



MALTA

**CIVIL COURT
(FAMILY SECTION)
THE HON. MADAM JUSTICE
ABIGAIL LOFARO**

Sitting of the 14 th January, 2015

Citation Number. 48/2009

AB and Dr Renzo Porsella Flores and Legal Procurator Veronica Rossignaud have been appointed as curators by decree dated 26th May 2009 representing the minor ED and by decree dated 16th March 2010 the same curators have been removed from the lawsuit as plaintiffs

vs

CD and by decree dated 16th March 2010 Dr Renzo Porsella Flores and Legal Procurator Veronica Rossignaud were appointed as curators of the minor E D and have been joined in the lawsuit as defendants

The Court,

Having seen the writ of summons by virtue of which plaintiff premised:

Informal Copy of Judgement

1. The marriage of the parties has been declared null by the Civil Court Family Section on the 3rd April 2008, court judgement is hereby attached and marked as Dok CP1;
2. The parties had separated by a contract of separation on the 15th December 2005, a copy is hereby attached and marked as Dok CP2;
3. The parties have a son E who was born on the 3rd July 2000 and today is almost nine years of age;
4. As per separation contract the mother has the care and custody of the child whereas the father has access on Wednesdays and Saturdays;
5. The applicant has contracted marriage to F B on the 27th December 2008 and would like to live in Germany together with her husband and child and is willing and prepared to bring the child in Malta during his scholastic holidays for the father to have ample access;
6. Thus she would like to vary certain clauses of the separation contract namely 5 ii) e), iii) a) b) iv) a) b) in accordance with her humble requests listed hereunder;
7. It is the child E's best interest to be authorised to live with his mother in Germany since she raised him while the father had abandoned them many years back;
8. That the applicant personally knows of all the facts hereby declared, and numbered;
9. The applicant has been authorised by this Court to file this case after the termination of the Court Mediation proceedings;

Plaintiff is requesting defendant to state why this Court should not for the afore mentioned reasons :

1. Authorise the minor E D to live in Germany with his mother;
2. Grant reasonable access to the father towards the said minor in the manner described above and which would be in the child's best interest;
3. Vary the clauses of separation in this regard namely 5 ii) e), iii) a) b) iv) a) b);

With costs against the defendant, and with a summoning of the defendant so that a reference to his oath be made;

Having seen plaintiff's list of witnesses;

Having seen the reply of the deputy curators, by virtue of which they state :

As curators for the minor child E D they are not aware of the facts which led to the present case;

Informal Copy of Judgement

Nevertheless, the curators submit that ultimately the problem one ought to confront is whether the proposed amendments to the deed of separation between the applicant, now remarried, and her former husband – which would enable the applicant to move permanently with E and her new husband – would be in E's best interest or not;

Having seen the deputy curators' list of witnesses;

Having seen the sworn reply filed by defendant whereby he claims:

1. That all plaintiff's requests, as set are unsustainable and should be rejected with all costs for the following reasons:

- i. That the first request, as set, is unsustainable as the minor *jure proprio* cannot be deemed to have the interest to file such a law-suit and submit requests that perfectly reflect the plaintiff's wishes and convictions;
- ii. That access obligations cannot be imposed by a judgement on the party who will exercise such right on the request of a party who anticipates that she shall be entrusted with the care and custody of the minor and consequently this is why the second request is unsustainable;
- iii. That also in respect to the second request, that when the minor is not within Maltese territory, then the Maltese Courts will not endeavour to establish modalities for the right of access for the same minor as the said minor will be outside the Maltese jurisdiction and thus such access will not be enforceable by the Maltese Courts;
- iv. That the third request is not contemplated at law. A contract which is authorised by the Court just like a separation contract, is a contract entered into voluntarily by the parties and although the Court is empowered to order – as regards the minor – some amendments to that which had already been agreed to, this cannot take place by an amendment in the contract.

That as cited above and in relation to the plaintiff's requests, it transpires that the plaintiff is requesting this honourable Court to radically change the conditions and modalities of access that defendant exercises for his minor child by taking the same child away from Malta. His pleas are the following:

2. That the agreement as reached in the separation contract is a contract of compromise. Jurisprudence on the matter dictates that our Courts have always deemed a separation

Informal Copy of Judgement

contract to be a contract whereby reciprocal rights are agreed upon and consequently the stipulations as set out by the spouses are indivisible. Jurisprudence has consistently held that it is not possible for one party to retain all that she would have acquired by virtue of the same contract and at the same time to impugn, reduce and amend that which she must give. Should this be acceded to, the stability and indivisibility of contracts – the law between the parties – will be compromised or minimised.

