

19th August, 1998

Judge:-

Onor. Gino Camilleri LL.D.

A

versus

B

Care and Custody - Paramount Interests of the Minor

In its decision whether the care and custody of the child should be given to one parent or the other the Court must solely be guided by what is most beneficial to the child. This decision illustrates how the Court evaluates diverse facts relating them to legal principles

with a view to ensuring that the interests of the child are given pre-eminent importance.

The Court:-

Having seen the writ of summons, written in the Maltese language, wherein plaintiff premised that:

"Illi hija l-omm naturali tat-tifel DANICA DALE VASSALLO li twieldet fl-14 ta' Mejju, 1992 filwaqt li l-konvenut huwa l-missier (Dok. A);

Illi l-attriçi u t-tifla minuri jabitaw f'Perth, l-Awstralja, u sa ftit taz-zmien ilu kellha l-kura u l-kustodja effettiva u fattwali ta' l-imsemmija tifla minuri izda qatt ma çahhdet lill-konvenut minn aċċess l-aktar ampju u liberu;

Illi r-relazzjoni intima li kellha l-attriçi mal-konvenut spiċċat fi Frar 1997;

Illi l-ftehim bejn il-partijiet kien illi l-konvenut ikollu aċċess liberu ghat-tifla meta jiġi l-Awstralja u darba fis-sena, meta t-tifla jkollha l-holidays tas-sajf (Nov. - Jan.) tigi tqatta' perijodu ta' xi xahar jew xahrejn hawn Malta;

Illi ma kinitx problema għall-konvenut li jivvjagga billi huwa airline pilot u inoltre jkollu rebates qawwijin fuq biljetti ta' l-ajru kemm għalih kif ukoll ghat-tifla;

Illi fi Frar 1997 il-konvenut talab lill-attriçi sabiex tibghat lit-tifla mill-Awstralja għal Malta u dak il-hin l-attriçi ma aċċettatx għaliex dan kien jaffettwa negattivament l-iskola tat-tifla, izda qalet lill-konvenut li f'Settembru kellha tinsel lejn il-

Portugal u ghalhekk ma kellhiex oggezzjoni li fl-istess zmien it-tifla tqatta' xi xahar jew xahrejn mal-konvenut hawn Malta;

Illi l-attriċi dejjem inkoraggiet li t-tifla Danica Dale iżzomm kuntatt ma' missierha u nkorraggietha illi tiktiblu u anke tpingielu xi stampi u tkellmu meta jċempel;

Illi kif mistiehem l-attriċi u t-tifla Danica nizlu mill-Awstralja u waqfu Heathrow fejn iltaqghu mal-konvenut u mbaghad huma lkoll marru l-Portugal fejn waslu fil-11 ta' Settembru, 1997. Waqt li kienu hemm jghixu flimkien ghal tlett ijiem, il-konvenut talab lill-attriċi permess sabiex jiehu t-tifla ghal disat ijiem halli jehodha l-Ingilterra fejn anke jghix missieru. L-attriċi aċċettat u l-konvenut, però minflok ma rritorna l-Portugal, baqa' niezel Malta. Wara xi fiit diskors l-attriċi aċċettat li t-tifla tibqa' ghal xahar f'Malta sabiex b'hekk Danica anke tara z-zijiet u n-nanniet Maltin;

Fl-istess hin l-attriċi zammet kuntatt telefoniku kontinwu, iżda gara li meta beda jghaddi z-zmien il-konvenut biddel it-ton u anke beda jirrikatta lill-attriċi li jekk ma ddawwarx ghal fuq ismu d-dar li kienu xtraw flimkien l-Awstralja, ma kienx ser ihalliha tiehu lura t-tifla. Hu beda anke jghid li jiddubita li hu kien il-missier naturali u beda jinsisti li l-esponenti tiehu blood test;

Wara hafna telefonati l-partijiet ftehm u li l-konvenut jibghat biljett lill-attriċi sabiex tigi Malta mill-Portugal, hi tigi hawn, taghmel dak li talab il-konvenut u wara dan it-tifla Danica tmur lura ma' l-attriċi f'pajjiżhom, oġoè l-Awstralja. Il-konvenut baqat biljett li b'ih l-attriċi waslet Malta fis-6 u kienet ibhukkjata li titlaq lura fl-10 ta' Novembru, 1997;

Illi kollox sar kif ried il-konvenut u wasal iz-zmien ghall-

attriċi biex titlaq lejn il-Portugal (fil-11 ta' Novembru) biex imbagħad wara ftit tmur lejn l-Awstralja. Meta wasal iż-żmien biex l-attriċi tmur lura l-konvenut ipperswada lill-attriċi li ried jieħu lil Danica għal darb'ohra lejn Londra u mbagħad iwassalha hu stess fid-19 ta' Novembru minn Londra għall-Portugal;

