



Civil Court – Family Section

**Mr. Justice Robert G. Mangion LL.D.
Dip.Tax (MIT), P.G.Dip. Mediation (Melit.)**

Today the 25th day of February 2016

Sworn Application No. 138 / 11RGM

Number on list: 19

**A B in his own name and
in the name of his minor son C D B
vs
E F**

The Court,

PRELIMINARIES.

Having seen plaintiff's application whereby he submitted and claimed as follows;

1. Whereas the parties had a relationship from which the minor C D B was born on the 27 May 2002. The applicant is the natural father of the minor and is recognised as such, as it appears from the birth certificate;
2. Whereas for grave and serious reasons that will be proved during the hearing of the case, the respondent is having a negative influence on the life of the minor and the applicant is also preoccupied with regard to the health and safety of the minor when he is in his mother's presence. In fact this Honourable Court has already ordered that the mother's access to the minor shall take place under supervision and at one time it was provisionally suspended completely.
3. Whereas the minor returns traumatised and unhappy after encountering the respondent and often cries and tells his father not to take him to his mother's.

4. Whereas in view of the circumstances, it would be in the minor's best interests if the father be given exclusive care and custody of the minor. At present, the minor is already residing with the father together with the paternal grandparents and the applicant has proved himself to be a responsible parent who cares for his son's health and safety. The minor has been residing with the applicant since April 2005;

5. Whereas the applicant is in regular employment with a local bank and enjoys flexible working hours and therefore he can satisfy the minor's needs better. Furthermore the applicant's income is stable and good and therefore respondent does not need to pay maintenance since the applicant is ready to provide on his own for the upbringing of the child.

6. Whereas the circumstances of this case are very particular, so much so that the mediation procedure had to be terminated after only one sitting and this for grave reasons as shall be proved during the case;

7. Whereas the respondent is not a responsible and dependable person in that there was already an occasion where she failed to return and kept with her the minor for two whole weeks in breach of this Honourable Court's decree. This was not only a traumatic experience for the minor, who usually resides with the father, but the respondent even failed to take him to school and respect the dietary needs of the minor. Moreover it is being submitted that the minor suffers from the condition Asperger's syndrome (which is a form of autism) and therefore these drastic changes in his routine and upheavals have had a huge negative impact on the minor and from that date he is now afraid that his mother may keep him with her again, away from his father, against his will;

8. Whereas the applicant is in a better position to take care of the minor, as in fact happened in the past;

9. Whereas the applicant humbly submits that it is in the best interests of the minor himself that his care and custody be entrusted definitively to the applicant who has already been given provisional, exclusive custody;

10. Whereas the applicant also submits that it is not in the minor's best interests that the latter has contact with and access to the respondent. Whereas the mother's presence in the minor's life is disturbing his serenity and mental health, as already explained by the psychiatrist Peter Muscat who had the opportunity to testify in this Honourable Court;

11. Whereas the applicant has been authorised to file this lawsuit by means of Decree No. 508111, Dok 'ML2' herewith annexed;

Therefore the applicant humbly requests that this Honourable Court:

1. Grants the care and custody and that the minor C D B be exclusively entrusted to the applicant, in the best interests of the said minor and this through the offices of nominated experts as the case may be who shall examine the minor;
2. Orders the denial of access by the respondent mother to the minor or alternatively orders access once a week under strict supervision.

With costs against the respondent.

Respondent filed her sworn reply which reads as follows:

1. In the first place, plaintiff A B is not authorized to file any judicial act on behalf of the common minor son C D and thus, said minor son C D should be declared non-suited in this case.
2. In the second place, there is no justification for the request of plaintiff A B to have the exclusive care and custody of the minor child C D and that defendant is not granted proper access to said minor child C D. That defendant is a responsible person to take care of said minor child C D as will be shown in the course of the proceedings and especially, in the light of the care that defendant is taking of her other minor child, G. That the financial stability of plaintiff A B should have no bearing on the outcome of the present cause and the truth is that plaintiff A B, who evidently cannot take care at all times of the minor child C D, prefers C D to grow up in the company of his paternal grandparents rather than that of his natural mother.

And whereas defendant would like to make use of this procedure to file a counter-claim against plaintiff A B.

1. Whereas the parties are the parents of the minor son C D;
2. And whereas the reconvening defendant is being deprived of adequate access to said minor son C D and has no say in any matter relating to his well-being;
3. And whereas the upbringing of the minor child C D is for the most not being carried out by plaintiff A B but by his parents who should never substitute the role of the natural parents of said minor child, C D;

4. And whereas the present state of affairs entails the almost total rupture of the rapport that should exist naturally between mother and child and certainly, is not in the interest and well-being of said minor child C D;

Thus, the reconvening defendant humbly requests this Honourable Court:

1. To decide that the care and custody of said minor child C D is granted to both parents jointly;

2. To decide that each of the parents should have adequate access to said minor child C D, which access should be as uniform and equitable as possible and that when one of the parents cannot exercise his or her access to said minor child C D for any reason, said minor child should be entrusted with the other parent and not with the paternal grandparents or other third parties.

