

THE BEST INTEREST OF THE CHILD IN CARE AND CUSTODY DISPUTES: A PREJUDICE TO THE FATHER'S RIGHTS?

**Kimberly Sammut
0500296 (M)**

**A research project submitted in partial fulfilment of the Degree of
Bachelor of Laws
(LL.B. Honours)**

**Faculty of Laws
University of Malta**

April 2018



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Student's I.D. /Code 500296 (M)

Student's Name & Surname Kimberly Sammut

Course Bachelor of Laws

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The Best Interest of the child in care and custody
disputes: A prejudice to the father's rights?

Word Count 12,000

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ABSTRACT

The present work is a study on the highly contentious issue of the assignment of children's care and custody in judicial proceedings. An examination of the sections of the civil code dealing with 'care and custody' reveals that, whatever the stage of the proceedings, the focus of Maltese law and the respective courts is not the interests of the parents but rather the best interest of the child. Prima facie, the law is neutral without any bias in favour of any parent. However, it appears that non-custodial parents are overwhelmingly men, leading to the perception that disputes over care and custody are ultimately reduced to 'gender wars'. Indeed, this term paper endeavours to determine whether this overarching principle of 'the best interest of the child' prejudices the father's rights. Some of the instances identified include the non-cessation of the father's obligation to provide maintenance even if he happens to be the non-custodial parent and the loss of the non-custodial father's right to reside in the matrimonial home due to the court's reluctance to remove the child therefrom. In the past, the courts were reluctant to award sole custody to the father. The dominant belief was that the mother was the most suitable parent to have custody of the minor children. This norm, commonly known as the 'Tender Years Doctrine' was eventually superseded by 'The Best Interest of the Child' doctrine. This study found that nowadays child custody norms are significantly changing. Parliamentary debates and the courts are increasingly recognising the importance of the father's presence in the children's upbringing especially following family breakdown. In the past decade or so, sole custody orders in favour of the mother have decreased considerably. A major limestone has been reached; courts are preferring joint care and custody orders over sole custody orders where parents cooperate with each other. Yet, even in joint custody orders, the tendency is that children live with the mother and access rights are granted to the father. The present writer concludes that even though the best interest of the children does in certain instances conflict with those of the father, the well-being of the children should come first. After all, children should not be treated as 'pawns' and their protection should be given priority, no matter whose interests are prejudiced in the process.

Keywords: care and custody; best interest of the child; prejudice; father; mother

In memory of my cousin, Natasha, a strong woman whom I still miss everyday, for always believing in my ability to be successful. You are gone but you left fingerprints of grace on our lives. Your faith in me has made this journey achievable.

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<<https://www.legislation.gov.uk/ukpga/1989/41/part/I#commentary-c15159151>>

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¹ All Maltese judgements can be accessed at <www.justiceservices.gov.mt>

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ACKNOWLEDGEMENTS

This term paper becomes a reality with the unwavering support and guidance of several individuals. I would like to extend my heartfelt thanks to all of them.

Foremost, I would like to offer this endeavour to The Almighty God for the wisdom he bestowed upon me, the peace of mind and good health to complete this research. I owe my deepest gratitude to my supervisor Dr Robert Thake for finding time in his busy schedule to impart his expertise, for his support and patience throughout the process of writing this term paper. Without his continuous optimism, enthusiasm and assistance this term paper would have hardly been possible. I must also express my warmest appreciation to my co-supervisor Dr. Ruth Farrugia.

I thank profusely all the University of Malta, Faculty of Laws library and the Melitensia library staff for their cooperation and their kind help in gaining access to past dissertations and other useful material. My cordial thanks goes to my friends and people who have willingly helped me out with their qualifications. In this regard, I am deeply indebted to my best friend, a statistics student, for having been of tremendous help in presenting the analytical aspect of my research.

Ceaseless gratitude goes to my boyfriend for having stood by my side during the entire preparation of this term paper, for never letting me lose hope and for constantly believing in what I can achieve. Besides, I humbly extend my thanks to my parents-in-law, whose support has rendered them a second family to me.

For holding my hand throughout these past four years of study, I wish to thank my cousin who regrettably died a month ago but who I am sure is with me in spirit. Last, but definitely not the least, I owe a great debt of gratitude to all my family, especially my parents and grandparents who have taught me to aim high. Had it not been for their unconditional love, constant encouragement and support my greatest ambitions would have purely remained a dream.

To you all, Thank you.

INTRODUCTION

Scope & Outline

The ever-increasing rate of child custody disputes arising before the courts calls for alarm. Cases revolving around the assignment of children's care and custody are "sensitive, often volatile" and "raise some of the most difficult issues before the courts"². The application of the 'best interest of the child' criterion offers guidance to the courts about the factors which must be taken into consideration in every case³. This principle is based on the premise that the interests of children prevail over those of the parents. Children must be viewed as the heart and *raison d'être* of every family and not as accessories to parents who would love to have it all. Alas, attaining the best possible resolution for the children is often much more fallacious than real. To say the least, natural wisdom is too restricted to clearly predict what would be in a child's sheer interests.

Although the term "award" of custody appears to imply that the courts are rewarding parents with a right over and above what they are entitled to, what the courts would be doing is merely reasserting a crucial right already vested in them. Undoubtedly, the non-custodial parent, having been denied custody of the children, suffers a prejudice to his parental rights. This prejudice, however, is juxtaposed with the best interest of the child. A common criticism to this fundamental principle is that the interpretation of the best interests' test affords a systematic advantage to the mother. Although, *prima facie*, it seems that gender equality has been achieved, at least on paper, a maternal preference still permeates the courts. Mothers are still being awarded custody more often than fathers and judges repeatedly consider mothers more central to the children's well-being. The reader may rest assured that the present author does not intend to presume that the father is more liable to be wronged in custody adjudication particularly because this is a highly politicised debate. In fact, one of the aims for carrying out this research is to come up with statistical evidence that settles this controversy.

Considering that most non-custodial parents are men, the present writer naturally feels the need to inquire into the ramifications of a strict application of the 'best interest of the child' rule on the father figure. As a matter of fact, the principal question of this study revolves around whether, as a direct result of children's best interest, fathers suffer a

² Judith Kaye, Chief Justice for New York's Court, 'Report of the Family Court Advisory and Rules Committee' (2006), 170.

³ Article 3 of the United Nations Convention on the Rights of the Child

prejudice to their parental rights. Also, the author aspires to identify specific instances which portray the extent of such prejudice.

Outline of Sections

The first two sections deal with the literature review and the methodology. The third section is dedicated to the definition of ‘care and custody’, the analysis of the relevant civil code provisions and the identification of the three forms of custody arrangements. The subsequent section, containing a subsection on the English paramountcy principle, thoroughly examines the traditional position and proceeds to analyse the shift to the adoption of the ‘best interest of the child’ principle. Apart from specifically outlining the ways in which the latter standard hinders the father’s rights, the final section ponders over the credibility of child abuse allegations raised in custody suits. The conclusion, apart from summarising the chief findings of this study, is intended to determine whether custody awards are gender-neutral or whether they are founded on the traditional approach of the mother being the fittest parent to have custody and the father readily accepting his access rights together with an obligation to pay maintenance. Hopefully, this paper would shed some light on the effect of the ‘best interest of the child’ principle on the father’s parental rights, and perhaps after acknowledging the turmoil, measures will be adopted to balance the counter interests without harming those of the children.