Illi l-konvenut dar lura minn kelmtu u għal darb'ohra dahaq bl-attriċi. Meta wasal id-19 ta' Novembru, 1997, la wasal il-konvenut u anqas it-tifla. Wara hafna telefonati u risposti dak in-nhar filgħaxija ċempel il-konvenut u nforma lill-attriċi li ma kienx bi hsiebu jibgħat lit-tifla lura;

Illi l-attriċi ppruvat minn kollox li tikkonvinċi lill-konvenut izda hu ma ried jisma' b'xejn. Anzi beda jsostni li ma jhallihix tkellem lil Danica qabel tasal l-Awstralja. Għalhekk l-attriċi marret l-Awstralja u minnufih ikkuntattjat lil Legal Aid Office għall-assistenza;

Illi l-attriċi minn dak in-nhar dejjem zammet kuntatt bit-telefon mat-tifla minkejja l-isforzi kontinwi tal-konvenut sabiex ifixkel tali kuntatt;

Illi l-attriċi dejjem hadet hsieb it-tifla. Ir-residenza tat-tifla hija l-Awstralja fejn bdiet tattendi skola u fejn għandha hafna hbieb;

Illi meta l-attriċi staqsiet lill-konvenut għaliex kien qed jagħmel hekk, hu qal li ried ipattiha lill-attriċi talli ma baqgħetx il-girl friend tiegħu. Qal ukoll li ma kienx konvenjenti għalih li joqgħod jigi l-Awstralja sabiex jara t-tifla;

Illi mhux xieraq li l-konvenut jingħata l-kura u l-kustodja tat-tifla minuri u dan billi, apparti li x-xogħol tiegħu ma

jippermettilux (huwa jahdem bhala airline pilot u ma jahdimx sieghat regolari u jqatta' perijodi ta' zmien imsiefer), huwa ghandu personalità vjolenti u aggressiva u dan kien il-fattur principali ghalix thassret ir-relazzjoni ta' bejn il-partijiet. Darba minnhom fuq xejn b'xejn qabad u kisser il-windscreen tal-karozza ta' l-attriċi b'daqq ta' ponn. Huwa intolleranti hafna u m'ghandux paċenzja mat-tfal. Hu jitlifha malajr meta ma tghaddix tieghu";

Plaintiff, having premised the above, requested that defendant shows cause why the Court should not:

"Tafdalha l-kura tat-tifla minuri Danica Vassallo taht dawk il-provvedimenti xierqa u opportuni dwar aċċess għall-konvenut u tawtorizzaha sabiex hi wahedha tkun tista' tapplika għal u zzomm passaport tat-tifla minuri u sabiex tiehu lit-tifla minuri Danica Dale Vassallo barra minn Malta, in attiz kull impediment tal-partenza li jista' jkun hemm vigenti fil-konfront ta' l-imsemmija minuri;

B'riserva għal kull azzjoni ulterjuri spettanti lill-attriċi u bl-ispejjez kontra l-konvenut li gie ngunt għas-subizzjoni";

Having seen plaintiff's statement of the facts duly confirmed on oath according to law, and her list of witnesses and having also seen plaintiff's affidavit;

Having seen the decree of the 28th of May, 1998, by means of which it was ordered that this case be heard with urgency;

Having seen defendant's statement of defence, written in the Maltese language, wherein he submitted that: *"id-domandi attriċi huma nfondati fil-fatt u fid-dritt u għandhom jigu*

miċhuda bl-ispejjez kontra l-istess attriċi stante illi huwa fl-interess ta' minuri Danica li tkun fil-kura in kustodja ta' missierha, il-konvenut Philip Vassallo, kif se jigi ppruvat fit-trattazzjoni ta' din il-kawza; illi bla preġudizzju għall-ewwel eċċezzjoni mhuwiex minnu li l-konvenut ha t-tifla fil-kura u kustodja tiegħu b'qerq jew b'leż ipatti lill-attriċi għall-azzjonijiet tagħha fil-konfront tiegħu, izda din id-deċizzjoni hadha fl-aħjar interess tal-minuri Danica u hu għalhekk illi l-esponenti qiegħed jipprevalixxi ruhu minn dawn il-proċeduri sabiex jagħmel kontro-talba sabiex il-konvenut jigi mogħti lilu l-kura u kustodja tat-tifla minuri Danica u dana kif aħjar imfisser fil-kontro-talba";

Having seen defendant's statement of facts duly confirmed on oath according to law and his list of witnesses;

Having seen that defendant has set up against the plaintiff a counter claim (reconvention) wherein he premised, in the Maltese language:

"Peress illi l-kontendenti twelidtilhom tifla fl-14 ta' Mejju, 1992;

Peress illi fl-Att Pubbliku ta' l-4 ta' Novembru, 1997, redatt min-Nutar Dr. Maro Burlò (Dok. A), l-attur irrikonoxxa bhala bintu u l-wild naturali tiegħu lill-minuri Danica u assumma fil-konfront ta' bintu l-obbligi u drittijiet kollha bhala missier skond il-ligi;

