



MALTA

COURT OF APPEAL

HIS HONOUR THE CHIEF JUSTICE

SILVIO CAMILLERI

THE HON. MR. JUSTICE

GIANNINO CARUANA DEMAJO

THE HON. MR. JUSTICE

NOEL CUSCHIERI

Sitting of the 6th July, 2015

Civil Appeal Number. 194/2011/1

Irene Cassar

v.

Gianfranco Desiderato

The Court:

Introduction

1. This is an appeal lodged by applicant [“the mother”] from a final judgment [“the appealed judgment”] delivered on the 15th July 2014 by the Civil Court (Family Section) [“the First Court”] whereby that Court rejected applicant’s request to relocate with the common child of the parties on the ground that “relocating the minor child [who at the time of judgment was 10 and a half years old] 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”.

The Facts

2. Briefly these are the relevant facts. From a relationship which applicant had with respondent [“the father”] the child Chloe was born on the 29th December 2003. At the time of the relationship the mother, who is both a Maltese and an American national, was 17 years old, whilst the father, an Italian national, was 25 years old. By the time of the birth of the child the parties had already terminated their relationship, and the mother raised the child on her own with the help of the child’s maternal grandfather who is a Maltese national. On his part the father married another woman and has a child from this marriage.

3. Although the mother lives in Malta she has relatives in the United States since her mother was an American national. In her evidence she states that when she was younger she used to go to the United States quite often during the summer holidays. Moreover, although at present she holds a first degree in psychology, she now wishes to relocate temporarily with her daughter to that country in order to further her studies there and return to Malta with better qualifications placing her in a better position to find a more remunerative job here enabling her to raise her standard of living, both in her interests and in those of her daughter.

4. By a partial judgment given on the 11th December 2012 the First Court awarded “sole care and custody” of the minor child, then 8 years old, to the mother with visitation rights granted to the father, after observing that-

“It is clear from the evidence that since Chloe’s birth, plaintiff has been her primary carer. The minor has lived uninterruptedly with her mother with visits do her father on a regular basis as agreed between the parties.

5. Regarding the mother’s request for authorization to relocate temporarily with the child to the United States, the First Court reserved judgment on this issue to a later stage after having heard further evidence, and after having examined the reports of the experts specifically appointed to assist the Court on the matter.

6. In fact, after giving the partial judgment that Court appointed as court-experts Professor Carmel Cefai, an educational psychologist, who at present holds the post of Director of the European Centre For Educational Resilience and Socio-Economic Health, as well as Dott.essa Veronica Ellul a clinical psychologist holding a degree in psychology from an Italian University.

7. It must also be stated that prior to giving the partial judgment the First Court had appointed a Children's Advocate, who heard the child on two separate occasions.¹

The Appealed Judgment

8. The judgment of the First Court on the relocation issue is based on the following considerations:

“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.

¹ Vol.1 - Fol.59 - 64

“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 small achievements to adults are monumental to infants.² 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.”³

“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

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

³ Op. cit. p. 64

resolving relocation cases that also appropriately weigh each parent's interests. Relocation cases involve various competing interests, including the following:

- “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.”⁴

“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.”

“The Court appointed expert, Dott.sa Veronica Ellul., in her report filed on the 6th June 2013⁵, explained in detail the interviews she conducted with the

⁴ A Judge’s Guide (page 125)

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 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

⁵ Fol. 504

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.

“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 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."

The Appeal

9. Applicant's appeal is based on the following grievances: [1] the appealed judgment is "procedurally flawed" as the relocation issue should have been dealt with in the first judgment and the First Court should not have

given a partial judgment once the case had been adjourned for judgment on all the applicant's requests; also, the First Court should not have allowed the "re-opening of evidence" after the evidence stage had been concluded and should not have allowed the production of witnesses which have not been included in the list of witnesses indicated in her sworn application; [2] the First Court, in deciding the relocation issue had failed to give due weight to its own decision awarding sole care and custody of the child to applicant; [3] the minor's wishes expressed to the Children's Advocate have been disregarded by the First Court even though at that time the child was 10 years old; [4] the court experts' report was based on assumptions and considerations which are inapplicable to the present case and the report contained "hypothetical negatives" whilst the positive aspects of the relocation on the child's development as well as the various technological means available facilitating contact with the father were not given due weight.