3. That for the agreement reached by the parties by virtue of their separation contract to be amended on the plaintiff's request, it needs to be proved in a clear way that the plaintiff's request will not only not be prejudicial to the minor child but that what she's requesting is actually in the child's best interests and that such change is actually preferential to the current state of affairs. The defendant contends that this is absolutely not the case. It transpires that the plaintiff intends to leave the Maltese islands to live with her husband in Germany since from what it transpires to the defendant, the plaintiff's husband refuses to live in Malta for two reasons that is, he doesn't want to lose his current employment in Germany and that he doesn't want to leave his own child. E's interests do not feature in these choices and certainly are not the motivation behind this choice which the plaintiff seeks to impose on him. In this regard, the defendant makes reference to his sworn declaration attached to the same sworn reply whereby he underlines and notes a number of factors that in their entirety should lead to the conclusion that the minor is in fact the victim and not the beneficiary of what the plaintiff requests and proposes;

4. That the defendant affirms that he possesses rights which are not simply related to access rights which the plaintiff wishes to amend. This law-suit is being filed only on the basis of the plaintiff's convenience and ulterior motives. The defendant possess rights in relation to the minor's travelling possibilities as contemplated in Article 5 of the separation contract. The effect of such stipulations is clear. The parties had wanted to reassure that whereas the minor would be allowed to travel for holidays with his parents, he had to be returned to Malta. This agreement still binds the plaintiff.

5. Save the production of further pleas.

Having seen the sworn declaration of facts of the defendant whereby he claims the following:

Informal Copy of Judgement

1. That the defendant understands that the plaintiff wishes to take E, their child away from Malta for the simple reason that the plaintiff married a German man who does not want to live in Malta and who permanently resides in Germany;

2. That this is not in the child's best interests, actually the contrary. The child's removal from the Maltese Islands carries with it a huge risk in the sense that the child's life could take a turn for the worse and because of the same removal, his emotional and intellectual development could be compromised;

3. That E was born and raised in Malta and is a Maltese child, no different from any other Maltese child. Although defendant is German, the minor does not speak German and the plaintiff's efforts in this regard were restricted to one lesson per week;

4. That if he were to move to Germany, the child will be socially and educationally disadvantaged. The plaintiff says nothing about her plans for the child's education and which school he should attend – because of his linguistic disadvantages – the child will not be deemed to be have reached the expected standard in his education;

5. Presently the child has a social life and a number of friends. He participates in a number of activities including sports. When the defendant attempts to make the plaintiff realise that the minor will be isolated and without friends, her only reply is that when the child is in Germany, he will make new friends. The plaintiff has no idea about German life-style where even the German children have little interaction between them;

6. E is Catholic and has been raised as Catholic. The plaintiff has changed her religion and is now part of a sect with teachings which are different from those adhered to by Catholics. Defendant is Catholic and wishes that his child is raised as such. The defendant had to intervene with the school authorities when plaintiff decided to stop the child from attending religion lessons as she feared that Catholicism might contaminate the child's ideas. The plaintiff's husband is also a member of this sect and consequently, should the child live with his mother and her husband the child will not remain Catholic. The defendant cherishes his faith and deems it his responsibility that his child is raised as Catholic;

Informal Copy of Judgement

7. That the plaintiff has not divulged any information about the child's life should he be allowed to live in Germany. Her requests are evidently based on her assumption that what seems to be beneficial to her is automatically beneficial to the child. In fact, the plaintiff is requesting this Court to send the child in a dark place without any information about the measures to be taken to ensure the child's interests in relation to his education, happiness and as to how the same child is to be raised as if this Court is to assume that there should be no problem for a nine year old child to suddenly move and wake up in a house with his mother's husband, grabs his books which he cannot read and go to a school where he knows no one and understands nothing.

8. That this Court knows nothing about the plaintiff's husband – should the plaintiff's requests be upheld, the plaintiff's husband will in fact be entrusted with the minor's care. The defendant knows very little about this man. However he is aware of the fact that plaintiff married this man after a relatively short time, during which they spent a long time apart. The defendant is afraid that the plaintiff does not know her husband well. That is her choice however the minor should not be made to take this risk as well.

9. That from what the defendant understands, the plaintiff wants to reside with her husband and his child who's approximately thirteen years of age in an apartment which is situated on top of his parents' apartment. There are a number of people who will be in direct contact with the child, however the plaintiff does not give any information about them;

10. The plaintiff does not mention anything about the way that the child will be maintained. The defendant cannot pay more maintenance, the plaintiff's husband is not bound or obliged to maintain the child and the plaintiff has no employment in Germany;

11. That the child has a right to be loved and cared for by his father. The child's relationship with his father is strong and healthy, based on love and supported by the constant contact that takes place during access. This relationship will change radically should the contact between the child and his father be restricted to holidays which will take place once or twice a year. This does not seem to concern the plaintiff. Her relationship with her husband and his insistence not to be away from his son are the basis for this case and she's not concerned about the fact that the minor child will be removed from his father.