THE EVIDENCE.

Plaintiff A B annexed his affidavit to a note filed on the 9th June 2011. He confirmed that he met defendant in 2000, they had an affair and their son C D B was born in May 2002. They did not live together at the time, so they agreed, by means of a private writing drawn up by a notary, that she would have the care and custody of the child, and he would have unlimited access. The child, for a considerable period of time used to be in his custody and used to sDp over in the weekends. Subsequently he had been advised that the private writing had no legal validity and was not enforceable in case his right to visit the child was denied.

Before C D B was born defendant already had another child from a previous relationship named G. In January 2003, without informing plaintiff, she took both children to the Ukraine, and she returned in February 2003, without G. She informed plaintiff that she had left him with relatives, so that she could live with plaintiff at his parents' house. She started insisting with plaintiff that they should marry, she wrote a letter to his father, annexed and Aed Document A wherefrom it resulted that she wanted to marry solely to acquire citizenship and not to have a family with plaintiff. In March 2004 plaintiff informed her that he did not intend marrying her, and defendant reacted by denying plaintiff access to his son.

Plaintiff explained that subsequently defendant filed with the police no less than thirty three (33) reports which plaintiff contends were all false reports.

Subsequently the Court granted plaintiff access to the minor child within the offices of Agenzija Appogg and under supervision. Plaintiff noticed that during access the child was always very hungry and was not kept clean by defendant. The

representatives of Appogg noticed that the child was very happy and serene in his father's presence and they filed a note in Court to the effect that supervision was not required.

Said report by Agenzija Appogg infuriated defendant, who started cancelling meetings in the last minute, by SMS on the pretext that the child was unwell.

In 2005 plaintiff discovered from a Google search that defendant was on a dating site, promoting herself by means of provocative photos. In 2005, a decree of the 22th August 2005, the Court ordered that the care and custody of the child be assigned to the father and as a result defendant filed a number of applications requesting reversal of the order. However the Court of Appeal confirmed the decree in favour of the father.

Plaintiff says that during access time instead of spending quality time with the minor child defendant used to go to St Luke's Hospital and make allegations, unfounded according to the father, of physical and sexual abuse on the child. On one particular occasion, the child was kept overnight at hospital and on verification it resulted that her allegations were completely unfounded. Plaintiff declared that all these vindictive actions on her part, were a direct consequence of the fact that he had refused to marry her and she could not obtain citizenship.

Plaintiff declared that defendant maliciously reported that the child suffered from epileptic fits, which was completely unfounded.

In 2010 plaintiff was abroad for two weeks, defendant failed to return the child to plaintiff's parents after access and kept him for two weeks without sending him to school. The child told his father that she kept him in miserable conditions, that he cried to return to him and that he had been through a traumatic experience. The child was terrified of the mother, he used to resist meeting the mother, became violent, refused to go out as he did not feel safe, had sleepless nights and bad dreams. According the plaintiff the child only developed these conditions after he had been kept against his will with his mother for two weeks.

In June 2010 defendant agreed that plaintiff obtains a passport for the child to travel with him to Euro Disney, only to file an application that plaintiff had contravened a warrant of Impediment of Departure.

Plaintiff finally declared that he filed this case solely in the best interest of his minor child as defendant is not capable of taking care of him, and that it is not in the best interest of the child to be assigned in her care and custody. Plaintiff contends that it will be more beneficial to the child if there is no contact whatsoever between mother and child. .

Rita B, plaintiff's mother, gave her testimony by means of an affidavit which she confirmed on oath on the 4th June 2011, Fol. 68 et seq. Witness declared that the minor child, C is her only grandchild and that she loves him dearly. Witness states that defendant had always brought up the subject of marriage and insisted with her and her husband that they should convince their son A to marry her. Plaintiff's mother mentioned the incident of 2003 when defendant travelled to the Ukraine with both children and returned after two weeks leaving G there. On her return she moved to their (plaintiff's parents') flat and was determined to marry plaintiff. She only brought G back to Malta eighteen months later.

Rita B explained that in the summer of 2003, when plaintiff was abroad, defendant had to undergo surgery, and the minor resided with the grandparents for two weeks. She had no problem leaving him with them as she knew they would take good care of him. According to witness, during those two weeks defendant did not call the child.