Peress illi l-minuri Danica Vassallo għamlet xi zmien tghix ma' ommha fl-Awstralja u dan sar b'intendere illi l-attriċi bhala tali l-omm tat-tifla minuri Danica Vassallo kellha r-responsabbiltà ta' trobbija xierqa u li tagħti l-attenzjoni kollha lit-tifla;

Peress illi l-konvenut biex jassigura li l-attriċi u t-tifla Danica jghixu f'ambjent xieraq, xtara proprjetà fl-Awstralja bil-ghan li jkollhom dar;

Peress illi l-istil tal-hajja ta' l-attriċ ma kienx konvenzjonali u ma jirriflettix ir-rwol tagħha bhala omm ta' tifla zghira, u fil-fatt qatt ma kellha impjeg fiss għall-perijodu twil;

Peress illi meta l-minuri Danica Vassallo kienet fil-kustodja tal-konvenut, ra l-komportament tagħha kien differenti minn meta kienet tghix miegħu, kif ukoll il-minuri Danica rrankontat ċertu stejjer ta' meta kienet tghix ma' ommha, l-attriċi l-Awstralja, bhal per eżempju li se jkollha "papa" ġdid u mhux il-konvenut. Irrakkontat ukoll illi hi u huha Rick kienu wahedhom jew ma' tfa' ftit ikbar minnhom u stejjer ohra;

Peress illi l-konvenut ra l-attriċi ma kinitx hadet hsieb il-bzonnijiet mediċi tal-minuri Danica Vassallo u dan intenzjonalment biex l-attriċi ma jkollhiex ir-responsabbiltà tal-kura medika tagħha;

Peress illi wara li l-konvenut ra dawn l-affarijiet kollha, iddeċieda fl-aħjar interess tat-tifla minuri Danica Vassallo, li jzommha hawn Malta u jkollha trobbija stabbli fejn ikollha l-imhabba u l-attenzjoni kollha u f'ambjent nisrani;

Peress illi b'digriet tas-17 ta' Frar, 1998, tal-Qorti tas-Sekond'Awla tal-Qorti Ċivili (dok. B) laqgħet it-talba ta' l-attur biex jiġi fdat il-kura u kustodja tat-tifla Danica";

Having premised the above, defendant requested that plaintiff shows cause why this court should not:

"Jigi kkonfermat id-digriet tal-Qorti tas-Sekond'Awla tal-Qorti Civili (dok. B) tas-17 ta' Frar, 1998; tafda l-kura u kustodja tat-tifla minuri Danica Vassallo lill-konvenut taht dawk il-provvedimenti xierqa u opportuni dwar access f'Malta ghall-attriçi u tawtorizza lid-Direttur tal-Passaporti johrog passaport tat-tifla minuri Danica Vassallo u li jigi moghti l-istess il-missier. Bl-ispejjez kontra l-attriçi rikonvenzjonata minn issa ngunta ghas-subizzjoni";

Having seen the defendant's statement of facts regarding his counter claim and his list of witnesses;

Having seen plaintiff's statement of defence in respect of defendant's counter claim wherein it was submitted (in the Maltese language): *"Illi t-talbiet rikonvenzjonali huma nfondati fil-fatt u fid-dritt u ghandhom jigu michuda; illi fit-tieni lok, jekk wiehed jezamina sew id-digriet tas-Sekond'Awla din kellha çerti riservi dwar dak id-digriet u di fatti ghamlita çara li dak id-digriet kien wiehed temporanju u provizorju u dan evidentement ghaliex kien ghad ma kellhiex feedback minghand l-esponenti; illi l-esponenti kienet l-Awstralja u ma kinitx taf bl-imsemmi rikors u l-kuratur mahtur mis-Sekond'Awla ma giex informat tempestivament bl-indirizz fejn jista' jikkomunika ma' l-esponenti u gie moghti l-indirizz ta' l-esponenti ferm wara li inghata tali digriet; illi mhux minnu li Philip Vassallo zamm it-tifla fl-interess ta' l-istess tifla minuri stante illi, sa l-10 ta' Novembru, 1997, il-partijiet kienu mistehmin illi t-tifla tigi ritornata lill-esponenti fid-19 ta' Novembru, 1997, il-Portugal fejn kellha tistennieh qabel ma jirritornaw flimkien l-Awstralja, b'dan illi bejn l-10 ta' Novembru, 1997, it-tifla kienet ippakkjat hwejjigha u hija telqet flimkien ma' missierha ghall-Ingilterra waqt li l-esponenti telqet lejn il-Portugal. Il-biljett sabiex Danica tigi l-Portugal fid-19 ta' Novembru, 1997, kien maqtugh. Zgur li sa dak in-nhar ma kien gara xejn minn dak li qed jigi allegat mill-istess Philip Vassallo u ghalhekk, jekk gara*

xi haga, dan kontra l-interess tat-tifla billi ngannaha u cahhadha minn ommha; illi ghar-rigward ta' l-allegazzjonijiet l-oħra ta' l-istess Philip Vassallo, dawn huma kollha finzjoni ta' l-immaginazzjoni tiegħu u qed isemmihom purament biex iwaddab it-tajn lejn l-esponenti u biex jisvija l-Qorti minn dak li verament huwa relevanti għall-kaz, çjoè l-ingann li huwa pprattika kontra l-esponenti sabiex ma jibghatx it-tifla lura lilha”;