Informal Copy of Judgement

Having seen defendant's list of witnesses;

Having seen the counterclaim filed by defendant by virtue of which he claims:

1. That the defendant wishes to make use of the sworn application to file a relative counterclaim;
2. That the parties were married on the 5th January 1995 in Germany and in Malta on the 30th June 1995;
3. That out of their union a child, E who is now nine years old was born;
4. That the parties legally separated by means of a separation contract published in the Acts of Dr. Liza Camilleri dated the 15th December 2005;
5. That the parties agreed on the travelling arrangements and care of the minor in the same separation contract. The parties had agreed to allow the minor child to travel as long as it was ensured that the same child is returned to Malta. The plaintiff was entrusted to be the principal carer of the child whilst the defendant was granted ample access and regular contact with his son;
6. That the parties' marriage has been declared null by this Honourable Court and the plaintiff has married a certain Marcus B, a German citizen who resides in Germany. It transpires that plaintiff wishes to leave the Maltese Islands in order to live with her husband and wishes to take the minor child E with her;
7. That the defendant firmly holds that it is not in the child's best interests to be removed from Malta, the country where he was born and bred in order to live with a foreign man, in a foreign country where he doesn't know how to communicate since he does not know how to speak in German;

Informal Copy of Judgement

8. That it is evident from the said sworn declaration and as will be proved during the course of these proceedings that it is in the child's best interests to stay in Malta under his father's care and custody and not be taken away by his mother.

Thus, defendant requested this Court to order in the child's best interests that the defendant be entrusted with E D's care and custody, should it transpire that the plaintiff persists in her wish to leave the Maltese Islands and establish residence outside of Malta.

With costs to be borne by the plaintiff.

Having seen defendant's list of witnesses;

Having seen the reply of plaintiff to the counterclaim filed by defendant, by virtue of which she claims:

1. The parties' marriage has been declared null by the Civil Court Family Section on the 3rd April 2008. From the union of the parties their son E was born on the 3rd July 2000 and today is nine years old;
2. The care and custody of the said minor was vested on to his mother as per their separation contract dated 15th December 2005. On the separation contract the parties had agreed for the minor's father to have access towards the minor every Wednesday from 4pm to 7pm and on Saturdays from 10am to 7pm;
3. The minor's mother has married Marcus B who is of German nationality, on the 27th December 2008. Notwithstanding her marriage, she is being deprived of living with her husband in Germany because of the minor's father opposition for the minor to live in Germany with his mother;
4. The minor's father C D is also of German Nationality but he is living in Malta;
5. The minor's mother wishes to reside with her husband in Germany together with E. It was always the mother who raised and took care of the minor and it is in the best interest of the minor to continue living with his mother;
6. By living in Germany the minor's father would still have access, which can be agreed to by the parties taking into consideration the wishes of the father;
7. The minor's fathers relatives and family including the parents of the minor's father, paternal grandparents, are also German and live in Germany close to where the mother's new house is in Germany;
8. The minor has been travelling to Germany for his holidays since he was six months old, he became part of the Christian Church since he was two years old, he speaks and understands the German language and has several German friends. The mother

Informal Copy of Judgement

has made all the necessary enquiries and arrangements for the minors schooling in Germany;

9. Thus she objects thoroughly to the father's counterclaim whereby he is asking the Court to be vested with the care and custody of the said minor should the mother persist in her intention to live with her husband in Germany;

Costs should be borne by the minor's father;

Having seen plaintiff's list of witnesses;

Having seen the deputy curators' sworn reply by virtue of which Dr. Renzo Porsella Flores et noe declared:

As curators they are not aware of the facts which led to the present case, however they declare that in any case, the plaintiff's requests should be examined from the child's best interests point of view.

Having seen the deputy curators' list of witnesses;

Considers :

That the principal matter to be decided by this Court is whether the child E should be allowed to be removed from Malta in order to live with his mother in Germany or not. The defendant, by means of his counter-claim, states that should the plaintiff persist in her wish of leaving the country, then he should be entrusted with the care and custody of the same child.

The Merits of the Case

Informal Copy of Judgement

Reference is first made to the separation contract¹ which necessarily binds the parties. Article 5 of the said contract stipulates that both parties shall be vested with the care and custody of the minor unless any of the parties is absent from Malta or is incapable of fully discharging the obligations, as stipulated in the contract in relation to the minor child. Particular reference is made to Article 5(ii)(e) which states that each party shall be freely entitled to travel with the said minor for a period which shall not exceed twenty-one (21) days every year, calculated cumulatively. Article 5(iii) then stipulates the defendant's access times for the said minor during the year whilst Article 5(iv) stipulates access time during particular days and holidays.

Evidence Produced

By means of her affidavit², plaintiff declares that her marriage to defendant was declared null and void. She attributes the breakdown of their marriage to his lack of commitment. She also declares that from their union, a child was born (who at the time was eight years old) and that is now married to F B. She does mention that she had a difficult time and mentions the different proposals she made before the parties separated legally in 2005. Her only interest was to provide E a similar environment to what was lost. She describes her efforts and endeavours to give E a good life. She worked, she sent the child to school and at the same time, as from the date of their separation contract, the defendant starting paying maintenance, although she claims that the same maintenance was not increased according to the cost of living index, although the contract stipulates this.