In 2004 defendant suddenly refused plaintiff's access to the child, after he had definitely refused to marry her. According to witness defendant started being vindictive, lodging false reports about them, such as abusing the child. As a result of her reports, plaintiff's access to the child had to be exercised under supervision of Agenzija Appogg. Defendant had objected to the grandparents being given the right to visit the child, whom they did not meet for nine (9) months. This drastic change of attitude on her part was very detrimental to the child's well being. Witness noticed that the child was neglected by the mother, he used to be very hungry and dirty, so much so that during his visiting hours plaintiff used to take him to his parents' house to be washed and fed. Subsequently, in 2005, the Court assigned the care and custody of the child to the father.

The child improved considerably living in the serene atmosphere with the grand parents, he became calm and was happy. By contrast she noticed that he used to be particularly disturbed after being with his mother, who also used to take him to various doctors as well as to hospital making unfounded allegations of physical and sexual abuse. According to the witness the child used to violently refuse to be with his mother claiming that "when I grow up she wants me to kill Nannu".

In November 2010 when plaintiff was abroad, defendant refused to return the child where he was living with his father and the paternal grandparents. Defendant had insisted that she would only return the child to the father not to the grandmother. She kept him for two weeks, did not send him to school and presented four (4) medical certificates from different doctors. When the child returned to the grandparents he was very disturbed and agitated. He had been

extremely unhappy staying with his mother, and angry with his grand parents for allowing him to stay with her.

Witness declared that being a teacher herself she helped the child with his homework and noticed a Aed improvement in him and that his progress will be disrupted if he is in touch with defendant. She also referred to the incident of the Euro Disney trip, where defendant agreed to have the passport issued in the child's name only to subsequently accuse plaintiff of contravening a warrant of Impediment of Departure. Witness declared that she is entirely committed to the child's welfare and that her immediate and extended family provide an ideal environment for the child's happy upbringing.

Maria Woods, plaintiff's paternal aunt, in her affidavit sworn on the 4th June 2011 Fol.72 declared that she was impressed with defendant's opinion on children who had told her "You love your children too much, to us they are a burden". She was shocked to learn that defendant had intentionally left her other son G in the Ukraine for more than a year. She confirmed the child C had a happy disposition, and became violent and uncontrollable when it was time for him to visit his mother. She was present on one particular occasion when she saw plaintiff physically overpowering him to take him to defendant. She had then reAed to him that this behaviour was not normal and that he had to take professional advice. She confirmed that the child is in a happy mode when he does not have to meet his mother, and as she knows that he suffers from Asperger's Syndrome drastic changes from his usual routine can be extremely damaging. She confirmed that his condition is definitely improving with no contact with defendant, and that plaintiff and his parents provide the ideal setting for the child's wellbeing.

Plaintiff filed an additional affidavit on the 11th January 2013 Fol. 119. He confirmed that defendant had precluded him from seeing his son for four months in March 2004, that the supervisor had noted the child's affection towards him and that defendant's allegations of his violence and aggression were completely unfounded.

When he visited the child under supervision the social workers could confirm that the child had been completely neglected by his mother, he used to be dirty and extremely hungry.

He referred to the report submitted by Dr Peter Muscat confirming the child's trauma as a result of his mother's behaviour. He added that it is not in the best interest of the child that his mother has access without supervision.

Ingrid Vassallo, Social Worker, gave her evidence at the sitting of 20th February 2013. She confirmed that the first report was lodged by plaintiff and that plaintiff

was always very cooperative, even when meeting dates had to be changed, and he was very regular in bringing his son to the visits. Defendant was also cooperative and regular in attendance. She confirmed that initially the child resisted any contact with the mother but in time the relationship improved, in the last two years there has been an increase in bonding between the mother and son.

Plaintiff continued with his testimony during the sitting of the 2nd May 2013 held by the Judicial Assistant Doctor Kenneth Gulia. He declared that the only reason why defendant is well behaved during the meetings is to have future meetings without supervision which would be greatly detrimental to the child. He declared “Our son is ten years of age has autism and the supervision is the only way to make her behave”.

Plaintiff was cross examined at the sitting of the 30th October 2013 and at the sitting of the 19th November 2013 held by the Judicial Assistant. He confirmed that he was following studies in accounting to obtain the ACCA. He had been following these studies for two and a half years and was meant to sit for his final exam. He admitted that he recognized the child after he received the DNA results. He said he was not aware when her visa expired and insisted that in the letter she wrote to his father it was obvious that her only concern was to register her marriage.

At the sitting of the 26th November 2013 he confirmed that he travelled to Asia for two weeks with friends on holiday to Dubai and the Maldives. He did not take his son as his mother would object.

Maryanne Woods, plaintiff’s aunt, was cross examined at the sitting of the 15th January 2014, held by the Judicial Assistant. She confirmed that plaintiff works on reduced hours so as to have time to look after his son. She visits her brother’s house regularly, her brother is plaintiff’s father, and confirmed that the child has improved considerably since he is living in a serene atmosphere together with plaintiff and his parents. She also declared that defendant wanted to marry the plaintiff but the latter had refused.