Having seen plaintiff's statement of facts in connection with her statement of defence to the counter claim and her list of witnesses;

Having seen its decree of the 11th June, 1998, by means of which it was ordered that these proceedings be conducted in the English language;

Having seen its decree of the 11th June, 1998, by means of which a ban was ordered in connection with the publishing of the names and surnames of the parties and of their minor child;

Having seen its decree of the 30th July, 1998, by means of which a request made by defendant was overruled. This request was to the effect that Giovanni Melfi, who resides in Australia, be heard as a witness in his country of residence;

Having seen the records of the case in the names **John Melfi vs Sylvia Melfi et** (Writ of summons no. 391/94) decided on the 18th June, 1997;

Having seen the minutes of the sitting of the 4th August, 1998; wherein the plaintiff and defendant declared that they are respectively 28 and 29 years of age;

Having seen all the other written proceedings and all exhibited documents;

Having heard the parties and the witnesses produced by them;

Having heard the oral submissions made by the parties' counsels and having seen their further written submissions;

Having seen the minutes of the sitting of the 4th August, 1998;

Having considered:

Defendant's application of the 1st June, 1998;

This application will be dealt with in the first place. In this application defendant is requesting that the letters of Julian Medeiros, Mario Serralheiro and Lita Medeiros attached to the writ of summons as documents C, D and E respectively be struck off from the records of the case. Defendant qualified and limited this request by a minute entered into the records of the sitting of the 24th July, 1998, when he declared that since Lita Medeiros has been allowed to testify *viva voce*, then her letter (page 23 to 26) should remain in the records. Plaintiff's reply to this request, as recorded in the sitting of the 11th June, 1998, was in the sense that the letters in question are not to be taken as affidavits of the persons writing the same letters;

The documents in question are a letter allegedly signed by plaintiff's mother and a sworn declaration allegedly made by one Maria Serralheiro, who seems to be a friend of plaintiff's. The said letter was never confirmed by the person who in fact

signed it. The sworn declaration seems to be a photocopy of the original. No prior authorisation was obtained from the court for the production of this sworn declaration. Furthermore defendant had no opportunity to subject Mario Serralhiero to cross-examination. In view of all this, defendant's request should be acceded to and the documents in question, that is documents C and D (pages 20, 21 and 22) should be struck off from the records of the case. The Court is therefore deciding in this way defendant's application of the 1st June, 1998:

Writ of summons and counter claim:

Plaintiff's writ of summons and defendant's counter-claim will be dealt with at the same time and after making the same considerations since their respective request is of the same nature and refers to the same thing. Plaintiff's requests in her writ of summons are to the effect that she be granted the care and custody of her daughter Danica. On his part defendant in his counter claim is seeking that he be given the care and custody of the same child. Indeed defendant is requesting that the said decree of the Second Hall of this Court of the 17th February, 1998, grating him provisional custody of his daughter be confirmed;

Facts:

The relevant resultant facts are the following:

In 1986 plaintiff married in Australia one Giovanni Melfi and the following year a child, Rick, was born. In 1989 plaintiff had maintained a friendly relationship with her ex-husband for the sake of their son;

In July 1991 plaintiff met defendant in Australia.

Defendant was in Perth following an air pilot trainee course. Plaintiff and defendant went out together and started a relationship. Plaintiff found out she was pregnant by defendant in September of the same year;

Defendant finished his course in February 1992 and returned to Malta. Plaintiff, too, came to Malta with her son Rick where on the 14th of May, 1992, she gave birth to her and defendant's daughter, Danica;

Defendant was not registered as being Danica's father. Plaintiff had not yet divorced her husband Giovanni Melfi, who was registered in the Maltese registry as being Danica's father. Indeed, in March of 1994, Giovanni Melfi initiated proceedings here in Malta to establish that he was not Danica's father. These proceedings were finally decided in Melfi's favour on the 18th of June, 1997;

In Malta the parties at first lived with defendant's mother in Rabat. Shortly after Danica's birth the parties, together with plaintiff's two children, moved to an apartment in the Rabat area;

The parties had agreed that plaintiff would give birth to their child here in Malta. When they so agreed they also established that for the time being they would live in Malta. Plaintiff's son was very much part of these plans and therefore agreement was reached with Rick's father in the sense that Rick would return to Australia every year for some time. Therefore plaintiff and her two children lived in Malta with defendant from 1992 up to December of 1994. During this period plaintiff and her two children returned to Australia in December of 1992 where they remained up to March of the following year and again returned to Australia in December of 1993 where they

stayed up to February of 1994. Plaintiff and her two children returned definitively to Australia in December of 1994. Indeed the parties agreed to live in Australia and also agreed to buy a house there. In January of 1996 the parties acquired such a house, which was suitable to both. Plaintiff and her two children settled in the new house, whilst defendant continued to reside in Malta;