She declares to be an Evangelical Christian and to believe in Jesus and the Trinity. She says that although defendant has been baptised in the Roman Catholic Church, he does not go to church.

She also states that although the separation contract stipulates the days and times when defendant exercises his right of access to E, there was a time when he did not abide with the same days and times and instead saw his child whenever it suited him best. Now he's abiding to the contract although he does not keep the time. She is of the opinion that the defendant's football commitments are more important to him than spending quality time with his son.

¹ A copy of which is exhibited in the acts of this case – see fol. Number 11

² See fol. Number 70 of the acts

Informal Copy of Judgement

She declares to have always been the sole carer of the minor child, to have raised him and to have been the parent, to take him to the doctor and for check-ups. The defendant does not even take care of the child when she's away in Germany to visit her husband as he's too busy and consequently E is taken care of by her parents. Defendant does not even have a proper bedroom for E at his flat. She states that she has dedicated her life to E but is now being impeded by defendant from establishing a new home in Germany with her new husband who's an excellent father to his thirteen year old son. She declares that E would live in a nice and healthy environment were she to be allowed to establish residence in Germany together with her son. She further states that she has visited the school where E would attend and has seen the syllabus. The headmistress assured her that E would integrate well and she's convinced that he will as he's intelligent and he will pick up the language very quickly. She describes E as a wonderful child who's well educated and she'd like to continue to take care of him and to give him the unconditional love that she has always given him.

She ends her affidavit by declaring that defendant will be able to go to Germany whenever he wants and that she's ready to bring E to Malta during the school holidays and in Summer. She also mentions internet calls and declares that she will facilitate the communication between the child and defendant. She declares that she will never leave Malta with her son but at the same time she wishes to live with her husband in Germany with E.

Plaintiff files a document dated the 28th March 2009³ issued by the Attard Primary School whereby it is declared that E attends school regularly, is well-behaved and that both parents have attended the two parents' meetings and show a keen interest in their son's progress and well-being.

By means of another affidavit she files⁴, plaintiff further states that defendant will be able to see E whenever he wants. She mentions statements that allegedly are said by the defendant to the minor child, statements which refer to her wish of leaving Malta and that she intends him to have no father. Plaintiff strongly affirms that these are lies. She further states that when E is with his father, he's sometimes left alone or in the company of his girlfriend's daughter Martina. This concerns plaintiff although she further states that she always cooperated with him and extended his access rights to sleepovers even though the contract does not provide for the same. She mentions that E often speaks to his dad about his wish to move to Germany. She states that she's attaching a number of photos of the house

³ See fol. Number 75 of the acts

⁴ See fol. Number 138 of the acts

Informal Copy of Judgement

where Max would live in Germany (though these are not attached to her affidavit) but attaches a report filed by Counselling Psychologist Mariella Blackman⁵, after the latter spoke to E several times. Under cross-examination, plaintiff obliged herself to check about potential schools that E would be able to attend. When confronted with questions relating to international schools which have the same curriculum only taught in English, plaintiff answers that she did not do a full research because she had planned for Max to go to a German school⁶.

Reference is also made to F B's affidavit⁷, by virtue of which he states that he's married to the plaintiff and that he shares joint care and custody with his previous wife of their son R who lives with him from Thursdays to Sundays. He gives a background of his life, achievements and qualifications. He describes his wife as an excellent mother to E who's very protective and affectionate towards him. He states that he wishes his wife to live with him in Germany together with E and that there's a room prepared for him with a computer and an internet connection so that he can contact his father any time. He describes the school in Germany intended for E as orientated for foreign children. He ends his affidavit by declaring that together with plaintiff, he will always ensure that E will have frequent contact with his father and that it is not their intention to deprive his father from his son Max. Interestingly enough, under cross-examination, the witness holds (with reference to his son from a previous marriage) that ***"The fact that I have joint custody with my son came from the fact that I feel it is important for a son to have his father and to have quality time with the father and it is important for me to have custody as I can discuss with my ex-wife"***⁸.

Reference is made to Nathalie Fiteni's affidavit⁹ who has known plaintiff for some years. She describes plaintiff as a loving mother who's always there for her son and that he's her first priority. Kenneth Mercieca¹⁰ also describes the plaintiff in a positive way as he describes her relationship with her son E. He further states that although sometimes the defendant sees his son, Max is closer to his mother as their love is very strong. Plaintiff's parents also make a sworn statement¹¹. They confirm what plaintiff says, in the sense that when their daughter is away to visit her husband in Germany, E stays with them and rarely does he sleep at his father's residence due to his very busy life-style, although under cross-examination, Mary-Rose Mercieca declares that she knows of no occurrence where defendant was offered to

⁵ See fol. Number 150 of the acts

⁶ See fol. Number 187 of the acts

⁷ See fol. Number 77 of the acts

⁸ See fol. Number 294 of the acts

⁹ See fol. Number 81 of the acts

¹⁰ See his affidavit a fol. Number 83 of the acts

¹¹ See their affidavits a fol 97 – 98 of the acts

Informal Copy of Judgement

keep the minor child to sleep and he refused¹². They confirm that plaintiff has raised E on her own as defendant was always busy with his football commitments. They declare that she's an excellent mother who dotes on her son and that her husband is respectful not only towards her but also towards her son Max. They state that E is very close to his mother and that whenever she's away he's down as they are inseparable. Although plaintiff always cooperated with defendant, the latter is now troubling her from moving on with her life in Germany. They declare that Max loves Germany, he often speaks about it and enjoys it when he's on holiday and that they believe that he can benefit from the high standard of education, environment and the beauty that the country has to offer.