During the same sitting, plaintiff declared that his official registered address is a flat in Mimosa Street, G’Mangia, but he lives habitually with his parents at Ta’ Xbiex. He bought the flat for investment purposes for capital appreciation.

Rita B, plaintiff’s mother, gave evidence at the sitting held on the 30th January 2014. She confirmed that her son works two days and sometimes four days a week, in order to spend more time with his son. The child attends school regularly and he is picked up by his father or occasionally by his grandfather. Being a retired schoolteacher, she helps the child with his homework. The child spends a

lot of time with his father who takes him out twice or three times a week for a pizza or to play with friends at Ta'Qali. She declared that she does all the house work and her husband helps her with the cooking. As a rule, they all have lunch and dinner together. She declared that she was under the impression that defendant did not have money, so she used to give her, but she realized this was not the case when she learned that she had a breast augmentation.

Defendant E F filed her affidavit on the 6th March 2014, Fol. 327 et seq. She listed the various Court Decrees regulating the access to the minor child, namely;

On the 5th July 2004 the father was granted access to the child, under supervision at Appogg Tuesdays and Fridays between 4pm and 5pm.

On the 7th April 2005 father was granted care and custody of the child, the mother was granted access to the child Tuesdays and Thursdays between 4.30pm and 7.30pm and Saturdays between 9.30am and 8.00pm. Applicant or members of his family could accompany the child to and from the mother.

On the 22nd August 2005 the Court did not accede to defendant's request to revoke the decree of the 7th April 2005 and in the best interest of the child confirmed it in its entirety.

On the 10th October 2007 the Court decreed that as long as the father resides with his parents, the care and custody of the minor is being assigned to him, however, decisions regarding education and health of the minor are to be jointly taken by the parents; that the father has to provide psychological therapy to the child at the expense of both parents, that access in favour of the mother will be twice a week, two hours each session, without supervision, Social Worker Tanya Chetcuti was nominated to monitor the case and report within three months.

In her affidavit defendant denies that she ever ignored the court decrees. She said that the Court Decree of the 7th April 2005 was based on the the report submitted by Appogg employee Therese Micallef which according to defendant contained grave inaccuracies; the report states that the social worker spoke to both parents. However defendant insists that she never met the social worker. She contends that the father is "a weekend father for the child, and it is the grand parents who are upbringing the child"; "

She refers to the report of Dr Michael Galea, Clinical and Family Psychologist, dated 12th September 2013 who concludes that defendant is an emotionally balanced person, confirming his earlier assessment dated 12th November 2004 and that she is very concerned about the welfare and holistic wellbeing of her son C D. She insists that all the Police reports of violent and short tempered neurotic

behaviour refer to A and his father Paul B. She alleges that the child's bruises and abnormal sexual behaviour were "taught by his father". She accuses the father to be a violent and abusive drug trafficker, humiliating the child for being autistic. She alleges that there is an incestuous relationship between the father and the child. She insists that the child has to be protected from his father who is a drug trafficker, a violent molesting child abuser. She declares that the child is not suffering because of the disagreement between the parents, but "because he was and is being mistreated". She alleges that the child was raised by a father she describes as 'a sadistic molester'. She insists that the child 'must be immediately isolated from his father and relatives gets full psychological assessment and only then psychotherapy'. She insists that the child needs to spend more time with her, to teach him understand feelings and emotions, and how to control them, as their time together is too limited. She alleges that the child is punished by the father because of his autism and Asperger's Syndrome. The father trains him to put up a 'normal face' so that people will not notice his condition.

She submitted in great detail, plaintiff's initial reluctance to acknowledge paternity of the child. She had filed a paternity case against him, the results of the DNA tests were positive, and the case was withdrawn at the first hearing. She insists that Plaintiff's declaration that she went to the Ukraine without telling him is false because she left on his request. She came back after three weeks because he had told her to return, get married and live as a family. When she returned he told her he had tricked her into bringing the baby back to Malta.

She spent one month at his parents' residence sleeping on the sofa with the baby. On the 15th February 2003 plaintiff took the baby to his room to stop him crying, and defendant and plaintiff's mother and sister, found the baby under a pillow and two folded quilts on his face, the baby could hardly breathe. Defendant declared that baby was eight months old, struggling for his life.

She declared that in the past there were many incidents of violence which she had suffered, together with her son, but she conceded that "there is no violence on me at the present time". She confirmed that her two surgery operations were necessary as a result of the injuries she sustained when the child was born. She asked plaintiff for financial help, which he refused, and her parents helped by selling some property in the Ukraine. She recalled how she was sadistically raped by plaintiff on the second day after the operation on the 14th September 2003.