SECTION 1

LITERATURE REVIEW

This section outlines the literature sources consulted to acquire a refined understanding of the scholar's standing on the issue of the best-interest-of-the-child and its effects on the father's rights. The main sources are jurisprudence, parliamentary debates, statutes and published articles in academic law journals. Although case-law is to a large extent local, certain matters required a cross-reference to foreign judgements either to substantiate the local position or to extract recommendations.

The researcher came across considerable literature dealing with the best interest of the child in situations where children are locked up in their parents' battle over custody. Extant literature portrays these children as 'pawns' (Denison, 2015). Most of the literature discussed the detrimental effects that these proceedings have on children whilst assuming that mothers, being the fittest to rear the children of the break up, are generally entrusted care and custody. This kind of literature however overlooked the father's standpoint. Unfortunately, very little literature dealt with the question as to whether the attainment of the best interest of the child comes at the cost of the father's rights. Literature addressing the hardships endured by the father in custody battles was often produced by male activist's rights groups. At times, different sources produced contradictory information. Numerous articles argued that the mother is no longer considered to be the fittest parent (Rosin, 2014)⁴. Other articles suggested that albeit numerous amendments to the law, maternal preference still lingers. For instance, one article stated that "*even after decades of ideological changes, courts still seem to rely on the presumption that mothers are best suited to parent children*"⁵. At first these contradictory views were thought to be a limitation but turned out to be advantageous, in that the present work contributes to the attainment of a novel investigation with a view to either invalidate or else enrich existing literature.

The most analogous work in the field is an online article quoting Newdow; a spokesperson for the British political group having the role of raising awareness about divorced fathers' custody rights. Newdow's concern is "*the assumption that you can deprive someone of his or her fundamental parental right simply to make a child's life*

⁴ Hanna Rosin, 'The perception that family law is unfair to fathers is not exactly true' (Dad's Day in Court, May 2014) available at <http://www.slate.com/articles/podcasts/doublex_gabfest/2018/02/doublex_gabfest_on_domestic_abuse_in_the_white_house_teens_watching_porn.html> accessed 26 February 2018

⁵ Elizabeth Gresk, 'Opposing Viewpoints: Best Interests of the Child vs The Fathers' Rights Movement' [2013] 33 Children's Legal Rights Journal, 391

more pleasant”⁶. Whilst recognising that society has a duty to safeguard children who are unable to protect themselves, there is a great difference between protecting children from harm and ameliorating their life in general. Surely, children should be protected from any real harm suffered but when it comes down to what someone believes might be better for the child, a fair balance must be struck between the child’s better needs and the prejudice suffered by the parent.

A recurring issue in the literature is that of judicial bias based on gender. Father’s rights activists argue that “... *the fact that men receive sole custody of their children far less often than women, even against the backdrop of a gender-neutral legal standard, suggest ‘judicial bias’*” (Radbord)⁷. Extant literature provides that joint custody is an effective way of overcoming this perceived bias and “*an opportunity for a child to continue a strong and meaningful relationship with both parents*”⁸ (DiFonzo, 2014). About gender equality in parenting, the present writer found a thesis⁹, which includes a short chapter on gender equality issues in custody proceedings. The present work will extend this academic literature in two ways. First, the present work is not solely concerned with gender equality but seeks to identify trends which, although justified in the name of the child’s best interest, nonetheless pose a threat to the enjoyment of father’s rights. Second, this term paper traces contemporary court decisions with a view to highlight any significant changes in the court’s reasoning.

The relevant dissertations mention three forms of custody arrangements. Whilst the common belief may be that joint custody is the better option, the Family Court’s decisions illustrate that this is not always the case (Cauchi v. Gauci, 2008). Most of the literature addresses the application of the tender years doctrine, on the basis of which mothers have superior “natural” nurturing abilities (Mason, 1994). Although some scholars believe that the ‘best interests’ standard is gender-neutral, still judges continue to favour mothers, particularly when adjudicating custody cases involving minors (Artis, 2004). Finally, a fundamental concern in the literature is that of credibility of abuse allegations in the

⁶ Susan Dominus, *The Fathers’ Crusade*, N.Y. Times, May 8, 2005, available at <<http://www.nytimes.com/2005/05/08/magazine/the-fathers-crusade.html>>

⁷ Joanna L.Radbord, ‘Equality and the law of Custody and Access’, 6(1), 36

⁸ J.Herbie Difonzo, ‘From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy’ [2014] 52(2)

⁹ ‘Gender Equality in Parenting: Maltese Jurisprudence’; Claire Guiliano (2013)

context of child custody disputes. The 2008 Family Court's Review¹⁰ was heavily relied upon when addressing section five. Several practitioners assert that malicious fabrications are an increasing concern for the justice system (Stahl, 1994). The fifth section falls into the literature addressing the veracity of abuse allegations by the mother against the father.

¹⁰ Jaffe, Johnston, Crooks & Bala, 'Custody disputes involving allegations of domestic violence: Toward a differentiated approach to parenting plans', *Family Court Review*, [2008] 46(3), 500-522.

SECTION 2

METHODOLOGY

The scope of this term paper encompasses qualitative research of a doctrinal and comparative nature. A quantitative approach is not suitable because the aim of this research is not the obtainment of quantification but rather a contextualised understanding of lived experiences. Owing to the legal nature of this research, a qualitative method of inquiry is a more appropriate methodological approach to investigate whether the overriding focus on the ‘best-interest-of-the-child’ dictum in custody battles prejudices the father’s rights and if it does, to what extent. Two hundred random judgements spread over the periods of, 2009-2013, 2014-2018 are scrutinised to examine the tendency of the court in awarding custody arrangements. The results obtained are compiled in a table and annexed to the present paper. The data obtained is illustrated by means of a pie chart; from which the present writer may conclude whether the gender-bias argument in custody proceedings is supported by case-law.

This study mainly assumes a ‘doctrinal’ or ‘black-letter law’ methodology, meaning that the majority of research conducted is based on analysing the legal rules on care and custody contained in the Maltese civil code and the jurisprudence related to the relevant provisions. As outlined by the *Law Teacher* website “*The primary aim of this method of research is to collate, organise and describe legal rules and to offer commentary on the emergence and significance of the authoritative legal sources in which such rules are considered, in particular, case law, with the aim of identifying an underlying system*”¹¹. Many commentators have criticised the black-letter method, arguing that it is so restricted to the ‘*letter of the law*’ that it overlooks the moral and sociological overtones of law ‘*in action*’.

Although statutes and case-law were traditionally construed as black-letter law, it is up to the individual researcher to approach these sources in an original manner. Since the aim of this study is that of analysing the implications of the law on the ‘father’, extensive reference to the case-law of the Civil Court (Family Section) was paramount. Although in Malta we do not embrace the doctrine of precedent, the study of case decisions carries considerable weight. Firstly, by analysing judgements the present writer counteracts the negative effects of the black-letter approach because judgements depict the application of theories in real life situations. Secondly, trends of the court can be identified. A comparative approach is also applied, serving as an additional critical tool for analysis.

