloe to see her maternal grandfather and aunts and uncles and also her nephews and nieces from A’s side family throughout her studies.”

The Children’s Advocate filed two reports in order to inform the court about the minor’s views and wishes. In the first report dated 3rd January 2012⁵ the Children’s Advocate explained that the child was not aware that for her mother to follow a course in the United States they had to stay there for at least three years, the length of the course plaintiff wishes to follow. She thought they were going for a holiday and return. However when the minor was interviewed for the second time⁶ on the 30th January 2012 this is what she expressed: “... the child made it very clear that she wanted to live with her mother even if her mother had to go to America because she feels very much attached to her mother, even if this meant that she had to change school”.

On plaintiff’s request, the Court heard the child *in camera*. She confirmed her wish that if her mother moved to the United States of America she wanted to be with her and not stay in Malta with her father.

To prove that she was of sound financial means plaintiff filed documentary evidence consisting of an investment summary and an equity diversification summary.⁷

Both parties filed documents relative to the procedure that would need to be followed in case plaintiff is allowed to temporarily relocate to the United States and does not return.

⁴ Fol. 51

⁵ Fol. 59

⁶ Fol. 64

⁷ Fol. 418

REQUEST BY PLAINTIFF TO RELOCATE TOGETHER WITH DAUGHTER TO THE UNITED STATES OF AMERICA

In its partial judgment of the 11th December 2012 the Court made a number of observations on the subject of child relocation in child custody cases which are hereby confirmed and reproduced for ease of reference.

“It has been stated that “relocation cases present some of the knottiest and most disturbing problems.”⁸

One of the most enlightening works which the Court identified on the subject under discussion is the publication entitled “**A Judge’s Guide – Making Child-Centred Decisions in Custody Cases**” published by the American Bar Association – Child Custody and Adoption Pro Bono Project, Second Edition (2008). In their introduction the editors succinctly depict in real terms the scenario facing the courts in similar cases: “Child custody and visitation disputes are among the most difficult for judges to decide. These disputes entail complex legal, social, cultural, economic, mental health, and related issues. They require judges to predict likely future behaviour and outcomes, rely increasingly on competing expert testimony, and ultimately depend upon a broad, indeterminate standard of the ‘best interests of the child’”. The best interests’ standard demands that courts decide cases in a way that ensures the well-being of children.

THE CHILD’S DEVELOPMENTAL CONSIDERATIONS.

The Court’s main concern with regards to plaintiff’s request for the relocation, even if temporary, of the child, is whether an authorised temporary relocation to the United States of America may have a negative impact on the child’s development.

From birth the child has never been with both mother and father under one roof. She has always lived in a one parent household. Contact hours with her father are on average twice a week for three hours each.

Infants from birth till eighteen months old have been defined as “*sensorimotor beings*”. That is, through their senses they learn to control and interact with their environment. What may seem like

⁸ “**Tropea vs Tropea**”, 665 N.E. 2nd 145, 148 (New York 1996).

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small achievements to adults are monumental to infants.⁹ Living from birth with her mother and not with her father has undoubtedly been instrumental in nurturing a very close bond between the mother and her daughter. This explains the reaction of the child to the prospect of her mother going to the United States. The child cannot bear the thought of being separated from her mother as confirmed by the child herself to the Court.

The age between eight and ten has been described as the “*critical age of industry or productivity*” as the child adjusts to more challenging schoolwork and increasing extracurricular activities. She needs a supportive learning environment at home as she faces increasing academic challenges. “Although independent in many respects, the child still needs adequate adult supervision and reinforcement of rules, expectations, and consequences. It is also at this time that the child has more realistic fears about the safety of loved ones and the potential loss of one or both parents. They need reassurance to maintain a sense of security.”¹⁰

The fact that the parents of Chloe have not lived together prior to their daughter’s birth has, in a way, avoided the trauma on the child of her parents physically separating. Most authors on the subject are of the view that the physical separation of the parents is one of the most traumatic moments for a child of separating or divorcing parents. The parties’ daughter was spared that trauma but she is definitely aware of the present dispute between her parents and that by itself is also traumatic for a ten year old child.

Plaintiff claims that relocating to the United States will be beneficial also for the minor child. The Court will be guided by the rule that any decision has to be taken in the best interest of the child.