In 1995, 1996 and 1997 defendant made regular short visits to Australia whilst in August/September of 1995 plaintiff and her two children came to Malta for a short holiday and here they lived with defendant;

In February 1997 defendant, whilst on one of his short visits in Australia, sought to get his daughter alone, that is without the mother for a holiday in Malta. The parties however did not agree about this. Indeed from this time onwards there seemed to be a serious crisis in the parties' relationship. As time passed their attitude towards each other seemed to be continually deteriorating. They did try to make up or to patch things up but with no success;

In September 1997 plaintiff and her daughter Danica met defendant in Heathrow Airport in London and together they proceeded to Lisbon, Portugal. Plaintiff planned to spend some time in Portugal to be able to visit family and also in connection with her aspirations for a singing career. In Portugal the parties seem to have understood that their relationship was inevitably and definitely over. In Portugal plaintiff agreed to let defendant take their daughter Danica to Malta for a holiday. At first plaintiff was not sure about this, however at the end she agreed, irrespective of the contrary advise coming from both her mother and her sister who were with her in Portugal. She and her said relatives feared that defendant would not return the child to her,

however at the end plaintiff agreed both because she wanted defendant to build a healthy relationship of father and daughter with Danica and also in view of the fact that defendant promised her and the child that he would return the child to her in Portugal;

In September 1997 defendant arrived in Malta with his daughter. In October of the same year defendant informed plaintiff that he will return the child to her only if she signs over to him her share of the house in Australia and only if she agrees to blood tests being carried out to verify the paternity of the child. Plaintiff agrees. She came to Malta and indeed she signed over to defendant her share of the Australian home;

In November 1997 defendant acknowledges Danica as his daughter by means of a public deed. Shortly afterwards he agrees with plaintiff that he should take Danica for a short holiday in the UK, where her father resides. Defendant promises plaintiff to return the child to her in Portugal on the 19th November, 1997. Plaintiff therefore leaves Malta to return to Portugal, whilst as agreed, defendant and his daughter go to the UK;

On the 19th November, 1997 defendant failed to keep his promise and did not return the child to her mother in Portugal. Instead he informed plaintiff in Portugal by phone that he had decided not to return the child to her. Contrary to plaintiff's wishes, defendant returned to Malta with his daughter;

On several occasions defendant refused to let plaintiff speak to her daughter on the phone. Plaintiff phoned both from Portugal and also from Australia after she returned there, hoping to speak to her daughter. Defendant also gave instructions to his mother when he was away on work not to let plaintiff speak to

her daughter on the phone. Defendant kept on insisting that if plaintiff wanted to speak again to her daughter she should first vacate the house;

In December of 1997, defendant applied to the Second Hall of this Court to obtain the care and the custody of his daughter. At first he gave as plaintiff's address the one in Portugal, when it results that he was fully aware that she was back in Australia. It is only after the decree that he gave the Australia address. Before the decree plaintiff was therefore not made aware in time of these proceedings. On the 17th of February, 1998, the said Court grants defendant provisional custody of his daughter;

Plaintiff performed certain judicial acts in Australia in respect of her share in the house. Eventually the parties by mutual agreement sold the house to third parties and the proceeds were equally shared between them;

In the meantime plaintiff did manage to speak on occasions to her daughter on the phone. Telephone conversations were the only way for plaintiff to keep in touch and in contact with her daughter;

Considerations of fact:

Marriage:

The question of marriage was a rather tricky one for the parties. The defendant wanted to marry plaintiff and he did ask her on a number of occasions to marry him. The plaintiff however was not ready for such a step. She had just divorced her husband and therefore she had just come out from what perhaps was an unfortunate and an unhappy situation. However

in their minds both parties wished that their relationship could last as long as possible. They planned their lives according to the existing circumstances. They wanted their daughter to be born in Malta and after her birth they lived here for some time. It seems that however they both wanted eventually to settle permanently in Australia. They actually bought a house there with the intention of residing in it together as a family;

Pregnancy:

It was only a short while after the parties started dating and going out with each other that plaintiff became pregnant. This event was not expected and therefore it was a shock for both parties. It seems that plaintiff from the very beginning wanted the baby, whilst defendant was a bit hesitant and he discussed with plaintiff all the options. He himself admits of having asked plaintiff whether she was also considering abortion;

The parents' love for their daughter:

Eventually, Danica was born. There is no question about both parents' love for the child. It is evident that both want to have Danica by their side and they both want to look after the child. They both want the opportunity to see the child grow and to see to her needs and her education. Inevitably however the relationship between the parties has now degenerated to such extremes that no patching up can be done. Plaintiff resides in Australia whilst defendant is Maltese and resides in these islands. Unfortunately, this seems to have been at the root of the problems between the parties as at a given moment in time neither party seemed ready to live in the other's place of residence;