¹¹ Law Teacher, (November 2013), Writing Law Dissertation Methodology, retrieved from <https://www.lawteacher.net/law-help/dissertation/writing-law-dissertation-methodology.php?cref=1>

The Paramountcy Principle under English law is discussed. Collins argues that seeking to use comparative law as a means of transplanting that law into another legal system is not always effective¹². Although this approach is beneficial to establish common principles in different jurisdictions and to obtain the best solutions through comparison, one disadvantage is that sometimes it is quite difficult to access information and judgements from other jurisdictions.

Interviews, focus groups, questionnaires and participant observation do not constitute part of this research. This does not mean that the use of these methods was not originally contemplated. Initially, the present writer believed that carrying out focus group interviews amongst fathers undergoing child custody proceedings would generate useful insights but this thought was eliminated once it became clear that the selection of male interviewees is not likely to be representative of the greater population and that it might not produce entirely reliable results considering the sensitivity of the subject. Since this study targets fathers specifically and since they have an interest in depicting a scenario in which they are being disfavoured, it is most likely that the outcome of these interviews would have been tainted by exaggerations and untruthfulness. Surely, the examination of court's decisions would produce much more reliable results.

Courtroom observation was out of question since cases involving claims for the acquisition of custody are not open to the public. According to the Journal of Anthropological Research, "*during participant observation ethnographers attempt to be both emotionally engaged participants and coolly dispassionate observers of the lives of others*"¹³. Given the sensitivity of this study, the present writer fears that the use of participant observation would increase the risk of 'going native'; being so involved with the participants that objectivity is lost. Interviewing children was not an option. Firstly, an account of their living reality may be contaminated by the dominance of the controlling parent. Secondly, questioning young children would add salt to the wounds already inflicted by the emotional trauma of their parent's quarrels. After all, the protection of children's well-being should not only be the focus of this term paper but a priority of any research question in this field. Henceforth, it did not take much time to realise that the best way to settle such a sensitive research question is through studying how each case

¹² Hugh Collins, 'Methods and Aims of Comparative Contract Law' (1991), 396

¹³ T.Barbara, 'From Participant Observation to the Observation of Participation', [1991] 47(1) Journal of Anthropological Research, 69-94

evolved, having regard to where the father stands and the considerations of the court in reaching a particular decision.

Finally, the lack of local academic literature taking the father's standpoint is a universal pitfall. The difficulty to strike a fair balance between the interests of children and those of fathers, particularly in an area of study such as this one, where there are so many conflicting interests at stake, is a major drawback. Despite that cases vary so much from one another that no definite conclusions can be drawn, the overriding advantage is that owing to the need of creating awareness on the father's value in the children's life, the current study is indispensable.

SECTION 3

THE CONCEPT OF CUSTODY UNDER MALTESE FAMILY LAW

3.1 Defining Care And Custody

The term custody finds its roots in the Latin concept of ‘custodia’, meaning guardian. Maltese law does not explicitly define care and custody nor does it define the ramifications of the different forms of custody arrangements. ‘Child custody refers to the bundle of rights, duties, obligations and responsibilities or parental authority that a person may exercise over a child¹⁴. In a stable family, a child is cared for by the parents, and the question of custody does not arise. But when a family breaks down, the future custody and care of the child becomes a central issue to be decided by the courts¹⁵. Nevertheless, child custody disputes are not restricted to separation or divorce proceedings because such disputes also exist between unmarried parents.

Under Article 5 of the Hague Convention, custody rights are assimilated with rights connected with the care of the person of the child, particularly that of determining the child’s place of residence. A fundamental distinction must be drawn between legal custody and physical custody. Legal custody has nothing to do with the child’s residence following separation or divorce. Rather, it revolves around making significant decisions affecting the child’s upbringing, schooling, daily routine and medical care. In Malta, whenever a custody dispute arises before the court, the likelihood is that the court will either grant sole custody to one of the parents or else shared custody. Judges favour more the idea of having one parent acting as primary carer and both parents consulting each other when taking major decisions.

The care and custody of a child following family breakdown is a crucial aspect of judicial proceedings. Indeed, if either of the parties fail to honour a consensual contract or court judgement ordering custody and access arrangements without reasonable cause, that party would have violated the Criminal Code¹⁶. Such an action, deemed to be a contravention against public order, is punishable with imprisonment.

3.2 Maltese Civil Code On Care And Custody In Judicial Proceedings

¹⁴ Professor L.WaiKum, ‘Principles of Family Law in Singapore’, [1997] Butterworths, 536-538.

¹⁵ The law Reform and Revision Division of the Attorney-General’s Office - Review of Child Custody Law [2005], Singapore.

¹⁶ Chapter 9 of the Laws of Malta, Article 338(ii)

The Maltese Civil Code has greatly contributed to the abolishment of the traditional roles of parents. A series of amendments have rendered the Code gender-neutral. By virtue of Act XXI of 1993 spouses enjoy equal rights and responsibilities in marriage and share responsibility for their children. The responsibilities of parents towards their children are clearly captured by the Civil Code in Article 3B. The opening phrase; “*Marriage imposes on both spouses the obligation to look after, maintain, instruct and educate the children of the marriage*” indicates that there is no discrimination between spouses.

The law imposes a considerable amount of responsibility on the Court when faced with disputes over child custody. The Family Court, guided by the ‘best interest of the child’ principle, would be compelled to make provision for the allocation of custody and access arrangements. The decisions reached by the Court concerning child custody issues are then backed up by enforcement procedures under the Code of Organisation and Civil Procedure¹⁷. The Civil Code falls short of providing provisions that serve as guidance to the courts for determining care, custody and access at a stage prior to the commencement of proceedings. However, it regulates custody arrangements both during the pendency of an action for separation/divorce as well as upon the pronouncement thereof. Article 47 provides that *pendente lite*, the Court shall give directions regarding care and custody of the children as it may deem fit. This article emphasises that paramount consideration shall be given to the welfare of the children. In other words, the needs and desires of the child trumps everything else and directions should be given irrespective of which spouse is the plaintiff.

This strong emphasis on the best interest of children illustrates that even though the Maltese system is heavily based on the concept of fault and punishment, children should never be used as weapons to inflict punishment on the guilty party. Therefore, the court may use its discretion to assign custody to the parent who has given rise to separation if it is convinced that it is in the best interest of the child. In terms of Article 56(1), “*the paramount consideration being the welfare of the children*” applies also when, on pronouncing separation, the court is constrained to determine to which of the spouses custody shall be entrusted. The Court may also direct that children be placed in the custody of persons in loco parentis or in alternative forms of care¹⁸. Besides, the Court

¹⁷ Chapter 12 of the Laws of Malta

¹⁸ Civil Code, Article 56(2)

may, in its judgement on separation, give directions as to the custody of the children even though no demand to this effect has been made by either parent¹⁹.

An important provision is Article 56(4) which empowers the Court to alter or revoke any decision regarding the children, at all times, in the best interest of the child. Other compelling powers endowed to the court include the power to deprive one or both parents of parental authority, whether in whole or in part²⁰. Following the amendments brought forward by Act XIV of 2011, Article 56A was introduced. This article provides that when grave reasons exist, the Court may declare that one of the parties is unfit to have the custody of the minor children. Such a declaration shall be made following a demand by the other party to that effect and may be issued either during the case of separation or after the declaration of separation. The last part of this article delineates that in the eventuality of the death of the said parent, the non-custodial parent would be a priori deprived of assuming custody of the child unless such party is authorised to do so by the court. The aim of this article is to safeguard the child after the death of the parent who has been awarded custody of the child.