Due to plaintiff's regular aggression and violence, threatening her with taking custody of the child and stop paying maintenance of £M80 per month, she approached Appogg and filed Police Reports against him. There were several criminal cases against her, subsequent to his reports that she was refusing him access to the child, without a valid reason. She contested plaintiff's allegations

that she had neglected the child, who used to be hungry and dirty, and declared that the reason was that the child would have just returned from football training.

She referred to the court decree of the 7th April 2005, when the child was only two years and ten months old, had been living with her, and custody was given to the father, after the Court had heard the Social Worker Therese Micallef, who never met her although she had so declared in her report. She further declared that the Judge was shown photos of women placing sex adverts on the internet, implying that she was a “hooker”.

She had even referred the matter to the Commissioner of Children. She claims that the child had been molested in the B house from 2005 to 2007. She accuses the father of being a child molester, the child’s abnormal sexual behaviour requires a proper assessment for childhood trauma and child abuse. He needs psychotherapy. She confirmed that on the 25th October 2005 the child was diagnosed with Post Traumatic Stress Disorder (PTSD) and consultant Dr Michael Galea also pointed out a possible child abuse.

She claims that on the 8th November 2005 she noticed that the child had Aings near his lips that were indicative of a sexually transmitted condition known as Herpes Simplex 1, which the father also suffered from.

Defendant refers in detail to the report submitted by Tanya Chetcuti who had the opportunity to observe the child very closely all through the year 2007, and she also referred to the comments of Josette Camilleri who suggested that A should leave the house where C lives and find alternative accommodation.

She insists that the child is an abused boy on an illegal diet suffering from constipation and from punishments for his Asperger’s Syndrome condition, being constantly tortured on his attachment to his mother and brother.

She declares that she is absolutely capable and willing to take care of C full time. She claims that she should be given the care and custody of the child and she endorses the opinion of the Psychologist’s recommendation of the 12th September 2013 for an immediate ‘care order’ for the child for a full forensic Psychological and Neurological assessment, even if temporary isolation from all relatives is necessary to obtain a correct independent assessment.

Paul B, plaintiff’s father, gave evidence at the sitting of the 25th February 2014 held by the Judicial Assistant. He declared that he had been retired for six years, he had three children who had a normal upbringing and he treats the child as if he was his own. He confirmed that plaintiff does not work the full five days of the week but when he is working the paternal grandparents take care of the child. He

helps his wife with the cooking, and she, being a retired teacher helps the child with his homework. The child plays on his own and also with his cousins, in Summer they go swimming to the Sliema Pitch. A goes abroad once a year and the child lives with them and they tend to all his needs.

G F, defendant's older son gave evidence on the 11th March 2014 at a sitting held by the Judicial Assistant. He confirmed that he was born in Kiev, Ukraine, is 17 years of age and has lived in Malta for the last 14 years. He lives with his mother who prepares breakfast and lunch for him, he helps in the cleaning of the house and attends school regularly. At home they have art kits so that C D can do some painting when he goes there. C goes there twice a week, two hours each session. He says that he loves his brother very much and they are very close. Once C drew things he did not like, he drew his father and grandfather and asked him to keep it a secret. He goes to the Higher Secondary school at Naxxar, he has completed a course of life saving water rescuer, is a member in rock climbing and has a certificate in scuba diving. His younger brother occasionally joins him in these activities.

Police Inspector Josric Mifsud gave evidence at the sitting of the 8th April 2014 held by the Judicial Assistant. He confirmed that in December 2003 he arrested plaintiff and two other lads who were involved in drug trafficking. He made two statements one on the 24th December, the other on the 25th December 2003. Plaintiff admitted that he used to buy drugs from a particular person, and used to lend money to another to buy drugs and make a 25% profit. In the statement he had declared that he started going wild after he had a problem with a Russian lady.

At the same sitting **Mary Borg**, a co-ordinator at Appogg, exhibited the reports regarding the supervised access visits, and declared that she was never present for the access meetings but she used to receive the reports submitted by the supervisor. She never spoke to the child.

Joyce Xuereb, a social worker also gave evidence at the same sitting. She declared that she carries out supervision of supervised access visits. She reported the child's approach has become more open towards his mother and there is a distinct improvement in the manner that C relates with his mother. She tries to instil high values in her children, is genuinely caring and tries her utmost to keep her children happy. She confirmed that C enjoys and benefits immensely from these visits, he loves his pets and he is allowed to play with them.

Dr Michael Galea, a clinical psychologist, confirmed at the sitting of the 20th May 2014 his previous reports and recommended that a psychologist should be appointed to assess the child provided that the child is living in a more neutral and

safe environment than the present one. He declared that “the child has the presence of both parents but the question is the quality of time and the experience with each one of them. There were times where the behaviour of the child towards his mother was problematic”.