Relationship is over:

Plaintiff feels that her relationship with defendant was over in February, 1997, whilst for defendant it was over in the Summer of 1997. It seems that it was plaintiff who really wanted to terminate this relationship. At first she said that this was because of plaintiff's negative attitude towards her and her son Rick. She claims that the relationship indeed was badly effecting her but especially Rick. It must be said that these claims in respect of Rick, however, were never confirmed by other evidence. Indeed, it seems that defendant had a good relationship with Rick and he treated him as his son. Defendant considered Rick as being part of the family;

Shortcomings:

Both parties are normal people having their respective good points and their defects. The defendant did care for plaintiff and when she was in Australia he did send her money not only for the purchase of the house. It does seem however that the defendant loses his calm more easily and more often. This might also have added to plaintiff's resolve to terminate the relationship. As time passed the defendant acted towards plaintiff more and more aggressively. He was abusive and on occasions, fortunately rare, also violent. Defendant also suspected that plaintiff was having affairs with other men. He was also thinking that he was not Danica's father. It was however conclusively established that the defendant is indeed the father. Furthermore the plaintiff always denied having affairs with other men;

The defendant can also be said to be somewhat demanding and domineering. He used to tell plaintiff what to wear and how to wear her hair. He wanted to be the boss and show that he is the boss. There were also occasions when, for futile reasons, he broke a glass pane, a car windscreen and a baby's chair. There

was one occasion when he was so angry at Danica and he pulled her by her arm so hard that he dislocated her shoulder. A similar incident happened again more recently when Danica's elbow was dislocated. The defendant claims that Danica's elbow gets easily dislocated. This is a good reason why the defendant should be more careful;

Reasons why defendant refused to return the child:

At first the defendant told plaintiff that he was refusing to return the child to her because he did not want to have to go to Australia every time he wanted to see his daughter. It also results that before this refusal the defendant never alleged that plaintiff was not capable of bringing up the child properly. Now however, the defendant is claiming that he does not like the way his daughter and her brother are being raised by the plaintiff. His reasons for saying this are that plaintiff's house was always in a mess. He also claims that there is no routine in the way the children are being brought up. He says that Danica's and Rick's attendance at ballet and piano lessons respectively is irregular. It does not satisfactorily result that plaintiff is untidy and keeps her house badly. It has to be noted that since Danica has been living with defendant, he has omitted to send Danica to ballet or to singing lessons;

Defendant claims that he made up his mind not to return the child to plaintiff because of some episodes which occurred when Danica was living alone with him in Malta. Indeed he claims that the child refused to get out of her bed during night time and this made him think that the mother imposed on the child not to get out of bed at night time because she had male visitors with her. The child mentioned the name of a male friend of her mother on several occasions and said that this man would eventually be her new father. The child said that she was given

some American dollars by some sailors who were at her mother's house. He also complains that at five years and a half, Danica could not read and could only write her name. He also complains about the fact that his daughter in Australia went over with her friend to see a bush fire not far away from the house. This worried him because she was unsupervised and her friend was nine (9) years old;

Defendant further submits that plaintiff did not sufficiently look after her daughter's health. He mentions and produced proof in respect to an alleged defect in Danica's eyes and in her teeth. Witnesses produced by defendant did confirm that there is no defect at all with the child's eyes and that the teeth decay could not be attributed solely to neglect, but could also be due to a high sugar diet, genetic reasons or factors and to lack of oral hygiene. Defendant in this respect complain that in any case plaintiff neglected these problems;

In this respect plaintiff confirms that on various occasions she took the child to be examined by a dentist and an eye-specialist. She spoke about this to defendant who confirmed that the child could be seen by the relevant specialists in Malta. She therefore decided not to do anything further in Australia until the child was in Malta. She was assured by the specialist in Australia that both conditions could wait. No neglect therefore results on the part of plaintiff;

Plaintiff gives a plausible justification for all these complaints. She says that the fire in question was a small one. Her daughter went over to see what was happening not alone with her nine year old friend but with her and other members of the family. Indeed all the neighbours went to see what was happening. She says that she is very strict on Danica's bedtime as she believes that she should enjoy her video at evening time

without being interrupted and without having to look after the children. She said that she never told her daughter not to get out of bed because she had some visitors or something of this sort. She admits that there was one occasion when there were two sailors in her house. She says however that these were friends of her sister and they only waited for ten minutes for her sister to get changed. She rightly says that the system of education in both countries in question is different as is confirmed by Danica's teacher in Malta. She also confirms that she has not been with other men since she got to know defendant;

The reasons brought by defendant why he acted the way he acted when he did not return the child to the mother can never be considered as good enough and sufficient reasons. The defendant broke a solemn promise made to both the plaintiff and especially to his daughter. In any case he should have first discussed these matters with plaintiff;

Threats:

The defendant threatened plaintiff and told her that she could not see her daughter again if she did not transfer over to him her share in the house. This is definitely unbecoming behaviour on the part of defendant. In this respect the defendant at first claims that it was plaintiff who offered to sign over the house to him. He later claims that in Portugal they had agreed on various matters about the house including that plaintiff would transfer her share over to him. In view of this the defendant is not credible;