Any agreement reached by the parties on the care and custody of their children may be annulled by the court at any time if it is beneficial to the children²¹. This was confirmed in “*Emanuel Bugeja vs Mary Rose Bugeja et*”²². Apart from protecting the children, this provision also safeguards parent’s rights which may have been undermined due to the original agreement concluded between them. This article may be relevant in cases where the father would have been intimidated into agreeing that the child should reside with the mother, in which case the court will step in and alter the initial agreement.

Following the introduction of the aforementioned Act XIV of 2011, the civil code continued to regulate care and custody issues in divorce proceedings. Article 66I covers those instances where the spouses are not already separated. In such cases, the court will compel the parties to appear before a mediator to allow the parties to conclude the divorce in terms of an agreement which will include matters such as the care and custody of children, maintenance and access. Article 66L which deals with the effects of divorce states that the pronouncement of divorce shall not have any effect upon any agreement on

¹⁹ ibid, article 56(3)

²⁰ ibid, article 56(5)

²¹ ibid, article 61, tackled in section 5

²² Civil Court, First Hall, per Mr. Justice R.C.Pace, 4 July 2002

custody reached jointly between them. It is also evident from Article 66L that the court may apply to divorce the same decisions relating to the care and custody that are applied when a separation is pronounced. Besides, the provisions of Article 56A mentioned above shall apply *mutatis mutandis*.

Having meticulously analysed the relevant sections of the Civil Code, the present writer may conclude that whatever the stage of the proceedings the focus of Maltese law and the respective courts is not the interest of the parents but the best interest of the child. Although the law seems to be neutral, case law has shown that the mother still has the upper hand and that the father only enjoys exclusive custody of children in exceptional situations.

3.3 The Different Types of Custody Arrangements

3.3.1 Sole Custody

Sole custody is awarded when one of the parents is unfit or unable to take care of the child due to abuse, violence or criminal behaviour. Sole legal custody empowers one parent, to the exclusion of the other, to exercise all legal rights and duties with regards to the child. In other words, decisions concerning health and education amongst others are exclusively taken by that parent. However, in a sole physical custody arrangement the child lives with the custodial parent and the non-custodial parent has visitation rights i.e. access. Under Maltese law, the non-custodial parent cannot take any urgent medical decisions affecting the child's health without first obtaining the custodial parent's consent. The only instance where the non-custodial parent can take such decisions on his own is when the custodial parent cannot be found and where both parents cannot be found any such urgent decision may be taken by a third party.

Traditional sole-custody arrangements produce an uneven power struggle between parents²³. When the mother enjoys sole custody of her children, she plays an inherent role in determining how much time fathers spend with the children. It has been a common tendency for mothers to deny the father visitation even though it has been ordered by the

²³ M.K. Miller, 'Through the eyes of a father: How PRWORA affects non-resident fathers and their children', *International Journal of Law, Policy and Family*, [2006] 20(1), 64

Court. Originally, Maltese courts awarded sole physical custody to the mother whenever the court deemed it to be the best arrangement. Although with the modern emphasis of the best interest of the child principle this maternal preference was considerably reduced, there are still cases which demonstrate that maternal preference is still the determining factor of the court.

In case 269/2010²⁴ the Court granted sole physical custody of the three children to the mother. The Court found ample proof that the father was guilty of adultery, excesses, cruelty, sexual violence against his wife and criminal behaviour. Not only did the husband exhibit criminal behaviour with his wife but he had also committed theft, used illegal communication apparatus and had also threatened the police on multiple occasions. The Court considered that it had already pronounced personal separation in 2004 and that after reconciliation his behaviour only became worse. The mother alleged that even after reconciliation he was having sexual relations with other women, used to go out alone and get back late at night, drunk. He used to sexually abuse her, act violently around her and even offered her money in exchange for intimacy. She also alleged that she often felt intimidated by him since he followed her everywhere. He had even offered money to the children to report on their mother. Despite attributing one third of the fault to the wife, the court still ordered sole custody in her favour due to the psychological harm that the father caused to the children. It ruled that until he proves to the court that he has undergone the necessary therapy, he shall not have access to the children. The court stressed that:

*“In vista li huwa qed jirrifiuta li jfittex l-ghajnuna ... il-Qorti ma tistax tpoġġi l-benessere tal-ulied fir-riskju biex tissodisfa l-htigijiet u l-ego ta’ missier daqstant kapriċċjuż. Illi huwa wkoll l-insenjament tal-Qorti tal-Appell, illi f’kawżi daqstant kontenzjużi b’hal din prezenti, ikun ferm aħjar għall-ulied, li l-Qorti tafda l-kura u l-kustodja tagħhom lil ġenitur wieħed”*²⁵

In a judgment delivered six months prior to the previous²⁶, the Court entrusted the father with the sole custody of his daughter and awarded ‘access’ rights to the mother. The father asserted that he was not registered as the girl’s biological father on the birth certificate

²⁴ ABC vs DB, Civil Court, Family Section, per Justice A. Lofaro, 24 October 2017

²⁵ “In view of the fact that he is refusing to search for help, the court cannot place the interests of the child at risk to satisfy the needs and capricious ego of the father. As it is also in the Court of Appeal’s opinion, that in contentious cases such as this one, it is much better for the child that the courts entrust their care and custody to one parent”

²⁶ AB vs CD, Civil Court, Family Section, per Justice A. Lofaro, 15 June 2017

and that she had returned to Malta with the child from England seventeen months following the girl's birth, at which time she informed him that he was the real father. Subsequently, the girl started to live with her father whilst the mother was constantly changing residence. In its ruling, the Court expressed its concern about the mother's lack of care towards her daughter not just materially but also emotionally. Not only had she failed to keep her clean but she had also failed to attend the school's Parents' Day, dancing concerts and her daughter's Holy Communion. For these reasons, the court entrusted the exclusive care and custody of the girl to the father, arguing that although he got to know his daughter eighteen months after her birth, he did not escape responsibility and was a good father to her. The court also reiterated that the child shall continue residing in Malta with her father.

3.3.2 Joint custody

Joint custody has commonly been perceived as a 'quick fix' in all cases of family breakdown. The crux of this arrangement revolves around the idea that although parents have split up, their offsprings remain legally and emotionally "married" to both. In pure joint custody arrangements parents share equal physical and legal custody rights. The authority to raise children and the responsibilities involved are shared between parents. However, this does not mean that all decisions or time is split evenly between them. The Court may order that the child resides with both parents in their separate households either by alternating weeks or weekends or less commonly order that the child shall live with one parent for one year and with the other parent for the subsequent year.

In joint legal custody arrangements, both parents hold the power to take all the decisions necessary in respect of their children's welfare. On the contrary, in joint physical custody each parent assumes everyday parental duties and children reside with both parents on a shared basis. Joint physical custody is generally preferred to sole physical custody due to two fundamental reasons. Firstly, parents will not be labelled as mere 'visitors' in their children's life and secondly such an arrangement will definitely prolong the limited visitation time that would have been granted in sole custody. Notwithstanding, joint physical custody is not without its drawbacks. In countries where parents live at long distances from each other this arrangement is not feasible. In this scenario, children would

be deprived of a stable environment since they would be constantly changing parent, home and schools and would face difficulties to reintegrate every time.