10. For the above reasons the mother is requesting that that part of the partial judgment whereby the First Court decided to address the relocation issue in a subsequent judgment be revoked together with the appealed judgment and that the mother be authorized instead to relocate temporarily with the child to the United States and regulate contact and visitation rights in favour of the father; with the costs of the proceedings against the Father

11. On his part, the father for reasons contained in his reply is requesting that the mother's appeal be rejected, with costs against the mother.

The Grievances

The first grievance

12. The mother's complaint under this grievance is that the First Court committed "procedural flaws" in delivering a partial judgment when the case had been adjourned for final judgment on all her requests including that relating to relocation. She sees fault in the First Court's failure to give one judgment addressing all her requests and instead, reserved to deal with the relocation issue in a subsequent judgment thereby re-opening the evidence stage which had already been declared closed before the case was adjourned for judgment. The mother further complains that after the partial judgment, the First Court allowed witnesses to be heard and also appointed experts to assist the court in deciding on the relocation issue. She also complains that the First Court relied on the opinion of these experts whilst discarding the report of the Children's Advocate as well as the wishes of the child expressed directly to the Court during a session held by the Court in chambers. By so doing, the First Court had allowed "defendant to unjustly undermine the evidence" that had been properly presented at the proper stage of the proceedings. The mother also complains that "whereas the Court had allowed the defendant

more sittings than originally established by means of its own partial judgment, enabling him to present all the evidence he requested, the [First] Court did not allow the plaintiff to give a few additional explanations which could have been given during the sitting on the 23rd. September 2013.”

The Court's Considerations

13. This Court observes that the mother's complaint that the procedure followed by the First Court is procedurally flawed is gratuitous and devoid of any legal basis. In reserving judgment on such a delicate and important issue affecting in a substantial manner the lives of both the mother and the child, as well as that of the father, that court not only acted within the parameters of the law but was in duty bound to do so once it felt the need for professional and expert advice on the issue.

14. All the more so in the light of the Children's Advocate first report from where it results that when interviewed on the relocation issue to America, the child appeared to be very confused [*“dehret konfuza hafna dwar is-safra lejn l-America”*] and stated quite clearly that she did not wish to reside abroad for a long period as this would diminish substantially her personal contact with her maternal grandfather with whom she spends most of her time while her mother is at work, with her father, her half sister, her friends and the school she attends at present [*“...it-tifla qalet b' mod car illi hija ma thosshix komda tmur tghix barra minn Malta ghal perijodu twil ta' zmien ghaliex ma tixtieqx illi*

taqta' kuntatt minn man-nannu matern (ma min tqatta' hafna hin waqt li ommha tkun ix-xoghol) minn ma missierha, ohtha u l-hbieb taghha u l-Iskola li fiha tattendi".⁶

15. The child's first reaction was such as to lead the Children's Advocate to recommend that it would not be in the child's interest that she resides with the mother in the United States for a period between two or three years.

16. Subsequently the First Court ordered the Children's Advocate to interview the child again specifically on the relocation issue. From the second report⁷ it results that after being asked whether she wished to stay with her father in Malta during her mother's stay in America, "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." This led the Children's Advocate to recommend that "in [the child's] best interests the care and custody of the child is entrusted to her mother.. and in the event that [her mother] plans to go to America to further her studies the minor child is to live with her."

17. Faced with this dilemma resulting from the inconsistency expressed by the child as to her wishes on the relocation issue, it would have been surprising had the First Court decided the issue without further investigation

⁶ Fol.59-60 First report filed on the 3rd January 2012

⁷ Vol.1 - Fol.64 – Filed on the 3rd February 2012

as to the child's welfare and without seeking assistance through the appointment of experts chosen from professionals in this field.

18. Regarding the mother's complaint that during the sitting of the 24th September 2013⁸ the First Court had denied her the opportunity "to give a few additional explanations regarding her educational and her career prospects in view of what Professor Carmel Cefai had stated in his cross-examination", this Court fully agrees with the First Court's decision and the reason behind that decision. As stated by that Court the mother had already given "detailed testimony on the merits of the case" and no new circumstance meriting additional evidence on the part of the mother had emerged from the testimony of the aforementioned witness. In fact from the records of the proceedings it results that the mother had given extensive evidence on the issue and had presented a substantial number of documents relating to her career prospects and the child's education in the United States.

19. For the above reasons this grievance is unfounded

The second grievance

20. The mother expresses this grievance in the following terms:

⁸ Vol.2 – Fol.527

“In granting the plaintiff sole care and custody of the minor child, the First Court evidently considered that the plaintiff 'was the best person who should be entrusted to take care of the minor.