Strange occurrences:

There are other resulting instances when one could say that defendant acted rather strangely in the circumstances. He did

not let plaintiff talk to her daughter on the telephone for a rather long period after he had refused to return the daughter to her mother. He insisted that the plaintiff should vacate the house before she could speak on the phone to her daughter. Indeed, he acted as if he wanted to show that he alone was in control of the situation. Only he could decide when the child could speak to her mother or to her brother. He also controlled his own mother who did exactly what he wanted and on occasions refused to let plaintiff talk to her child on the phone;

Defendant acted oddly in that he recorded a video tape of Danica in Christmas but he refused to give it to plaintiff because he insisted that plaintiff was upsetting him. Also, after listening to audio tapes sent to the child by the mother, he refused to give one of them to his daughter;

The way the defendant acted in the proceedings before the Second Hall of this Court is very strange indeed. He gave the address of plaintiff in Portugal when he knew that she had already returned in Australia;

Capability of parents to bring up Danica:

The defendant is a First Officer with Air Malta and it seems that in his work he is well up to standard. He has a good salary and can improve his position and therefore could also improve his income. He contends that he could bring up the child in a better way than plaintiff. He says that the child would be brought up in an environment were he is a pilot, his brothers are respectively a police inspector and an insurance claims adjuster, whilst his mother is involved in voluntary work. Defendant is living with his mother in a big house in Rabat and when he is working and away from the island it is his mother that looks after the child;

The Court is however not satisfied that plaintiff is not able to bring up the child in a proper and reasonable way. It is true that plaintiff's income comes mainly from the "Single Parent Child" benefit she receives from the Australian Government. She has other income as well as she receives money from her ex-husband and she also works part-time with her parents. In all she takes a decent monthly income. One of her sisters is reading law whilst her other sister is studying psychology. It seems that her parents have a thriving business. Indeed defendant himself has admitted that when he merely received Lm100 a month because he was on a cadetship, plaintiff's pension was of great use. There is no question about the ability of plaintiff to raise her daughter. Furthermore plaintiff now rents a three bedroomed house in Australia and one bedroom is intended for Danica. Plaintiff has also set up a games room which seems to be fully equipped;

Plaintiff's son in Malta:

One point that has been emphasised by defendant is the fact that plaintiff's son has been in Malta since the beginning of these proceedings. Defendant seems to be implying that plaintiff is neglecting her son's studies and education. It has to be noted in this context that plaintiff is in Malta not because it is her capricious wish to be here. Indeed the fact that plaintiff is here is due to defendant's irregular action when he decided not to return the child to her mother. Furthermore plaintiff confirms that she has been trying to provide some sort of tuition for her son, who it seems, also refuses to go back to Australia. One wonders what would defendant have said had plaintiff left her son in Australia, possibly with "strangers";

Singing career:

Another point which has to be made is that there is nothing wrong in plaintiff's aspirations as to her singing career. There is nothing wrong in that plaintiff did try to achieve something as far as her singing is concerned. However it also results that plaintiff has been quite realistic about her singing talent;

Religion:

The question of religion is a very delicate subject. When the parties got together they knew that they were coming from different countries, with different traditions and different ways of lives. In this situation it is important that one completely respects the thoughts and beliefs of the other. Defendant has produced various witnesses who have declared that Danica at one point or another did tell them that her mother (plaintiff) says that God does not exist or words to that effect. Plaintiff denies ever saying this;

The Court feels that for some reason or another defendant is giving undue importance to this matter. He emphasises that the child now is attending a private catholic school and is also attending catechism classes. The child is now six years old and when she allegedly said those words she was four or five. We have therefore a child of 4 or 5 who is speaking about God. Defendant claims that when the child was born he wanted her to be baptized. Plaintiff's reaction to this was that when the child was older she could decide for herself;

One must understand that plaintiff is not used to the local mentality and to local traditions. Perhaps somebody of a different religion and coming from a foreign country could be understood when he or she reasons in this way. As a matter of fact plaintiff has declared that she believes in God. Indeed one witness has said that it was defendant who said that plaintiff was

not cultured enough to make statements about God and that it was indeed the defendant who declared that it is very difficult to prove the existence of God;

In this case this should not be treated as an issue. As a matter of fact it was never alleged that plaintiff's other son does not believe in God. Indeed in Australia he goes to a catholic school and in Malta he is attending catechism classes;

Ex Parte Experts:

Both parties produced *ex parte* medical experts. Defendant produced a consultant psychiatrist with a special interest in children. Dr. Peter Muscat said that he found the child to be a bright child. She was very talkative and talked in a very animated way. There was no sign of anxiety or depression. His assessment was that she was making a good adjustment to her new circumstances. The expert did not notice any upheaval in the child's emotions because of the fact that her mother had returned to Malta. The child however expressed her wish that her parents would live together again. The expert however subsequently noticed that the child was becoming selfish, and becoming rather possessive of her father. When the child was asked about her mother she was evasive and changed the subject. The child said that she was happy, that she had seen her brother again. She also said that she was missing her dog in Australia. The child refused to say with whom she wanted to be with, either her father or her mother. The child also said that when the "man in the court" decides with whom she had to go then she will go with this parent. Danica never spoke badly about either of her parents;

On her part plaintiff produced a clinical psychologist, whose area of expertise is child and family psychology. Dr.