Critics often propound that joint custody arrangements have only been devised as a way to safeguard the father's rights rather than to protect children. Fathers are generally financially driven and may seek joint custody orders to cut down on their responsibility to provide child support. Supposedly, since fathers share custody they are only paying for half of the cost of nurturing their child. A growing inclination of fathers is to entrust children in his mother's care during such time that the children are supposed to be in the father's physical custody. Yet, conclusions should not be drawn on this hypothesis alone considering that there are a good number of fathers who genuinely wish to have an equal say in their children's life.

Both parents and children may reap the benefits of joint custody. On the one hand, the father would retain a vibrant role in his children's life irrespective of the belief that the mother is the primary caregiver whilst on the other hand the mother will be relieved from the strain of having to support the children on her own. Children benefit by maintaining stable contact with both parents. However, joint custody may only be presumed to be in the child's best interest as long as both parents are willing to put their differences aside, co-operate and communicate with each other in order to fulfil their children's utmost needs. As noted by the New York's Court of Appeal in '*Braiman vs Braiman*'²⁷ delivered in 1978, joint custody is "*insupportable when the parents are severely antagonistic and embattled.*" This was confirmed by the Maltese Court of Appeal in '*Miriam Cauchi vs Francis Cauchi*' decided on 3rd October 2008 where the court held:

“... *fejn il-genituri ma jirkellmex, talba għall-kustodja kongunta għandha tigi skartata mill-Qorti ... l-istess principju japplika fejn iz-zewg genituri m'humix kapaci jirkellmu b'mod civili ma' xulxin li l-kura u kustodja m'għandhiex tkun kongunta għaliex immankabilment tkun sors ta' litigji ulterjuri b'detriment serju għall-benessere tal-minuri*”.²⁸

²⁷ 44 N.Y.2d 584, 378 N.E.2d 1019, 407 N.Y.S.2d 449,450

²⁸ “ ... Where parents are not on speaking terms, a plea for joint custody should be disregarded by the court ... the same principle applies where parents are incapable of talking civilly to one another, that the care and custody shouldn't be joint because it will be a further litigious source of a serious detriment to children's best interests”

The same Court in the case of ‘*Darmanin vs Cassar*’²⁹ confirmed that:

*“Il-Qorti qed tiskarta t-talba ghal kustodja kongunta ghaliex bhala sistema m’hijiex prattikabbli meta l-genituri ma jiftehmux bejniethom”.*³⁰

Moreover, in ‘*Duca vs Xuereb*’³¹ the court further asserted that:

*“Idealment il-kura u l-kustodja ta’ minuri tkun kongunta bejn il-genituri. Anke mill-aspett psikologiku hu essenzjali ghall-minuri li kemm ommu kif ukoll missieru, ikunu parti minn hajtu u jippartecipaw attivament fid-decizzjonijiet kollha li jkunu qed jikkoncernaw lill-istess minuri ... huwa necessarju li jigi ppruvat li tali kura u kustodja kongunta tkun fl-ahjar interess tal-minuri. Izda l-Qorti hija fid-dover li timxi b’kawtela kbira meta tigi sabiex tiddeciedi dwar il-kura u kustodja ta’ minuri fl-isfond ta’ litigji kontinwi bejn iz-zewg genituri”*³²

In the recent judgement of *AB vs CD*³³, the Court denied the father’s plea for joint care and custody since it was not deemed to be in the child’s best interest. The court considered that the boy is often hospitalised and if an emergency crops up requiring the consent of both parents and this consent is not given this will result in irreparable damage to the minor. This conclusion was reached on the basis that the father had, on another occasion, refused to sign to have the child reviewed by a psychologist. Besides, the court continued, it is in the child’s best interest not to have contact with his father due to his indifference and insensitivity. Therefore, it awarded custody exclusively to the mother and ordered the father to pay €230 monthly as maintenance covering education and health expenses.

Local case law reveals that in granting joint care and custody orders the Court often fails to achieve equilibrium between the amount of maintenance and equal childcare. This begs the question of whether the Court reaches its conclusions based on the assumption that because the father is often the non-residing parent, he has the fundamental obligation to

²⁹ *Mario Darmanin vs Annalise Cassar*, Court of Appeal, 31 October 2014

³⁰ *“The court is disregarding the plea for joint custody because as a system it is not practical when the parents do not agree between themselves”*

³¹ *Sarah Anne Duca vs Clint Xuereb*, Civil Court, Family Section, 9 June 2016

³² *“Ideally the minor’s care and custody should be joint between parents. Even from a psychological aspect, it is essential for minors that both the mother and father form part of their life and that they actively participate in all decisions concerning them ... it is necessary to prove that that joint care and custody is in the best interest of the minor. However, the court is duty-bound to act cautiously when deciding on the minor’s care and custody in the context of continuous litigation between parents”*

³³ *AB vs CD*, Civil Court, Family Section, per Mr Justice R.G.Mangion, 31 October 2017

financially support the children. This portrays the prejudice that fathers face in cases where they are obliged to provide a higher maintenance even though they enjoy joint custody.

3.3.3 Split Physical Custody

The Court may order that the custody of one child be awarded to one parent whilst the custody of the other child be awarded to the other parent. Split custody awards are only possible when there is more than one child involved.

Split custody arrangements are rare in Malta due to judges' strong belief that siblings should remain united. However, there have been cases where the Court has felt that split custody would be the best arrangement under the circumstances. For instance, in a 2006 judgement,³⁴ the court ordered split custody with visitation rights. In this case the wife had left the matrimonial home twice. The first time she was thrown out by her husband following allegations of adultery and the second time happened shortly after they had reconciled, at which time she went to live with her parents. On both occasions the mother left the house with her seven-year-old son whilst her eleven-year-old daughter remained residing with the father in the matrimonial home. The court summarised the reasons for granting split custody, stating that the children have adapted themselves to the reality imposed upon them and are comfortable with their *modus vivendi*. It concluded that having to go through another radical change in their life would not be in their best interests.

More recently, the Court awarded split custody in case 155/11³⁵. This case was filed by the mother, requesting the custody of her two children and the pronouncement of personal separation on the grounds of adultery, excesses, cruelty, threats and grievous injury. The wife alleged that problems between them escalated upon the birth of their son. Allegedly, when the daughter was born the husband requested a paternity test and never exhibited any interest in her. Besides, the father was holding his son in a way that the applicant could not talk to him except in the morning and during the night. It was determined that

³⁴ *AB vs CB*, Civil Court, Family Section, per Mr Justice N.Cuschieri, 14 November 2006

³⁵ *AB vs CDB*, Civil Court, Family Section, per Mr Justice R.G. Mangion, 24 November 2016

the boy used to stay with his father in the matrimonial home while the mother stayed with her parents to avoid trouble. There was no communication between the mother and her son and every time she managed to reach him the boy would tell her that he couldn't talk to her. These allegations made by the mother instigated the court to delve into the theme of parental alienation, quoting English jurisprudence³⁶:

“Where ... the court has the picture that a parent is seeking without good reason, to eliminate the other parent from the child, or children's lives, the court should not stand by and take no positive action. Justice to the children and the deprived parent ... require the court to leave no stone unturned that might resolve the situation and prevent long term harm to the children.”