“It was therefore utterly surprising and rather contradictory that while the First Court clearly considered, by granting the mother sole care and custody, that she is the best person to bring up the minor child, to take care of her needs, and take all those decisions for the minor child she may deem fit concerning her upbringing, it then overruled the mother's wishes to relocate with the minor for a number of years abroad. In so doing the first Court has undermined the whole point of awarding care and custody solely to the mother by not letting the mother decide and act according to what she deems best, despite the fact that main reason which inclined the appellant plaintiff to further her studies abroad and in particular in the United States of America, is to obtain educational qualifications, whatever they may be [*sic*], which would allow her to find better work opportunities when she comes back to Malta so that she 'would be able to provide better for the daughter's needs on a long term basis, especially since despite her local university qualifications, she has struggled to find a stable well-paid job.”

21. The mother feels that the First Court did not sufficiently appreciate the fact that she has a dual citizenship and therefore, both she and her daughter will “fit in quickly rather than being drastically uprooted.”

22. The mother further submits that the First Court should have given more weight to the mother's personal circumstances when compared to those of the father of the child. Denying her authorization to relocate with the child to the United States, even though she has sole care and custody of the child would mean that “as a consequence of the birth of the minor child, her life had to ‘stop’ so that she could take care of the minor child, while the defendant on the other hand kept living his own life, even starting a new family [by] getting married and having another child.”

23. The mother continues that she has the right to move on with her life, the more so in this case where the father has played a very limited role in the child's life. Regarding her professional ambitions, the mother explained in her note of submissions that, though initially she explained that she was interested in pursuing a course in graphic design, she was keeping her options open by also considering taking up a Veterinarian Programme at the University of Florida or Georgia, as the veterinarian career may be a better choice since there is a relatively small number of people who follow this career in Malta. In the light of these submissions the mother takes exception to that part of the judgment which states that she had not provided any plausible explanation why the course she wished to pursue was not available closer to home. She explains that going to Italy or to any other European country may represent a language problem to both the mother and the child.

24. In this grievance the mother stresses that her intention is to improve the quality of her life and that of her child by furthering her own studies abroad. This has also been recognized by the First Court when observing that "One may reasonably argue that if the mother furthers her education then the child stands to gain as well." Moreover the very fact that the child would be exposed to a much wider culture would be beneficial to the child, by broadening her life experiences and getting to know a part of her heritage.

The Court's Considerations

25. In the Court's view this grievance is based on a misunderstanding of the two issues involved in this case: the care and custody issue and the relocation issue. Though both these issues are subject to the overriding principle of the welfare of the child, the two issues are not necessarily co-related issues in the sense that the first does not necessarily comprise the second.

26. The fact that a parent has been awarded sole care and custody does not give that parent an unlimited right to take all decisions relating to the child even excluding the possibility of examination by the courts, when called upon to do so, to decide whether a particular decision, taken by the custodial parent chiefly in her/his interest, would be damaging to the child's interests. Even though the custodial parent has been awarded sole care and custody certain decisions which are life-changing in that they affect the child's life in a radical manner, may not be in the child's best interests as they may cause an upheaval in the child's life which may be damaging particularly where the child is of a certain age. Needless to say care and custody must not be looked upon as conferring rights on the custodial parent, but rather as placing a heavy burden on that parent to consider the best interests of the child in taking a decision, whether the decision is taken merely in the interests of the child or where it is taken, as is the case in issue, chiefly in the interest of the custodial parent.

27. In the light of the above considerations it emerges quite clearly that there is no contradiction between the First Court's partial judgment and the appealed judgment. Whilst in the partial judgment the Court felt that it is in the child's interest to award sole care and custody to the mother, in the appealed judgment that same Court considered that, notwithstanding the rights granted to the custodial parent, the decision to relocate the child's residence to the United States goes against the interests of the child as has been confirmed by the court-appointed experts.

28. Regarding the motive behind the mother's decision to relocate with the child to the United States, the Court observes that though there is no reason to doubt the mother's sincere desire to better her life, and that of her daughter, by furthering hers studies abroad to obtain further qualifications "whatever they may be", this is subject to the overriding principle that the best interests of the child must prevail.

29. As to the mother's complaint that it is unfair that her life has to stop so that she could take care of the child, this Court considers this to be an exaggerated point of view on the part of the mother. From the evidence it results that the child spends most of her time with her maternal grandfather who is of great assistance both to the child and to the mother. Moreover, as Professor Carmel Cefai states in his evidence⁹, the possibility of following

⁹ Fol.537

courses through distant learning offered by some renowned foreign universities should be considered as an alternative by the mother.