Reference is made to the counselling psychologist Mariella Blackman's report¹³. After having spoken to the minor who declared to wish to go to live in Germany with his mother and her husband, despite the fact that he loves his dad, he mentions that part of his decision is also based on the fact that he feels that his access time with his dad is mostly spent with his father's girlfriend instead of his dad. She declares that it seems evident that mother and son have a good relationship and that the minor is serene with her. In her conclusions, she recommends that E moves to Germany with his mother and that he spends some quality time with his father during the holidays (although she emphasises that such access should take place between father and son and that Max is not entrusted to third parties during the same said time). Under cross-examination¹⁴, Mariella Blackman states that when a child is triangulated between two different wishes of his parents, ***"it is only natural that he would manifest psychological issues, like for example sense of helplessness when he feels trapped in a situation he does not want"***¹⁵. She further opines that being a very intelligent child, E will be able to grasp the German language (which he is learning) and thus he will be able to adjust to schooling accordingly. During another sitting, the same witness further elaborates by saying that Max confided in her that he sees DD (his father's girlfriend) as a foreigner but does not see Marcus B (his mother's husband) in the same way since the latter treats him well as if he's his own son, whilst DD is sarcastic. She also mentions that the child wanted to speak directly to the judge about this matter, which shows his level of anxiety.

Mr. Anthony Spiteri¹⁶ in his capacity as Head of Attard Primary School, declares that E is doing well at school. He always does his homework and studies and very rarely he skips religion and social studies homework. He's well-behaved and gets good grades and seems to be normal happy child despite the fact that he speaks about his parents' separation which

¹² See her testimony dated the 11th November 2011 a fol. Number 285 of the acts

¹³ See her report a fol. Number 150 of the acts

¹⁴ See her testimony dated the 17th February 2011 a fol. Number 220 of the acts

¹⁵ Ibid

¹⁶ See his testimony dated the 29th November 2010 a fol. Number 209 of the acts

Informal Copy of Judgement

he accepts as a fact of life. He mentions that there was a time when the plaintiff requested that Max should not attend religion lessons, however after having spoken to the defendant and the plaintiff again, Max resumed his religion lessons.

By means of his affidavit, defendant¹⁷ states that his marriage broke down after plaintiff had an affair with a foreign man. It seems that her family are not aware of this affair and blame him for the breakdown of their marriage since his subsequent affair seems to be known to them. He states that he deeply loves his son and is very proud to be his dad. He further states that as time went by, his relationship with plaintiff got better in the sense that he cannot suspect that she's influencing the child in an objectionable way, save in respect of her religious beliefs. He continues to state that when plaintiff originally told him of her plan to move to Germany and of taking Max with her, he immediately opposed on two grounds – that he would miss his son severely and that such a move would be detrimental to the same child. She refused to discuss her plans in detail but instead replied that **“he'll learn German; he'll make friends; he'll catch up in school”**¹⁸. Since then, plaintiff will only allow him access during the days as stipulated in the separation contract. Although he tried to explain to her that her actions are detrimental to their son, she continues to see him as an obstacle to her actual family, that is, her husband, herself and Max. This is why he believes that plaintiff's intention is to sever all forms of contact between him and E. He fears that since he's barely given the opportunity to communicate with his son when he's in Malta, he cannot presume to keep contact when he's living in Germany. He states that plaintiff excludes him from all aspects of his child's life and although he wishes to be informed as to when he's sick and as to his upbringing, plaintiff does not inform him about anything, just as she did not inform him about the psychological assessment carried out by Mariella Blackman. He notes several discrepancies in her report and concludes that the same report was filed with the sole purpose of backing his wife's case. He states that the child is influenced by his mother and although he does express the wish to move to Germany, he does so in a way which clearly shows that his mother is influencing him as he's unrealistically optimistic about the move which clearly shows that plaintiff is giving him false hope. He's also aware that due to the fact that the child lives with the mother, although he loves both his parents, given the choice, he would rather choose his mother and disappoint his father than vice-versa. Defendant believes the child can't overlook the far reaching consequences of moving to another country.

He feels that the relationship between him and his son is strong and now that E is growing up, he needs a strong father figure and relationship. This is why he feels that contact on a regular basis is important. He declares to be very interested in his son's schooling and

¹⁷ See a fol. Number 265 of the acts

¹⁸ See a fol. Number 266 of the acts

Informal Copy of Judgement

upbringing and although in Maltese, he attends the school meetings, concerts and parents' days.