The court, attributing the fault to both parties, agreed with the psychologist's evaluations that both spouses were incapable of carrying the responsibilities that marriage entails and that this has led them to resent each other with the ultimate result of permanently damaging the children's psychological development. Finally, with regards to its order of split custody it affirmed:

“Din il-Qorti, hija tal-fehma illi z-zewgt itfal, izda speċjalment it-tifel li huwa ikbar u li ghex is-separazzjoni turbolenti tal-genituri tiegħu f'eta` ikbar meta seta` jifhem u jgharbel certu affarijiet, għandu bżonn l-ghajjnuna sabiex jerga` jibni rrelazzjoni ma' ommu mingħajr l-ostilita` u r-riżentiment li qieghed iħoss lejha...

Il-Qorti tqies ta' importanza primarja li tohloq bilanc fejn ix-xewqat tal-minuri jigu rispettati u fl-istess hin l-aħjar interess tagħhom jigi salvagwardjat. Hija għalhekk konvinta li f'dan l-istadju, l-interess suprem taz-zewg minuri E u F, anke bi preparazzjoni għal adolexxenza sana, jiddetta illi l-kura u l-kustodja ta' E għandha tigi assenjata lill-konvenut, filwaqt li l-kura u l-kustodja ta' F għandha tigi fdatha f'idejn l-attrici. Dan qed jigi deciz f'tentattiv estrem sabiex il-partijiet ikunu jistgħu jahdmu individwalment fuq ir-relazzjoni tagħhom maz-zewg uliedhom, kif ukoll sabiex il-minuri F tiddistakka ruhha mill-influwenza qawwija li għandu

³⁶

M (Children) (contact: Long term Best interests) [2005] EWCA Civ 1090; enunciated by Ward LJ

*fuqha huha E, illi tidher illi hija r-raguni principali tar-relazzjoni xejn
tajba illi hija ghandha prezentement ma' ommha”³⁷*

³⁷ “This court, is of the opinion that both children, but mostly the boy who is the oldest and who has experienced his parent’s turbulent separation at an older age and is thus more able to understand certain issues, needs help to rebuild his relationship with his mother free from the hostility and resentment he feels towards her ... The court deems it particularly important to strike a balance between respecting the minor’s wishes and safeguarding their supreme interests. It is therefore convinced that at this stage, the supreme interest of the two minors E and F, in preparation of a sane adolescence, dictates that care and custody of E be assigned to the defendant, whereas the care and custody of F be entrusted to the applicant. This is being decided, in an extreme attempt, so that the parties are able to work individually on their relationship with their children, and so that the minor F distances herself from her brother’s strong influence, which seems to be the main reason behind the faulty relationship which she has with her mother”

SECTION 4

THE DETERMINING FACTOR PAR EXCELLENCE: ‘THE BEST INTEREST OF THE CHILD’ PRINCIPLE

4.1 The Traditional Position & ‘Gender Wars’ – Has The ‘Tender Years Doctrine’ Been Rendered Obsolete?

Roman law and early Maltese law conferred ‘*patria potestas*’ on the father and this had a great bearing on child custody. Eventually, this paternal preference was replaced by a maternal preference. For many years, the prevalent belief dominating Maltese law was of the father being the breadwinner and the mother being the primary carer, nurturing the children at home. This situation gave rise to the ‘Tender Years Doctrine’. As provided by the California Law Review³⁸, this doctrine “ ... embodies a presumption that a mother's care is ordinarily in the best interests of a young child”.

This ‘tender years’ presumption was present even in the civil code. Prior to the 1973 amendments, Article 55 used to say that during the pendency of an action for separation, children who have not yet attained the age of three years shall be left in the mother's custody. In assuming that young children's interests are best served by remaining with their mothers, the role of the father in the child's development was relatively undermined. This gave rise to a lot of criticism and the need for amendments was well-needed. Consequently, the 1993 amendments to the civil code were introduced, bestowing equal rights upon both spouses. Following these amendments, custody disputes started to be decided in terms of the fundamental principle of the best interest of the child rather than on the parent's gender. This situation has given rise to what are known as ‘gender wars’, where the two sexes fight for the custody of their children. Yet, it is ultimately up to the judges to choose the fittest parent to be awarded custody depending on the child's needs and wishes. On this note, in the English case ‘*Finlay vs. Finlay*’, of 1925, it was decreed that it is the judges' responsibility to exercise their power as a “wise, affectionate and careful parent” to make decisions which are in the child's best interests³⁹. With the sudden shift from maternal preference to the best interests' standard, joint custody arrangements were rendered indispensable.

In Malta, although the court's focus has mostly been shifted to the best interests of the child, the ‘tender years’ doctrine is still indirectly applied in some suits. In ‘*Ronald Apap*

³⁸ Ramsay Laing Klaff, 'The Tender Years Doctrine: A Defence' [1982] 70(2) California Law Review, 335

³⁹ Marsha Kline Pruett PhD, MSL, Kathy Hoganbruen PhD & Tamara Jackson MA, 'The Best Interest of the Child, Journal of Divorce & Remarriage', [2000] 48

vs *Rubie Ritchie*', delivered in 1995, not only did the court confirm the 'tender years' doctrine but it also stated that the best interest of children of a tender age lies with the mother. In the recent case 152/200⁴⁰ the Court pronounced the mother's right to have custody of the young children particularly since she has always been the one to rear and care for them. The statement of the judges is worth quoting in this context:

*“mhuwiex fl-interess aħħari tal-istess minuri li l-kura u l-kustodja tagħhom tiġi fdata f'idejn il-konvenut rikonvenzjonanti missierhom meta ex admissis ma għandux il-ħin għalihom, speċjalment tenut kont tal-fatt li l-minuri għandhom ta' eta' tenera”*⁴¹.

The last sentence of the quote may be assimilated with the Chief Justice's statement in a 1996 Australian case⁴² :

“a father, who has not performed the role of a primary caregiver of young children in the past, could never be awarded custody”.

Case 269/2014⁴³ presents an exception because despite the child's tender age, the father was granted care and custody. It is worth noting, however, that this decision was only reached after the court was convinced that the mother is an entirely unsuitable parent. For instance, evidence was presented showing that when in her mother's presence, the baby is denied her basic needs.

This shift towards joint custody reflects the necessity of father's involvement on the children's development post-familial breakdown. This has been reflected in Maltese parliamentary debates. On this issue, the fourth report of the eleventh legislature specifically on 'The Effects of the Father's Absence in the Children's Life' highlighted that in all situations, care and custody should ideally be joint⁴⁴. According to the family therapist accompanying the Committee of Ministers, the role of the father compliments that of the mother and cannot be substituted in any way. It finally asserted that:

⁴⁰ AB vs CB, Civil Court, Family Section, per Justice J.Azzopardi, 23 October 2015

⁴¹ *“It is not in the minor's interests that their care and custody be entrusted to the defendant, their father, when ex admissis he does not have the time for them, especially considering the fact that the minors are still of a tender age”*

⁴² R v. B, Australian Full Court, 1996

⁴³ LX vs AP, Civil Court, Family Section, per Justice R.G. Mangion, 31 January 2017

⁴⁴ Ir-Raba' rapport tal-Ħdax -il Legislatura, 'Ir-rwol tal-missier u l-familja: Għaliex ir-rwol tal-missier huwa uniku u għandu jkun apprezzat aktar: l-effetti ta' nuqqas tal-missier fuq it-tfal', December 2009, p. 26 available at <<https://parlament.mt/media/82992/report-no-4-l-effetti-tan-nuqqas-tal-missier.pdf>>

“hi x’inh i r-relazzjoni bejn l-omm u l-missier, ir-rwol tal-missier huwa uniku, u kull inizjattiva ghandha tkun mahsuba sabiex tippreserva r-rwol tal-missier u tippromwovi l-prezenza u l-hajja attiva tieghu mal-ulied u fil familja. B’hekk it-tfal ikollhom trobbija ideali u tigi mnaqqa t-tbatija ta’ meta l-missier ma jkunx prezenti f’hajjet it-tfal”⁴⁵.