30. On the strength of the above, the Court considers this grievance to be unjustified.

The third grievance

31. By virtue of this grievance the mother complains that the First Court has failed to give due consideration to that court's decision in the partial judgment whereby the mother was awarded sole care and custody. The mother claims that the First Court has unfortunately given significant weight to the father's right to maintain the six hour access-time afforded to him by that court, whilst at the same time disregarding her wish to relocate abroad. The mother continues by quoting extracts from the partial judgment, amongst which the following are more relevant to her claim:

"It is clear from the evidence that since Chloe's birth, plaintiff has been her primary carer. The minor has lived uninterruptedly with her mother with visits to her father on a regular basis as agreed between the parties..

"From the testimony of Chloe's teacher and school headmistress it results that defendant hardly if ever attends any of Chloe's school activities..

"From an examination of the evidence collected from both sides the Court is convinced that plaintiff is well capable of looking after herself and the minor child..."

32. The mother states that during the final stages of the proceedings the father has confirmed that his marriage has broken down and that he is already in a relationship with another woman. This shows that the father has been

able to live his life freely, and also explains why he is content to play only a minimal role in the child's upbringing. Moreover, even though the child would be abroad the father would still be able to maintain "meaningful communication" with the child considering today's modern means of communication, "as well as having a number of visits to Malta during the year, including Summer which would enable the father to actually see the minor more than he does at present during such holidays."

33. She continues saying though the Father would still be able to communicate on a regular basis with the child -

"the [First] Court did not appreciate enough the fact that the plaintiff feels [that] it is truly unfair for her to be held back from pursuing her aspirations simply to preserve such few weekly hours of access, while defendant has been able to live his own life without the responsibility which the plaintiff took up from the moment the minor was brought into this life [making sure] that she takes care of the minor each and every day of her life."

The Court's Consideration

34. As the previous grievance, also this grievance is based on a misunderstanding of the point at issue which is when the child's relocation to the United States and the consequent exposure to a much wider culture at this stage of her development would likely cause a harmful disruption in the child's life. In fact, according to the court-experts the child is at an age when such radical change in her circumstances and in the child's social and educational environment may have a negative effect on the child's development. So even if contact with the father were to increase through skype or email and even

though the child would be spending more time with her father during the summer holidays, the best interests of the child dictate that at this stage the child is not uprooted from her present environment and immersed in a wholly different environment where there is no support either from her maternal grandfather or from her father. In fact, in her evidence the mother admits that she will not have the support she and the child have in Malta.

35. In her evidence¹⁰ the mother admits that in the United States she will be alone with the child and even though she states that she will be making friends and will have neighbours she vaguely says

“... there will be [support] network, but I am not relying on that; but I am sure that will happen. It's natural that that will happen. So in this case scenario, there will be a neighbour or someone [!]”

36. From this part of the mother's testimony it appears quite clearly that instead of the support of her maternal grandfather, the child will be staying with “a neighbour or someone” until her mother returns from university. Notwithstanding the mother's good intentions to relocate to further her studies with the least possible harm done to her daughter, the fact remain that once in the United States the mother will be on her own in a vast environment trying to find ways how to juggle between her university life and her life as a mother relying exclusively on the possibility of making friends and finding neighbours who are prepared to help her during this period. Maybe things would have been different had the mother been staying with her relatives

¹⁰ Vol.2 – Fol.192

throughout this period and who would be giving her and the child the full support which they will need to deal with a totally different environment.

37. On the strength of the above, this grievance is found to be unfounded.

The fourth grievance

38. The mother complains that the First Court has failed to give sufficient weight to the fact that the child had expressed her wish to the Children's Advocate and also to the Court to be able to relocate to another country with her mother, whilst on the other hand relied on the report of the court-appointed expert, which is full of "hypothetical negatives" without making significant reference to the "positives" that such experience would have on the child. The report failed to appreciate how enriching this experience would be to the child.

39. The mother makes the following points regarding the court-experts' report:

40. [a] The report fails to consider sufficiently the positive aspects of the relocation and focused mostly on the transitional aspect linked to the minor's educational progress;

41. [b] Even if the minor were to stay in Malta she would still be potentially exposed to certain changes, including a possible change of school, which would give rise to a change in the environment she is accustomed to, change of friends as well as change from primary to secondary education;

42. [c] The experts based their conclusions on “only a few hours’ assessment of the plaintiff, the child and the whole situation.”