Defendant is concerned about the confusing state of affairs about the child's religion as the child is not sure of his religious denomination since although he was baptised in 2000, according to plaintiff, he was 'presented to the Lord'- something which E failed to understand. He firmly believes that plaintiff has become fanatic about her sect as she often replies '***I don't know, but God will decide for me***'¹⁹. He comments and is concerned about the fact that Germany is described as a land of opportunity and Max is given hope about living there soon whilst Malta is described as a poor, underdeveloped country without any opportunities. He strongly believes that no matter what the outcome of this suit, Max should be proud of his culture and civilisation and should be able to stand tall before anyone (including his mother's husband) who speaks negatively about Malta. He's also concerned about the expensive gifts Max is receiving from his mother's husband which are intended to 'buy' his friendship.

Defendant points out yet another concern, that is E's lack of knowledge of the German language and the fact that children with a foreign background are not very easily accepted in Germany and often find it hard to integrate in a society where racism and attacks against foreigners are a frequent occurrence. Furthermore he states that plaintiff's proposed new home is in a rural area where social contacts are difficult to keep and this does not support Max's needs to interact with children of his age. Even his step-brother R barely speaks to him and shows no interest in communicating with him.

He describes the plaintiff's husband as a hostile and unfriendly man who had no positive words about Malta. Due to the fact that plaintiff does not intend to work in Germany, defendant asks as to what would happen to Max if their marriage had to fail. Who would maintain his child and who would protect him in a foreign country? He concludes that the move to Germany would be detrimental to his son and to their relationship as a father and son and that he has no intention of being away from him in order to fulfill his ex-wife's needs and those of her husband. He asks '***why should Max grow up in Germany and leave his father, because his new stepfather places his own son in higher regard than his wife***'?²⁰ He further states that should plaintiff move permanently to Germany, he will be ready to take full care and custody of the child and he'll be willing to re-organise his work and social

¹⁹ See a fol. Number 269 of the acts

²⁰ See a fol. Number 272 of the acts

Informal Copy of Judgement

life towards the best interests of his son. Should plaintiff decide to visit Germany more often, he would be very willing to take over their son's care during her absence.

Ian Mifsud²¹, Head of St. Nicholas College, declares that E attends his school – a small school with a few number of students which is deemed to be an advantage for its students due to the individual attention being given to the students. He confirms that E has integrated well at school. He's well liked, he has integrated well and he's a high achiever.

The Court also makes reference to the affidavits produced by both parties in relation to the fact that the minor was allegedly abducted from Malta by the mother and returned willingly in February 2013 as ordered to do so on the 13th March 2013²². Defendant²³ explains how plaintiff, despite her reassurance that she had all intentions to return to Malta, failed to do so. She denied him all forms of contact with his son and he was threatened not to approach their house. He later confirmed that his son he was attending a German school against all the conditions and stipulations of the separation contract. In Germany, proceedings were taken for the safe return of E to Malta and the German Court concluded that Max was to return back to Malta since plaintiff had acted unlawfully. She appealed however she subsequently withdrew her appeal and returned back to Malta on February 13th, 2013. He concludes by saying that despite the plaintiff's indoctrination and the unfortunate turn of events of his abduction, his relationship with his son has improved and they now participate in activities together. By means of her affidavit plaintiff²⁴ states that the Youth Department in Germany could not understand why E was being impeded from living in Germany since he holds a dual citizenship and both countries are members of the European Union. Since the Youth Department decided to support the case, she decided not to return to Malta and to continue the case there, although her original plan was to return to Malta on the 6th September 2012. She states that Max was angry at his father for not accepting his decision to move to Germany whilst on the other hand, the defendant would not accept that his son be removed illegally from Malta. Communication between father and son was halted. When plaintiff lost her case and was ordered to return to Malta, she was given the advice to appeal and so she did. However, upon different advice, she withdrew her appeal and decided to return to Malta. She makes out a plan which she proposes as access times for the defendant should her requests be acceded to. Together with her affidavit she attaches a number of documents, including emails exchanged between the defedant and the minor child and documents issued by the German authorities and Court.

²¹ See his testimony dated the 3rd May 2012 a fol. Number 307 of the acts

²² See a fol. Number 342 of the acts

²³ See his affidavit a fol. Number 346 of the acts

²⁴ See a fol. Number 352 of the acts

Informal Copy of Judgement

Reference is also made to the court appointed expert Ms. Carmen Sammut²⁵ in which she confirms that minor child's wish to be with his mother. Although he confirms that he wishes to live in Germany, upon further investigation it resulted that the child wishes to stay in any country as long as he's with his mother, in whom he has blind faith. He also mentions that he would like to continue to have a good relationship with his father and to have ample communication with him (freely in a way which is convenient for all parties) and that he'd be able to spend the holidays with his dad due to the fact that in Germany, school days and holidays are different than Malta.