Tanya Chetcuti, a trained counsellor, confirmed that she used to work for Appogg and formed part of the supervised access team at the Department. She confirmed her report at Fol 650 and Fol 665. She had recommended that the child would benefit from undergoing relevant psychotherapy. She found defendant to be a very caring and loving mother who missed her son. The child was living with the father’s parents in a cramped environment.

At the sitting of the 24th June 2014 the Court nominated psychotherapist **Carmen Delicata** to report whether the child needs therapy after meeting the parents and the child separately. In her report submitted on the 9th October 2014 she concluded that the child should receive individual therapy free from the constraints of the Court, where the child is free to disclose and share without fear of being reported to the Court. She recommended Dr Mireille Villa who was appointed by the Court at the sitting of the 9th October 2014.

Defendant was cross examined at the sitting of the 6th October 2014 and of the 23rd October 2014 held by the Judicial Assistant. She confirmed that there was one Court Order that suspended her access to the child, and there were other orders ordering supervision during her access. She contested the allegation that she was not fit to act as a mother to the child and declared that the Court was not in a position to assess the evidence properly. She contested plaintiff’s claim that she brainwashed the child in any way or that she had a negative influence on the child.

She had reported the child’s abnormal sexual behaviour, masturbating in front of other children in the playground and everywhere, to Social Worker Josette Camilleri for a psychological assessment, the latter spoke to the father and his parents, who denied such behaviour in their presence, so she concluded that living with the mother was causing the problem, and she recommended to the Court to suspend her access.

After a couple of months, she received a letter from school confirming the same behaviour, and she was granted access under supervision. In her final report Josette Camilleri suggested that A B, the father of the child should leave the house where the child resides. She mentioned a particular occasion when the child acted abnormally in the presence of social worker Josette Camilleri and child psychologist Roberta Attard.

She confirmed that in 2006 her access was suspended, a decree of Judge Noel Cuschieri, following a note of Josette Camilleri regarding the child's abnormal sexual behaviour. This was followed by supervision for one year by Tanya Chetcuti who reported that C was masturbating, urinating and effricating at Appogg in front of Tanya Chetcuti. He was 5 years old at the time. She reported Carol Ellul and Therese Micallef to the Commission against Corruption, as the former had admitted that her affidavit had been typed by A B's lawyer, and the latter as she had declared that she had talked to her which was not the case. They were both employed by Appogg, but they do not work there any more. She confirmed that at present she has a wonderful relationship with her son C, she tries to use their limited time together in the most productive way and together with G they help C in developing his talents. She firmly believes that the child should have psychological help and that he should spend sufficient and adequate time with both families.

Dr Peter Muscat, Consultant Psychiatrist and Psychotherapist was cross examined at the sitting of the 13th January 2015, held by the Judicial Assistant. He confirmed that he talked to the child when he was ten years of age and that what he told him was spontaneous. He declared that following the meeting of the 29th December 2010 he was in a position to conclude that the child had a disturbed relationship, a pathological relationship with the mother. As he was expressing fear he concluded that he should not be forced to see his mother on his own. That was the situation four years before he was giving evidence. He declared that the masturbation at that age was not sexual but a form of anxiety relief. He confirmed that in 2007 the child was diagnosed with Asperger Syndrome by Dr Martin Micallef. He could not comment on the child's present condition, as that would require an examination of the child. He confirmed that it was not necessary to talk to the mother or the father, because he only needed to look into the child to find out that he was very distressed and that there was a pathological relationship. He insisted that his report referred to that particular day. He confirmed that after the meeting of 2010 he did not meet the child, his father or anybody else associated with him.

On the 11th June 2015 the Court **heard the child *in camera*** in the presence of family therapist Carmen Delicata and the supervisor from Agenzija Appogg, Joyce Xuereb.

In his note of submissions, plaintiff refers to the note filed by Appogg complaining of the lack of cooperation on the mother's part and to Dr Peter Muscat's report which highlighted the child's negative reAs of respondent's behaviour. In this note it is being submitted that:

“The overwhelming conclusion having read the reports, notes and Court Decrees is that there is a dysfunctional and unhealthy relationship between respondent mother and the child necessitating constant supervision. Rather than admit to her wrongful behaviour, respondent mother has raised allegations against the Social Workers, the Courts and Psychologists.”

Plaintiff refers to the video recording of the child which confirms the alarming damage on the child by the mother when her access was not supervised.

He submitted that the child requires special care and attention which only the plaintiff can offer. He claims that he should be given the care and custody of the minor child with no or limited access to respondent which should be at all times under supervision, and when plaintiff is abroad, custody is to be exercised by the paternal grandparents subject to access in favour of respondent mother.