43. [d] The considerations made in the report were drawn from divorce/separation case scenarios and on the effects that such cases have when the minor is displaced from the two parent environment into a single-parent environment. It should have been pretty obvious that such situations are not applicable to the case at issue since in this case the child has been brought up from birth by her mother only.

44. [e] Referring to Dr. Veronica Ellul’s evidence in court, the mother points out that this expert admitted in her testimony that “My findings were that [the mother] is emotionally stable. She would be able to cope if she were to move to America”. Regarding the minor the expert states that “she has very good cognitive abilities so she can plan ahead and can adjust pretty well.”

45. The mother points out that at the time the child was interviewed by Dr. Ellul, the child was 10 years old, and that by the time these proceedings come to an end she will probably be two years older.

The Court's Considerations

46. Regarding the child's wishes as expressed to the Children's Advocate, the Court observes that this element of proof rather than supporting the mother's contention that the child wishes to relocate with the mother, militates strongly against it. This emerges quite clearly from what the child told the Children's Advocate in the first interview when she stated "quite clearly" [*qalet b' mod car*] that she did not wish to reside abroad for long periods to the detriment of her close relationship with her maternal grandfather, her father, her friends and her school in Malta. Also, in the second interview, the child seemed to accept relocating to the United States, not because she really wants to but only to be able to stay with her mother with whom "she feels very much attached". An objective analysis of these reports reveal quite clearly that the child does not wish to relocate to the United States, as she does not want to be uprooted from her present environment, but if her mother relocates she will not want to be separated from her.

47. Regarding the complaint that the court-experts considered only the "hypothetical negatives" without duly examining the "positives" of the

relocation, the Court observes that apart from the fact that the positives are equally “hypothetical” as the negatives, this complaint is baseless and shows that the mother fails to understand the significant negative effect which relocation may have on the child.

48. As Dr. Ellul states in her report, though relocation may be a positive experience to children as these tend to be more resilient than adults and adjust to change considerably fast, yet it is important to consider the negative effects which such move may have on a child, particularly in this case where the move is being made by one parent only whilst the other parent is left behind.

49. The expert report examines the negative effects which relocation may have on the child in this particular case and after making various considerations resulting from her interviews with the child and the parents, she has come to the conclusion that at this stage in the child’s development “it seems more risky [for the child] to actually move at this point in time”.¹¹ This Court also observes that in dealing with the issue at hand it is logical to focus on the “transitional aspect linked to the minor’s educational progress” for two main reasons. Firstly, the transitional stage is the time when the child is most vulnerable since it is the period when the child is uprooted from her present environment where she is happy and has ties which she wants to maintain

¹¹ Testimony of the 30th July 2013 – pg.3

[such as the relationship with her grandfather with whom she is very much attached and her friends] to be then exposed to a vast culture with probably different lifestyles where she will be on her own with her mother. Secondly, educational development and progress is one of the most important factors in the development of a child who has not finished secondary school.

50. The mother complains that even in Malta the child may have to face changes, such as change of school and friends. In this respect the Court refers to Dr. Ellul's evidence where, whilst agreeing that the child may probably experience such changes also in Malta, observed "but the actual stress the move [relocation] will make will increase this further". She continues to explain that:

"at the moment she [the child] already seems to have difficulties on an emotional and social level, let alone if she were to be moved from her stable environment....Any relocation would be difficult for a child so event with both parents, it would always put some strain on a child. However, having to let go of her current relationship, especially her father and her grandfather who seem to be important people in her life, will actually create more strain than a child who would be moving with both parents."¹²

51. The mother criticises the report further by stating that the expert based her conclusions on only a few hours of interviewing the child and the parents. Also that the expert's considerations were based on divorce/separation scenarios.

¹² Ibid – pgs.10 - 14

52. In this regard the Court observes that from the report it results that prior to reaching her conclusions, Dr. Veronica Ellul held various interviews with the persons involved. In fact she held one interview with the father, two interviews with the mother and four interviews with the child. Also from the detailed considerations made in the report it results quite clearly that the experts delved deeply into the situation of the parents and the child, and arrived to a decision after a careful analysis of their findings.