4.2 Defining ‘Best Interest’ In Light of Jurisprudence

Evidently, the allocation of child custody and access are guided by ‘The Best Interest of the Child’ principle. This means that whenever a legal and/or physical custody dispute arises before the court, the judge is constrained to decide in the best interest of the child irrespective of the parent’s wishes. As enunciated in *“Darmanin vs Cassar”*,⁴⁶

“... meta tigi biex tiddecidi dwar kura u kustodja ta’ minuri, il-Qorti ma ghandhiex tkun iddettata u kondizzjonata mill-meriti u dimeriti tal-partijiet ‘ut sic’ izda biss x’inh i l-ahjar interess tal-minuri”⁴⁷.

The term ‘best interest of the child’ connotes myriad implications. Maltese law does not provide a clear definition of this principle because the interests of each individual child vary from one case to another. However, Article 56(1)⁴⁸ of the Civil Code specifies that *“on separation being pronounced the court shall also direct to which of the spouses custody of the children shall be entrusted, the paramount consideration being the welfare of the children”*. The term ‘welfare’ includes physical, social, intellectual and moral welfare as evidenced in the aforementioned *“Cauchi vs Cauchi”* judgement where it was stated that the court must interpret the best interests of children broadly to include their physical and psychological health. Besides, as pointed out by the English High Court of

⁴⁵ ibid p.5, “whatever the relationship between mother and father, the role of the father is unique, and every initiative shall be well-thought so as to preserve the father’s role and promote his presence and his active life with his children and family. This way children will have an ideal upbringing and the hardships caused by the non-presence of the father will be minimised”

⁴⁶ *Mario Darmanin vs Annalise Cassar*, Court of Appeal, 31 October 2004

⁴⁷ “When deciding on care and custody, the court should not be dictated and conditioned by the merits and demerits of the parties ‘ut sic’ but only by the children’s best interests”.

⁴⁸ This article has already been referred to in Section 3

Justice, “the best interest of the child’ principle dictates that the welfare of the child must be viewed “in the short, medium and long term”.⁴⁹

Article 56(1) grants the court considerable discretion to decide to which parent custody should be entrusted. It is not only appropriate, but also imperative that the law endows the court with such discretion because there can never be any fixed law that dictates the outcome of every single case. In fact, our courts have always determined custody cases on a case-by-case basis. For instance, in two parallel cases; ‘John Cutajar vs Amelia Cutajar et’⁵⁰ and ‘Maria Dolores Scicluna vs Anthony Scicluna’⁵¹, it was held that:

*“il-prinċipju dominanti ‘in subjecta materia’ huwa dak tal-aktar utilita’ u dak tal-aqwa vantaġġ u nteress tal-istess minuri fl-isfond taċ-ċirkostanzi personali...”*⁵²

Even in early case-law, the Maltese courts advocated this principle. For instance, in an 1858 judgement in the names of ‘Lawless vs. Lawless’⁵³, the Court had stated:

*“la cura ed educazione dei figli, nel caso che la moglie non continua ad abitare col marito, deve essere commessa ed affidata a colui, fra i conjugi, che si riconoscerà’ piu atto ed idoneo a curarli ed educarli, avuto riguardo alla loro eta’, ed a tutte le circostanze del caso – sotto quei provvedimenti, che si reputino spediti pel vantaggio di tali figli”*⁵⁴.

Later, in a 1998 judgement⁵⁵, the civil court enunciated this principle whilst highlighting that it is the court’s duty not to allow the children to be caught in their parent’s crossfire:

“The Court should at all times seek the best interest 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 truth. This is why it

⁴⁹ EWHC 1948 (Fam) [2012] Case Number: MA11P00521

⁵⁰ Civil Court, First Hall, 28 January 1956

⁵¹ Civil Court, First Hall, per Onor Justice RCP, 27 November 2003

⁵² “The dominant principle ‘in subjecta materia’ ... is that of the greatest utility and best advantage and interest of the minors in light of the personal circumstances and ‘de facto’ ”

⁵³ Susan Ellen Lawless vs Il Reverendo George Lawless, Civil Court, First Hall, 8 December 1858

⁵⁴ “The care and education of children, where the wife no longer lives with her husband, shall be entrusted to him, among the spouses, who is more fit and suitable to treat and educate them, having regard to their age, and all the other circumstances of the case, in the children’s benefit”.

⁵⁵ Sylvia Melfi vs Philip Vassallo, Civil Court, First Hall, 25 November 1998.

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.”

4.3 A Comparative Analysis on The Principle: The Paramountcy Principle Under English Law & ‘The Welfare Checklist’

The ‘best interest of the child’ standard possesses worldwide recognition. The predominant legal standard for allocating custody under English law is the paramountcy principle. This principle encompasses a scenario where the child’s welfare is afforded paramount consideration and the interests of parents are subordinated to those of the children. Lord McDermott highlighted that this principle “*connote[s] a process whereby when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child’s welfare*”⁵⁶. Likewise, in *Re O (Contact: Imposition of Conditions)* of 1995, the Court reaffirmed that:

“The court is concerned with the interests of the mother and the father only insofar as they bear on the welfare of the child ...

Thus, the law’s rendering of the paramountcy principle is individualistic. Hence, the welfare of the child is viewed without consideration for the welfare or interests of the rest of his or her family, friends and community”.

Initial attempts to promote the welfare of children trace back to 1989, when the UK Children’s Act was introduced. The very first section provides that, in regulating issues relating to the child’s upbringing, the administration of children’s property or the operation of any income arising therefrom, the Court shall give paramount consideration to the child’s welfare.

⁵⁶ *Re KD (Wardship: Termination Of Access)* [1970], 710-711.

The paramountcy principle has been critically scrutinized. In particular, it has been criticised for coming into conflict with Article 8 of the European Convention on Human Rights granting the right to respect for private and family life. Whereas the latter is based on rights, the former is solely concerned with child-welfarist principles. This critique became even stronger with the implementation of the 1998 Human Rights Act which transposed Convention rights into UK law. Notwithstanding, both principles are significant for children's development and albeit the paramountcy principle's utilitarian foundations, the two principles should not be hindered from co-existing.