When the presiding Judge spoke to Max in the presence of Mrs Carmen Sammut, Max repeated the version which he had given to Carmen Sammut.

Legal Considerations

It is evident that the case is to be decided, taking into consideration two major factors, that is, the child's supreme interests and the contractual obligations entered into by both parties and consequently the principle known as *pacta sunt servanda*. This Court strongly holds that the parties' intentions at the time of the publication of the separation contract leaves no room for interpretation – that is, the minor child was to live with his mother in Malta, was continue to reside in Malta and to have access time with his father. The same child was allowed to travel outside Malta with any of this parents for a period which should not exceed twenty-one days. This necessarily means that both parties had agreed that the child's residence is Malta.

At this stage, reference is made to the *pacta sunt servanda* principle mentioned above and to Article 992 of Chapter 16 of the Laws of Malta which states the following:

“(1) Contracts legally entered into shall have the force of law for the contracting parties.

(2) They may only be revoked by mutual consent of the parties, or on grounds allowed by law.”

²⁵ See her report a fol. Number 522 of the acts

Informal Copy of Judgement

In terms of the same mentioned Article, reference is also made to the applicable jurisprudence in relation to the same principle and its interpretation:

- **Grace Spiteri vs Carmel sive Lino Camilleri et** (decided on the 30th May 2002 by the First Hall Civil Court) where it was stated that ***“Il-principju kardinali li jirregola l-istatut tal-kuntratti jibqa’ dejjem dak li l-vinkolu kontrattwali ghandu jigi rispettat u li hi l-volonta’ tal-kontraenti kif espress...li kellha tipprevali u trid tigi osservata. Pacta sunt servanda”***;
- **Onor. Edgar Cuschieri nominee vs Perit Gustavo R. Vincenti** (decided on the 13th February 1950 by the Court of Appeal) where it was declared that ***“gjaladarba kuntratt ghandu forza ta’ ligi bejn il-partijiet li jaghmluh, l-interpretazzjoni tieghu tinnessita li wiehed jestraja minnu, skond ir-regoli maghrufa, l-volonta komuni reali konsegwita mill-kontraenti”***;
- **Eric Schembri et nomine vs Lewis Baldacchino** (decided on the 11th November 1997 by the Court of Appeal) and
- **Raymond Vella, Joseph Vella vs Neil Duffy, Kim Duffy** (decided on the 22nd of July 2010 by the Small Claims Tribunal)

where it was stated that ***“il-qofol u pediment ta’ kull ligi li qatt saret biex tirregola l-konvivenza socjali bbazata fuq l-obligazzjoni sa’ mill-bidu, cioe’ ir-rationalis principium, huwa l-pacta sunt servanda”***;

- **Frank Salt Real Estate Limited vs Edward Anthony Ellul Sullivan f’ismu proprju u in rapprezentanza tas-socjeta’ Sullivans Limited** (decided on the 8th January 2010 by the Court of Appeal), with reference to Article 992 of the Civil Code of Malta cited above where it was stated that ***“strettament u korrettement interpretat, b’dan il-provvediment il-ligi tenfasizza l-kuncett illi dak il-kuntratt ma jistax jigi rizolut, in linea ta’ principju, bis-semplici volonta’ unilaterali u ta’ xi parti kontraenti, u in effetti, l-istess provvediment jissokta jipprovidi illi l-kuntratt ma jistax jigi mhasar hlief bil-kunsens ta’ xulxin tal-partijiet jew ghal ragunijiet maghrufin fil-ligi”***.

This Court strongly believes that it should not delve into the parties’ intentions (at the time of the publication of the contract) and as to their interpretation any further as the contract leaves no doubt as to this. However, this case cannot be merely decided on the binding effect of the contract since the same contract stipulates conditions in relation to the minor

Informal Copy of Judgement

child. What the plaintiff requests (and should these be acceded to by this Court), will necessarily drastically affect the contents of the same contract. But such requests cannot be looked into merely from a contractual point of view (based on the *pacta sunt servanda*) principle alone due to the fact that the same requests are related to the minor child's life. Her requests are so fundamental that the child's life, education, and life-style are at stake. Thus, such a decision needs to be decided primarily on the basis of the child's best interests principle. This Court needs to decide whether it is in the child's best interests to be removed from Malta (with all its implications), whether it is in the child's best interests to stay in Malta with his dad (should the plaintiff insist that she wants to leave Malta anyway, irrespective of the outcome of this judgement) or whether it is in the child's best interests to continue to live in Malta in the same way that he has been living so far (if this is possible at all).