Defendant in her note of submissions declares that plaintiff is making a further request that is not included in the original application namely that when the father is abroad, custody is to be granted to his parents. Apart from the procedural obstacle defendant claims that this constitutes ample proof that plaintiff’s family are only concerned with their rights of access and want to limit defendant’s access at all times.

She submits that Plaintiff refers to situations, such as the video recording, which do not reflect the present situation as the child now has no problem in visiting the mother as he does so willingly, a fact which plaintiff conceded when being cross examined. She also refers to Ingrid Vassallo’s testimony who confirmed that the relationship between the mother and child has improved considerably. There were absolutely no incidents in the last three years and C has developed a sensitive and tender attitude towards his mother and brother and displays a strong emotional dependency towards them.

C is now growing into a teenager and is trying to fit into his brother’s circle of friends and actively participates in all the activities in the house, even though the time he is given is very limited.

Defendant contests plaintiff’s allegation that only the father can see to the child’s special needs, her special interest in the child over the years constitutes ample proof, she has been for years insisting on the child ‘s full clinical neurological and psychological assessment.

Defendant refers to various instances, reported by the social workers, where she showed exceptional management qualities to calm the child when he goes into a tantrum. She also referred to the fact that plaintiff had lied to Josette Camilleri

when he had told her that the child's sexual behaviour was never abnormal at his house, and that he only acted in that way in his mother's house. This is confirmed by Dr Peter Muscat who declares in his report that he advised the father how to handle the situation and not to over react at the child's masturbation as this at that age is not sexual but merely an anxiety relief.

Defendant cites from various reports submitted by Supervisor Joyce Xuereb confirming the excellent relationship between the mother and the child during the supervised access visits.

Defendant finally requested that the care and custody of the minor child C D should be granted to both parents jointly, and that both parents should have uniform and equitable access, and when, for any reason one of the parents cannot exercise its access rights, then the child should be entrusted to the other parent and not with paternal grandparents or other third parties.

In her note of submissions defendant is contesting plaintiff's allegation that the child was being forcibly held in Malta, and could not travel with the father for holidays because of her opposition. She refers to the case Application number 345/2004NC in the names A B vs E F decided on the 26th January 2011 by the Civil Court Family Section. In that case it was the father who resorted to legal action to ascertain that the child cannot be removed from Malta without the Court's authorization. In the said judgement the Court, inter alia, declared:

“ The Court observes that unfortunately, the parties involved have suffered a lot, and are still suffering, mainly due to their abusive behaviour towards each other resulting from the issue of custody and access. Also, in the midst of this tug-of-war between the parents, the most vulnerable is the child whose interests this Court is bound to safeguard and protect, and which must prevail over those of his parents.”

CONSIDERATIONS OF THE COURT.

The primary aspect of the dispute between the parents parties to this court case is the issue regarding the care and custody of their child. As recounted above the parties do not agree with whom should the child reside. They also do not agree who of the parents should have care and custody rights over the child. The matter is regulated by **Article 149 of the Civil Code:**

“Notwithstanding any other provision of this Code, the Court may upon good cause being shown, give such directions as regards the person or the property of a minor as it may deem appropriate **in the best interests of the child**”. (emphasis of this Court.)

As was held by the Court of Appeal in a judgment in the names ‘**Simon Galea vs Samah Mansour**’ delivered on the 29th January 2016 confirming a judgment delivered by the Civil Court (Family Section) :-

‘Fis-sentenza tal-Prim’Awla tal-Qorti Civili fl-ismijiet **John Cutajar v. Amelia Cutajar** (28 ta’ Jannar 1956) l-istess Qorti qalet: “apparti l-hsieb ta’ ordni morali u dak ta’ ordni legali, li ghandhom setgha fil-materja ta’ kura u kustodja tat-tfal in general, il-principju dominant ‘in subiecta materia’ li jiddetermina normalment il-kwistjonijiet bhal din insorta f’din ilkawza huwa dak tal-aktar utilita` u dak tal-aqwa vantagg u interess tal-istess minuri fl-isfond tac-cirkustanzi personali u *de facto* li jkunu rrizultaw mill-provi tal-kaz li jrid jigi rizolut.” “Dan il-hsieb huwa fuq kollox rifless fl-Artikolu 149 tal-Kodici Civili li jghid li l-Qorti ghandha dejjem tiddeciedi fl-ahjar interess tal-minuri (Appell Civili, **Marion Meli v. Emanuel Meli**, 5 ta’ Dicembru 2014). “Anke fil-kawza fl-ismijiet **Jennifer Portelli pro et noe v. John Portelli** (25 ta’ Gunju 2003) l-istess Qorti qalet li “... .. il-kura tat-tfalhija regolata mill-principju tal-aqwa utilita` u l-akbar vantagg ghall-interess tal-istess tfal li c-cirkostanzi tal-kaz u l-koefficjenti tal-fatti partikolari tal-mument ikunu jissugerixxu.”