53. Apart from this, the Court notes that no request was made to the First Court for additional experts to be appointed.

54. Regarding the second point, Dr. Ellul adopted the same line-of reasoning when she states that, even though the issue dealt with in this case does not arise from a divorce or separation case, “however from what I’ve seen between the child and the father and also from her family drawings, it seems that her father is still an important factor in her life, not only the father, even the maternal grandfather.”¹³

55. Regarding that part of the report wherein it is stated that the mother is emotionally stable and that she will be able to cope if she were to move to the United States, the Court observes that the expert also noted that “ What may be her weakness is the fact that perhaps in a group she would tend to be

¹³ Ibid – pg.7

more submissive and not assert herself.”¹⁴ Regarding the child’s good cognitive abilities and her ability to adjust pretty well, Dr. Ellul explains further: “However, it seems that on a social level and perhaps on an emotional level, there is still some conflict. So whilst on a cognitive level she might be able to cope, on an emotional level she might have problems adjusting to peer relationships or perhaps in the future relationships once she grows up.”¹⁵

56. Regarding the age of the child on the date these proceedings are definitely concluded, the Court observes that, at the time of the delivery of this judgment, the child will be eleven (11) years and six (6) months old and therefore at a stage where the experts’ considerations are still applicable.

57. Answering to a question relating to the impact a denial of the custodial parent’s request would have on the custodial parent and on the child, Dr. Ellul gave the following reply which this Court considers to be an added valid reason for refusing the mother’s request:

“Yes, I agree that this can have an effect on the relationship [between the mother and the child] but what concerned me as well is the fact that Ms Cassar seems also unsure. So the main motivation was to go to America to come back to Malta to be more employable. Now if she is still unsure whether a degree [from an American university] ... will provide her with more job opportunities in Malta, this will continue to create more stress in the relationship. So what my concerns were ... [that] ... if she were to move that would already be stressful for the child, then coming back and being again in a stressful situation and Ms

¹⁴ Ibid – pg.8

¹⁵ Ibid – pg.9

Cassar not satisfied with her profession or career, then that will further more stress the child.”¹⁶

58. Further on in her evidence, the witness noted that the mother –

“did not seem convinced about the choice of course...That is why I also recommended that perhaps she should seek some career guidance counselling so that perhaps in these 6 years [when the child finishes her secondary education] she might also decide to further her studies in Malta..... so as not to uproot the child and put her into so much stress”¹⁷.

59. On points of law the following key extracts from the judgment given by the UK Court of Appeal in *Payne vs Payne*¹⁸ are very relevant

“...a review of the decisions of this court over the course of the last 30 years demonstrates that relocation cases have been consistently decided upon the application of the following two propositions:

[a] the welfare of the child is the paramount consideration; and

[b] refusing the primary carer’s reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children” [para.26] [Lord Thorpe].”

60. In the same case Butler-Sloss P made the following observations regarding the factors to be considered by a court in deciding relocation requests where children are involved:

“As in every case in which the court has to exercise its discretion, the reasonableness of the proposals [on which the applicant parent] basis his/her request for relocation], the effect upon the applicant and upon the child of refusal of the application, the effect of a reduction or cessation of contact with

¹⁶ Ibid – pg.4

¹⁷ Ibid – pg.5

¹⁸ 13th February 2001

the other parent upon the child, the effect of removal of the child from his/her current environment are all factors among others ... which have to be given appropriate weight in each individual case and weighed in the balance. The decision is always a difficult one and has not become less so over the last 30 years." [para.84].

61. In the case at issue, this Court observes that it is not easily inclined to reject a request for relocation made by a custodial person thereby holding that parent hostage in the country of residence of the child until the child reaches a certain age thereby putting an added burden on that parent. However, this is subject to the overriding principle that the welfare of the child is the prime consideration.

62. In this case the court-experts are of the opinion that relocating the child at this stage to the United States, even though for a temporary period of three years, may be harmful to the child in that it may cause a disruption to the child's life at this stage of her development. This Court observes that, apart from the fact that no request was made for the appointment of additional referees, it sees no valid reason why the experts' report should not be given the full weight it deserves. Both the First Court and this Court have carefully examined the case in the light of the aforementioned factors, as well as in the light of the court-experts' conclusions and have arrived to the conclusion that, having regard to the uncertainty surrounding the mother's proposals on which her request to relocate with the child is based and having regard to the negative effect such a request if acceded to may have on the minor child

given the factual basis of this case, the balance weighs heavily against acceding to the mother's request at this stage of the child's life.

63. On the strength of the above, this Court considers this grievance to be unfounded.

Decide

For the above reasons rejects this appeal, and confirms the judgment of the First Court.

Costs of the proceedings relating to the first instance are to be borne as decided by the First Court, whilst those relating to the appeal are to be borne exclusively by appellant.

< Final Judgement >

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