

MALTA

The Honourable Mr Justice Noel CUSCHIERI President of the Family Section of the Civil Court, Valletta

Mr Chairman, Ladies and Gentlemen,

By way of introduction, I must mention the **Child Abduction and Custody Act** which was enacted in 1999 with a view to ratifying both the 1980 Conventions: The Convention on the Civil Aspects to International Child Abduction, as well as the European Convention on Recognition and Enforcement of Decisions Concerning the Custody of Children and the Restoration of Custody of Children. By virtue of this Act a substantial part of the above conventions became part and parcel of our law. Jurisdiction has been granted to our civil courts to deal with matters regulated by the convention on International Child Abduction, giving them power to declare as wrongful or otherwise a removal or retention of a child outside Malta; as well as to issue interim decrees with a view to securing the welfare of the child or preventing change in the circumstances relevant to the determination of the application.

The Act also provides for the setting up of a **Central Authority** in Malta, in the person of the Director responsible for Welfare, to discharge the functions in the light of the objectives as laid down in the Convention. Accordingly a number professional people, from the legal and social fields have been appointed for the implementation of this part of the Convention.

Also in section 12 the law empowers the Rule Making Board established under the Maltese Code of Organisation and Civil Procedure to make "such provision for giving effect" to this part of the act dealing with this convention "as appears to it to be necessary or expedient."

But by far the most innovative legislation, concerning family issues, was introduced in 2003 changing the set up of our Civil Courts with a view, chiefly, to concentrating the determination of family issues to one section of the Civil Court, denominated **The Civil Court [Family Section]**. Cases falling under this category are at present assigned to three judges. This concentration of jurisdiction is in line with paragraph six [6] of the Second Malta Declaration, and serves to guarantee that family issues, including custody and visitation issues are dealt with in a uniform manner by the same judges, who through reciprocal exchange of views and experiences, contribute in no small measure to a speedier, more effective and more efficient system of justice where such matters are involved. The Child Abudction and Custody Act fall under this competence.

Undoubtedly a very important and revolutionary piece of local legislation was passed in 2003 [Legal Notice 397/2003] subsequently amended in 2004 and 2006, introducing the concept of mandatory mediation proceedings, in cases concerning family disputes, prior to the institution of judicial contentious proceedings. This law makes it mandatory on the parties to attempt to settle their disputes through mediation with a view to discerning, and eliminating the causes of the dispute, thereby at best bringing reconciliation between the parties, or at least helping them reach an amicable settlement. Both reconciliation and parental agreements have the advantage of establishing a *modus vivendi* which is satisfactory to both parties, and more importantly, which is be of great advantage to the children and their welfare. Regulation 9 of this law Act explicitly mentions "disputes between parties, whether married or otherwise, concerning the custody and maintenance of, or visitation rights to the children." as falling within the ambit of this law. In such cases, the parties cannot file a lawsuit without the authorisation of the Court, which will only be given on the closure of unsuccessful mediation proceedings.

In this respect the law sets up a framework for mediation proceedings to be carried out effectively, speedily and in a manner least prejudicial to the children, or to any of the parties. Accordingly, the procedure prescribed is a simple one, free of charge and allows for the intervention of the judge where necessary.

Thus a party to a family dispute writes a letter to the Court Registrar, which is brought to the attention of one of the duty-judges assigned to the Family Court, who in turn

nominates one of the mediators instructing him to start the mediation process. However, should the need arise requiring the judge's direct intervention, any party or the mediator or the children's advocate may apply to the judge with a view to obtaining interim measures even during this stage. These measures usually deal with temporary care and custody and visitation rights, as well as maintenance for the child. If the parties fail to reconcile, but instead manage to reach an agreement on the issues involved, a draft of the parental agreement is remitted to the judge for his approval, which is given where the agreement does not contain anything which runs counter to public order. Most importantly, particular attention is given by the judge to that part of the agreement dealing with care and custody, and to the consequent payment of maintenance for the child, as well as to visitation rights.

Mediation proceedings are confidential and "no evidence may be adduced before any court of anything divulged to the mediator." This necessary tool goes a long way in helping the parties reach an amicable settlement.

This legal framework was made possible through the introduction of a number of mediators, appointed by the Minister responsible for Justice in consultation with the judges sitting in the Family Court; as well as the appointment of a number of **Children's Advocates** to safeguard the interests of the children. In fact Children's Advocates are very often nominated by the judge, both at the mediation stage as well as during contentious proceedings, where the children are of a certain age permitting them to express their wishes. In certain cases, children are also heard by the judge directly in chambers. In addition, social workers are appointed by the Court, *ex officio* or at the request of any of the parties or the mediator especially in those cases where custody and visitation rights are heavily contested by the parties, and the interests [as distinct from the wishes] of the children so necessitate. In the case of cross frontier issues, the help of the Central Authorities of the States concerned is crucial in assisting the parties reach an agreement within this legal framework.

The above is in line with paragraph six [6] of the Second Declaration afore-mentioned, and with paragraph three [3] which recognises the importance of having adequate structures encouraging parental agreement and facilitating access to mediation, without at the same time delaying unnecessarily effective access to the courts. It also recognises the importance of "having in place procedures enabling parental agreements to be judicially approved, and made enforceable in the countries concerned."

Finally mention must be made of **article 149** of the Maltese Civil Code empowering the Court, on good cause being shown, to give any directions or orders regarding the person or the property of a minor "as it deems appropriate in the best interests of the child." and this "notwithstanding any provision of this Code". This is a residual clause which caters for situations which may not fall within specific legislation, but which nonetheless call for direct judicial intervention in the interests of the child.

Mention must also be made of the strong support given by **Agenzija Appogg**, a government agency, set up in 1994 offering specialised social work services to children through the **Child Protection Unit**; and subsequently in 2001 an offshoot was created denominated **Court Services** aimed to assist the Family Court in access and visitation by providing the services of a number of social workers, psychologists and other trained social care personnel as well as a place where supervised access can take place and practical difficulties in visitations disputes sorted out. In practice, this agency, in conjunction with the Central Authority, is of great assistance in supervising cross-frontier visitation rights, and in ascertaining that the conditions imposed by the court are being observed.

Though the Convention deals with the civil aspects of International Child Abduction, it is not amiss to point out that it is considered to be a contravention in Malta to refuse, without just cause, to allow access to a child in breach of custody rights emanating from a judgment, court order or from an agreement. Such cases are dealt with before the Magistrates Court with specific duties assigned in this regard and which in family cases operate within the Family Section.

I conclude by saying that Malta's small territory, coupled with an efficient and effective system of notification, ensures that in cases of abduction the interested parties, and the

relevant authorities at port entry and at exist points, are informed without delay, making wrongful removal of minors more difficult to effect. Besides, the provisions of the **warrant of prohibitory injunction** contained in our procedural law, aimed to restrain the wrongful removal of minors outside Malta, present a further safeguard against such removals, and have on various occasions proved to be very effective in preventing child abduction on an international level.

I conclude by thanking you again Mr.Chairman, and I look forward to hearing the views and exchanges of the other participants, which I am sure will help us understand better the various legal systems in this regard with a view to an effective and uniform application of the rules embodied in the conventions, and the principles regulating the welfare of the child in family disputes.

Thank You