Angela Abela said she asked the child to speak from her heart and not to think about hurting her mother or her father. At this the child had a film of tears in her eyes and this showed that this whole situation was very painful for the child. The child told her that she wanted to live in Australia with her mother and that her mother would take her to see her father. The child spoke of her room in her house in Australia and this showed that she still had memories of her life in Australia. The child said that both her parents were good. However she also said that her mother never lied to her. The child also expressed her worry that her father would take her again and not give her back to her mother. This expert concluded that a girl of Danica's age should live with her mother if her mother is indeed able to look after the child. The expert said that her feeling was that the child was saying the truth;

Having considered at length what these two expert witnesses have said, the Court feels that it should give weight to what has been said by the expert witness produced by plaintiff. The Court feels that Danica was truthful when she said she wanted to live with her mother in Australia. Indeed, what was said by the child to Dr. Muscat does not contrast with what she told Dr. Abela. It is possible that the child did not talk to Dr. Muscat about her father because she thought that Dr. Muscat was her father's friend and therefore he would tell her father what she had said. For the same reason she refused to tell Dr. Muscat with whom she wanted to be;

In actual fact defendant himself admits that his daughter says that she is missing her mother. The Court moreover gives importance to what was said by a witness who seems to be neutral as far as the parties are concerned, Janet Vassallo, who is related by marriage to defendant's father, confirmed that Danica tells her that she looks forward to going back to her mother;

In this respect it must also be noted that since Danica was born she always lived with her mother either in Malta or in Australia and this until her father decided not to return the child to her mother. It is true that the father only acknowledged Danica as his child in November 1997. The fact however remains that *de facto* the child was in the case and custody of plaintiff and undoubtedly this was the position when defendant decided not to return Danica to her mother. The parties had agreed that the child would live in Australia with her mother;

Considerations of law:

In this case the Court must seek to do what is in the sole interest of the minor child. In its decision whether the care and custody of the child should be given to one parent or the other the Court must solely be guided by what is most beneficial to the child;

The Court refers to a judgement of the Honourable Court of Appeal in the case in the names **Leslie Anne Pace vs Joseph Pace**, decided on the 27th March, 1998. This case was very similar to the present one and in the light of this judgement the following considerations can be made;

It is important for both parents to strictly follow and adhere to their agreement as to which of them is to have the care and custody of their minor child. Eventually such agreement can only be changed either by their mutual agreement or by order of the competent authority. This is more so if the parties have already acted in accordance to their original agreement. It is clearly not in the interests of the child that same child be the object of some illegal, violent and abusive behaviour of one of the parent. When one parent decides, on his own, to go contrary to that agreement and dispossesses the other parent of the child,

in such a case the child will inevitably become the centre of a controversy between the parents. This is surely counter productive to the supreme interests of the child and the same child will be at the very centre of a controversy between violence and what is right. Good sense and also the law dictate that the care and custody of the child should be immediately restored to the dispossessed parent;

The Court should at all times seek the best interests of the child irrespective of the allegations, true or false, made against each other by the parties. Such allegations often serve to distance oneself from the truth and serve to render almost impossible the search of the Court for the truth. This is why it is the duty of the Court to always look for the interests of the child. Exaggerated controversies between the parties often make one wonder how much the parents have at heart the interest of their children. Sometimes parents are only interested at getting at each other and all they want is to pay back the other party through their minor child. Therefore the principle *ante omnia restituendum* must be always applied, not only as a deterrent but in the supreme interest of the child;

Conclusions:

In view of all the above it results that it is in the interest of the minor child in question that the care and custody of the same child should be given to plaintiff that is the mother. The father should have a right of access to his minor child and this in the place of residence of the minor child for one week during both Christmas and Easter holidays and for one month during the summer holidays;

For these reasons:

Decides in the first place by overruling all defendant's requests as contained in his counter-claim, and in the second place by acceding to all plaintiff's requests as contained in her writ of summons and consequently gives to plaintiff the care and custody of her minor child Danica Vassallo. The father should have a right of access to his minor child and this is the place of residence of the minor child for one week during both Christmas and Easter holidays and for one month during the summer holidays. Plaintiff is hereby authorised to apply for, on her own (without the intervention of the father) and to keep in her possession the passport of her said minor child. Plaintiff is also authorised to take the said minor child Danica Vassallo outside these islands irrespective of the existence of any impediment of departure that may be *in vigore* in respect to the said minor child;

All costs and expenses are to be paid by defendant.