As was declared by the Court of Appeal in the case **Jacqueline Balzan pro et noe vs Joseph Balzan** decided on the 1st February 2016:-

“Kwalunkwe Qorti illi jkollha l-kompitu difficli illi tiddeciedi fuq kwistjonijiet simili ghandha l-ewwel u qabel kollox tosserva l-Artikolu 149 tal-Kodici Civili illi jghid li l-Qorti ghandha dejjem tiddeciedi fl-ahjar interess tal-minuri.”

When the matter to be decided concerns the well being of a minor child the Court is duty bound to hear the views of the child. This may take place by different methods according to the particular circumstances of the case and the age of the child. The court can appoint a child psychologist or a children’s advocate to hear the child and report to the Court. The Court may however decide to hear the child directly either in camera or by what is know as video conference,. In this case the Court decided to hear the child in the presence of a family therapist and a social worker with whom the child had contact. This was done in line with the **UN Convention on the Rights of the Child**.

Article 12 of this Convention provides that:-

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the

child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The minor child, who is the subject of this decision, is a child with special needs. It is evidently clear that the child found himself in the most difficult of situations, literally in the midst of a ferocious tug of war between his father and mother, both of whom left no stone unturned to fight each other each claiming to be the best of the two to take care of the child. The Court is of the view that even a perfectly normal child would have been traumatised with such a unique bitter experience at that tender age. In this particular case, the child has been diagnosed suffering from Asperger's Syndrome, an autistic child requiring special needs. His particular condition has accentuated considerably his psychological disturbance and insecurity.

The Court is of the view that it is in the best interest of the child that none of the parents forfeits parental rights over the child (l-awtorita' ta' genitor). Although each parent has his or her own faults in the way they treated each other in the past, the Court is convinced that both love their child and wants the best for him. It is their duty as parents to ensure that the well being of the child is not compromised by their behaviour towards each other. It is therefore this Court's decision that care and custody over the minor child should be exercised jointly by both parents.

On a positive note, however, there has definitely been a Aed improvement, particularly in the child's relation with his mother and her other son G, as has been amply confirmed by the Social Worker's progressive reports. The child actively participates in all the activities the mother organises for him when he visits her. He has become loving, affectionate and caring towards his mother. It seems that the violent tantrums he used to experience when he was still very young are a thing of the past. The boy was born on the 27th May 2002, he will be 14 years of age next May and attends a church school where he also benefits from the assistance of a facilitator. He is now also showing interest in mixing with his elder brother's circle of friends, which is a good sign as generally, a person in his condition is a lonely person. It results that the present situation of the child is calmer; there have not been any incidents of any relevance, no reciprocal Police reports, no issues with the Social Workers. The only pending issue is to strike the correct balance in determining the details regarding access.

As the child is growing and leading a more stable life, compared to his tumultuous past, another sign of 'normalization' would be to spend precious time with both parents in a more equitable manner, minimizing as much as possible any disruption in the child's present routine and 'modus vivendi'. The access time should not interfere with his school hours.

It is the Court's firm opinion that in this and similar cases the question of the parent's access to a minor child should never be transformed into a contention between the parents as happened in this case, unfortunately.

The Court, and anyone else including the parents, are duty bound to take into consideration what is in the best interests of the child. It is The Courts after lengthy deliberations concludes that it is definitely in the best interest of the child to be able to spend more time with his mother and his (half)brother, rather than meeting them twice a week, for two hours each session. On the other hand, the child has been living for several years with his father and paternal grandparents, a radical change from this obtained 'status quo' would not be beneficial to the child, however a moderate change from the present set up will improve his relation with both parents, and in the long run the child will feel equally attached to both parents, who both love him. The child will finally realize that he is the good thing that happened to his parents, who should join forces in assuring his welfare, and not treated as a bone of contention between them.

DECIDE

The Court therefore decides this case as follows:

1. Rejects in part plaintiff's first claim, accedes to defendant's first request in her counter claim and decides that the care and custody of the minor child C D be granted to both parents jointly;
2. Rejects in part plaintiff's second claim, accedes in part defendant's second request in her counter claim and orders that the child is to continue residing primarily with the father, in the paternal grandparents residence. Defendant shall exercise access to the minor child as follows:-

Every Tuesday and Thursday between 4pm and 7pm,

During the week-end in an alternate manner, one week on Saturday and the following week on Sunday, between 10.00 am and 7.00 pm

The Court orders that the access of the minor child by the mother be monitored by Agenzija Appogg.

Costs of this case to be borne by both parties in equal shares between them.

Judge

Deputy Registrar