The following extract from the publication “**A Judge’s Guide – Making Child Centred Decisions in Child Custody Cases**” quoted above should provide an objective approach to the issue of the minor child’s relocation:

“Attorneys, judges, child and family advocates, and mental health specialists have been struggling for years to develop child sensitive approaches to resolving relocation cases that also appropriately weigh

each parent’s interests. Relocation cases involve various competing interests, including the following:

⁹ A Judge’s Guide (2008) (ABA) (2nd Edit. 2008) p.50

¹⁰ Op. cit. p. 64

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- The child's right to stability and meaningful regular contact with both parents after a divorce.
- The custodial parent's right to move on with his or her life after a divorce without the interference and potential costly burden of litigation.
- The noncustodial parent's right to continue to have meaningful contact with his or her child after a divorce."¹¹

One author has noted that "judges and child custody evaluators need to recognize the risk of those biases [presumptions for or against the move] and set them aside when reaching conclusions about whether or not a specific child in a specific family moves with his or her parent."

Before a Court decides a request to relocate a minor child together with a custodial parent, away from the non-custodial parent, a number of factors need to be taken into consideration. The following are the most salient:

- Whether the move will improve the quality of life for both the custodial parent and the child.
- Whether the motives of the relocating, custodial parent are in good faith and not simply intended to frustrate the noncustodial parent's visitation.
- Whether the relocating, custodial parent will comply with the new visitation orders once he or she relocates.
- Whether the noncustodial parent's motives for opposing the move are in good faith or simply to avoid paying support.
- The parents' reasons for seeking or opposing the move.
- The quality of the relationships between the child and the parents.
- The impact of the move on the quantity and quality of the child's future contacts with the noncustodial parent.
- The degree to which the child and custodial parent's lives will be enhanced by the move.
- The feasibility of maintaining the relationship between the child and the noncustodial parent through suitable visitation."

¹¹ A Judge's Guide (page 125)

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The Court appointed expert, Dott.sa Veronica Ellul, in her report filed on the 6th June 2013¹², explained in detail the interviews she conducted with the parents and with the child. The following are her concluding comments and opinions:-

“Although one cannot be certain as to how the move will actually affect Chloe, it does not seem to be in her best interest at this stage of her development to move to America for a temporary or indefinitely. Although it may be a positive experience for her, there seems to be a number of risk factors which are mentioned in the concluding comments section.”

The risk factors outlined by Dott.sa Ellul are mainly the following:-

- although this is not a divorce case, according to research, children whose parents move more than one-hour drive away after divorce are significantly less well-off than children whose parents do not relocate. Research conducted on university students revealed that students whose divorced parents moved felt more hostility in their interpersonal relations, suffered more distress related to their parents' divorce, perceived their parents less favourably as sources of emotional support and as role models, believed the quality of their parents' relations with each other was worse and rated themselves less favourably on their general physical health, their general life satisfaction and their personal and emotional adjustment.

- although Chloe seems to want to go to America, it appears that she is aware that this is her mother's dream and she feels a strong sense of loyalty towards her to help her actualize her dream. Loyalty conflicts can be a problem for children of all ages but 9 to 13 year olds are especially vulnerable to parental pressures to take sides.....This may lead to Chloe to have a sense of powerlessness and may eventually exhibit anxiety or challenging behaviour in the future.

- although Chloe has built a good attachment with her father, displacement from the father for an extended period of time may have a detrimental effect on their relationship.....Research indicates that when fathers do not have an active role in raising their children, it is more likely that they develop long-term adjustment problems.

- moving to another country will inevitably effect a child's education. Some children might thrive in a new environment but others may find it more difficult to adjust and fit in. Should it be decided that Chloe is to move to America, the timing is very important in that it would be ideal for Chloe to start off at a new scholastic year rather than in the middle of a scholastic year.....From the

¹² Fol. 504

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information gathered from A and C, Chloe seems to be struggling already with her studies and this is an important area to think about.

- although Chloe does seem to have good coping abilities in the cognitive and physical area she still perceives her environment as weak to offer her support.This may create a lot of stress for her if she moves to America with her mother since they will not have a support network.....between 6 – 12 years children begin to learn specific skills and therefore they are eager to demonstrate their competences and develop a sense of pride in their accomplishments.....Losing her current friends and having to fit into other formed groups might be stressful for her.