Thus, having established that the present case is to be decided on the basis of the child's best interest principle, this Court is now moving on to refer to case-law and legal theorists' arguments relating to the same principle and its application:

- (i) When considering the best interests of the child, the Court places great weight on the exercise of the child's right to freedom of expression and the wishes of the child²⁶;
- (ii) The best interests of a child clearly depends on a proper evaluation of the facts of each individual case²⁷.
- (iii) Goldstein, Freud and Solnit opine that it is in the child's best interest not be separated from their psychological parent and thus be '**free from conflict and inconsistent parenting**'²⁸ while R. H. Mnookin suggests that the Court should always prefer the adult '**who has a psychological relationship with the child from the child's perspective**'²⁹;
- (iv) In the **Sylvia Melfi vs Philip Vassallo**³⁰ case, the Court (and rightly so in the appellant's humble opinion) held that dislocating the minor from her habitual

²⁶ *Hokkanen vs Finland* (1993) EHRR, 19, 139, paragraph 61

²⁷ Chrizell Chürr, *The Hague Convention: Consent Issues and Enforcement of Swift Return Orders*, Journal of Contemporary Roman-Dutch Law, Vol. 73, p. 144, 2010

²⁸ J. Goldstein, A. Freud, A. Solnit *The Best Interests of the Child* (New York: Free Press 1980) in Sarah Anne Agius *The Best Interest of the Child* (2003) LL.D.,;

²⁹ R. H. Mnookin 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 Law and Contemporary Problems, 226-293

³⁰ *Sylvia Melfi vs Philip Vassallo* (1998) CA

carer (in that case the mother) and from her habitual residence and environment was surely not in the child's best interests;

- (v) **Re M.**³¹ case where the children's expressed view in not wishing to see their mother was upheld by the Court of Appeal since it was held that ordering contact with the mother against their wishes could be harmful;

The Court emphasises that despite the fact that the child, now fourteen years of age has been given the opportunity to express his wishes, this does not necessarily mean that the child's wishes are to be acceded to as children do not often realise what's at stake and what long-term consequences such decisions might have. It is true that the child's wish is to relocate to Germany, or better still to live in a country where his mother resides, however this does not mean (and the Court is not convinced) that such a decision is truly in his best interests. The Court is convinced that the child wishes to be free of conflict but due to the fact that he has always lived with his mother (despite having a good relationship with his father – bar the time when he was unlawfully removed from Malta and ordered to return), given the chance he would always choose to please his mother rather than his father. The Court is aware that the child is closer to the mother and that she may very well be described the 'psychological parent' but such meaning or description does not make the father less present in the child's life. Had the father been absent from his life or had the father truly abandoned his child, the psychological parent principle would have had a greater bearing but in the present case, although there's a stronger bond with the mother, the father is present and very keen to be part of his son's life. This necessarily means that the decision as to whether the child should be removed to Germany or not cannot be decided on the basis of which parent is present in the child's life or not as both are (although in different ways and grades). The Court is also convinced that should the child be removed from Malta, the contact between the same said child and the father would deteriorate as it had deteriorated during the time the child was unlawfully removed from Malta. It was only upon his return that their relationship started to improve.

From the above-mentioned case-law and references it is evident that the child's best interest in the present case is to remain in Malta where he can spend time with both his parents who enjoy joint custody³². The child is now fourteen years of age and in a two more years the same child would be required to sit for major exams – exams for which he is surely being prepared for at his present school in Malta. Removing him from the environment in which he has lived for all his life, disrupting his educational progress at such an important and vital of his life and disrupting his youth would surely prove to be detrimental to the child's

³¹ *Re M.* (Contact: Welfare Test) (1995) 1 AC F.L.R. 274

³² As per decree dated the 11th April 2013 a fol. Number 469 of the acts

Informal Copy of Judgement

educational progress. Thus, even from a scholastic and educational point of view, it transpires that at this point in time, it would be detrimental to the child to be removed from Malta and be sent to a foreign country where he would need to adapt and ensure that he competes well with his peers.

It is true that as the plaintiff argues that she should not be forced to live in Malta whilst her husband resides in Germany. However, such cases as has been said above, are to be decided according to what is deemed to be in the child's best interests. This Court believes it is in the child's best interests to continue to live in Malta, where he can spend quality and regular time with his father (just as the plaintiff's husband deemed it fit to continue to live in Germany so that he could continue to spend time with his child from his previous marriage). Ordering E to sacrifice his life in Malta, his education (at a very particular and crucial stage of his life) and his time with his father would surely be detrimental to his long-term life and happiness. It is unfortunate that the plaintiff is bound to live away from her husband who resides in Germany, but that decision was taken in the knowledge that E is a Maltese citizen, with a father who habitually and permanently resides in Malta. Just as the plaintiff's husband is convinced that it is in his child's best interests to continue to live in Germany, this Court is convinced that it is in the E's best interests to continue to live in Malta. Due to the fact that the plaintiff has declared that she will not leave Malta unless authorised to do so together with E, the Court feels that the separation contract between the parties should not be amended in any way.

Decide

For all the reasons cited above, the Court is hereby deciding the case as follows:

1. Denies and rejects all requests as put forward by plaintiff.
2. Due to the particular circumstances of the case, denies and rejects the counter-claim as put forward by the defendant.

With costs to be borne by plaintiff.

< Final Judgement >

-----END-----