- plaintiff's primary motivation to move with Chloe to the United States is to become more employable on her return to Malta. If this does not happen her motivation for leaving Malta in order to return with a better chance of being employed will still create frustration and dissatisfaction for plaintiff and will thus create more strain on her relationship with Chloe.

As regards the wishes of the child Professor Carmel Cefai had this to say:

“...I think that is very important that we consider what the child wishes [are], however as the psychologist said here we have to be a bit careful as well. While we listen to the voice of the child, we also have to consider the situation that the child is living with her mother, she's more likely to share the mother's dream”

In her note of submissions plaintiff refers to local and foreign jurisprudence on the subject of child relocation with the custodial parent. Particular reference was made to case number 436/04NC decided on the 20th June 2007 where the Court had authorised the mother to relocate to Italy, together with her minor child.

The Court is of the opinion that although there are similarities between the two cases there are also marked differences mainly that the mother was returning to her country of origin and that the child was being relocated to a country which is only an hour's flight from Malta.

Plaintiff criticises the conclusions reached by Dott.sa Ellul and the Court examined the objections raised by plaintiff.

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The question posed before the Court is not whether the mother has a right to relocate to another country to further her studies but whether relocating a ten year old child to a foreign country, outside the European Union; on the other side of the globe; away from her father and other members of her family is the right thing to do in the best interest of the child. The uncertainties and variables are many and no one can ever be sure of what the future has in store for the child if she is allowed to relocate to the United States of America.

The one and only reason brought forward by plaintiff to relocate together with the child is not directly related to the child. The reason brought forward by the mother to relocate with the child is "to further her studies". One may reasonably argue that if the mother furthers her education than the child stands to gain as well.

However, as the court expert rightly pointed out, relocation of mother and child to the United States shall move the child away from any family member except her mother. Evidence shows that the child has a very good bond with her maternal grandfather, who takes care of her after she finishes school each and every day until her mother finishes from work and picks her up. There will be no substitute in the States for Chloe's grandfather and from the evidence gathered it seems that if the mother's wishes materialise she will have to find child minding facilities to cater for the child from the time Chloe finishes school until the mother returns home from the educational institution or work. The Court is of the opinion that if the child was older it might not be a problem, but with a ten year old child it is.

The Court took into account all the factors outlined above and is not convinced that the move shall improve the quality of life of the minor child. As regards plaintiff's motives for relocating, plaintiff has not provided any plausible explanation why the course she wishes to pursue is not available closer to home.

In her note of submissions plaintiff contends that once she has been awarded sole care and custody of the child, than she is entitled to go abroad with the child in order to increase her qualifications and long-term career prospects. Plaintiff refers to the case *Nash vs Nash* [1973] where it was held that once a parent is given custody "it is a very strong thing for this court to make an order which will prevent the following of a chosen career by the parent who has custody."

However what has just been quoted cannot be considered in a vacuum. One has also to take into consideration the non-custodial parent's right to continue to have meaningful contact with his or her child. In her note of submissions plaintiff asks: "..... should the mother's life be kept at a standstill simply to preserve the father's 6 hour weekly access?" For plaintiff six hours of weekly contact between father and daughter might seem insignificant. However terminating these frequent

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weekly contacts will have a negative effect on the development of the child and would definitely have a negative impact on the quality of the relationship between the child and her father.

With all the good intentions possible, uprooting **a ten year old child** away from her current school, from her friends, from her father and half sister, from her maternal grandfather, and from her familiar surroundings, carries a lot of risks as outlined by Dott.sa Ellul.

Conclusion.

The Court is of the opinion that relocating the minor child to the United States of America for a period of approximately three years is not in the best interest of the child at this stage of her life.

For the above reasons the Court upholds defendant's third plea and consequently rejects plaintiff's request to relocate the minor child, Chloe, to the United States of America.

Each party to bear his and her own costs.

The Court prohibits the publication of the names of the parties and of the minor child in order to protect the identity of the child.

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Mr Justice Robert G. Mangion

< Sentenza Finali >

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