Section 1(3) of the Act lists a number of criteria, collectively known as 'The Welfare Checklist' in order to ensure that the Courts are constantly acting in the best interest of the child. These criteria *shall* be applied by the courts in the circumstances listed under the fourth paragraph namely, during the court's consideration whether to "*make, vary or discharge a section 8 order*" or an order which is "opposed by any party to the proceedings" as well as during the court's consideration whether to "*make, vary or discharge an order under Part IV*". This 'Welfare checklist' includes the following:

- "(a) the ascertainable wishes and feelings of the child concerned;*
- (b) his physical, emotional and educational needs;*
- (c) the likely effect on him of any change in his circumstances;*
- (d) his age, sex, background and any characteristics of his which the court considers relevant;*
- (e) any harm which he has suffered or is at risk of suffering;*
- (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;*
- (g) the range of powers available to the court under this Act in the proceedings in question."*

This checklist is not hierarchical. Even though the child's wishes are on top of the list, they do not take prevalence over the other criteria. Indeed, these criteria should be analysed separately and it is not any one individual criterion which takes paramountcy but the totality of the children's welfare. The "wishes and feelings of the child" has been subject to myriad of criticism because children, if being given a choice vis a vis their family's breakdown, are likely to wish for their parents to stay together. Therefore, in

practice, the children's wishes cannot truly prevail. By allowing them to choose with which parent they want to reside, the court would be imposing upon them a burden which is greater than they can bear. Moreover, in terms of section 1(5), the Court shall refrain from making any orders unless it is satisfied that it is "*better for the child than making no order at all*".

Although originally hailed by Lord Chancellor Mackay as "*the most comprehensive and far-reaching reform of child law ... in living memory*"⁵⁷, the Children's Act is not the only reform which English law required. Indeed, in 1996, the UK adopted the (UK)Family Act. Article 11(4) of this Act imposes upon the court a similar 'welfare checklist' which the court is bound to follow during separation or divorce proceedings.

⁵⁷ Nspcc factsheet, 'An introduction to child protection legislation in the UK' [May 2012] 1(1) Child Protection Factsheet, 2

SECTION 5

THE BEST INTEREST OF THE CHILD VIS A VIS THE FATHER'S RIGHTS: REPURCUSSIONS

5.1 The Ways In Which This Principle Comes Into Conflict With The Father's Rights

There can be no doubt that 'the best interest of the child' principle is crucial for the determination of custody disputes. However, for many years the tendency of the courts has been, and still is to a certain extent, to give preference to the mother, to the prejudice of the father. In most cases, the courts justify such preference by arguing that custody should be entrusted to the mother for the simple reason that the father spends most of his time at work. Indeed, in a relatively recent judgement⁵⁸, Judge Azzopardi concluded that the children must be placed in their mother's care since the father works long hours. This issue raises a lot of controversy and puts the concept of gender equality in serious doubt especially at a time when the number of women participating in the labour market is constantly on the increase.

For instance, in the above-quoted 1956 judgement⁵⁹, the Court did not honour the father's application to be given custody. Instead the Court decided that it was in the best interest of the girl to migrate to Australia with her mother. The father's argument that migration would not be in his daughter's best interest because Australia is a non-Roman Catholic country was deemed to be irrelevant. Although the court recognised that contact with the father would be next to impossible it juxtaposed this with the advantageous implications of migration for the minor child. The court took into account that in Australia the girl would have greater job and educational opportunities. Yet the main argument of the court revolved around the fact that custody could not be given to the father because he worked all day and if the girl were to reside in Malta, the court would have to assign her to a children's institution.

⁵⁸ *AB VS CB*; Civil Court, Family Section, per Onor J.Azzopardi, 23 October 2015, quoted under 'The Tender Years Doctrine' section.

⁵⁹ *Cutajar vs Cutajar*, quoted above

5.1.1 Allocation of The Matrimonial Home

The allocation of the matrimonial home is an area in which the father being the non-custodial parent may suffer prejudice. The determination of which spouse shall be awarded custody often has a bearing on the allocation of the matrimonial home. Since the courts put the interest of the children above those of the parents, courts are generally reluctant to remove the child from the matrimonial home. Thus, the custodial parent often enjoys the right to reside in the matrimonial home to the exclusion of the other parent irrespective of whether the property is paraphernal or whether it forms part of the community of acquests.

Article 55A of the civil code which deals with the allocation of the matrimonial home following separation proceedings appears to be neutral but seeing that custody is more awarded to the mother than the father, the father is most likely to be the one evicted from the matrimonial home. Besides, the father's prejudice is even more evident when the home happens to be his paraphernal property.

5.1.2 The Non-Cessation of The Obligation to Pay Maintenance

The present writer opines that one can hardly speak of the children's welfare without addressing the issue of maintenance. Article 54(2)(a) of the Civil Code stipulates that when it comes to fixing the amount of maintenance due to children in a situation of separation the court shall act in the best interest of the child. In terms of the amendments brought forward by Act XIV of 2011, parents are duty-bound to maintain their children till the age of twenty-three if the children are participating in full-time education. Article 57(1) goes on to say that "Whosoever may be the person to whom the minor children are entrusted, the spouses shall maintain their right to watch over their maintenance and education...". Although it appears that both spouses are expected to financially contribute to their children's maintenance, it is usually only the non-custodial parent, normally the father, who will be required to effect payment. Even when joint custody is awarded, maintenance is usually paid to the spouse with whom the children are residing, which in most cases happens to be the mother as has been discussed earlier in section three.

When the father happens to be the losing party in a custody suit he suffers twice the prejudice. Not only is he denied custody but also his obligation to supply maintenance does not cease. The law justifies this by reference to the best interest of the child. In having to apportion a considerable amount of his income to the mother, the non-custodial father might feel that his paternal role has been diminished to one which is measured in terms of money. What's more the father's duty to keep supplying maintenance subsists even if the mother denies him access to the children. Indeed, in a 2001 judgement, '*Pulizija v. Bigeni Carmelo*'⁶⁰, the court confirmed that the father's refusal to supply maintenance cannot be justified by arguing that the mother failed to honour the court's decision to give him access.

5.1.3 The Right to Modify Custody Orders and Arrangements

The right to modify a custody order issued by the court or a custody agreement reached between the parties appertains to both parents equally. This right is enshrined in Article 56(4) of the Civil Code which empowers the court to "*revoke or vary such directions respecting the children*", at any time, "*where the interests of the children so require*". Article 61 affords the same rights to parents having privately concluded a custody agreement. The court may, at any time, annul such agreement upon the demand of one of the parents or their relatives only where it is in the best interest of the child.

Although the legislator wanted to provide parents with a possibility to demand changes if they might feel aggrieved by a custody order or intimidated into reaching an agreement, the legislator did not want this right to be absolute. Rather, the law subjects this right to the best interest of the child. This was elucidated by the Court in case 201/2004⁶¹ whereby it was stated that whilst it is true that a contract is law between the parties and *pacta sunt servanda*, the court has the obligation to alter its terms if the best interest of the child so requires. The Court quoted from "*Mario Galea vs Maria Concetta Galea*"⁶²:

"...l-interess tal-minuri jibqa' suprem u ghalhekk nonostante kull ftehim li jista' jkun hemm bejn il-partijiet dwar il-minuri jista' jigi annullat mill-Qorti jekk 'hekk

⁶⁰ Court of Criminal Appeal, 6 March 2001

⁶¹ '*A vs B*', Civil Court, Family Section, per Judge R.C.Pace, 16 March 2005

⁶² Case 1168/99; per Mr Justice R.C.Pace, 2 October 2003

*ikun mehtieg għall-gid tal-minuri' u dan skond id-dispozizzjonijiet tal-artikolu 61 tal-Kap.16.”*⁶³

It is curious to note that in most of the cases where article 56(4) was invoked, the request for modifying custody orders was made by the father. This does not reflect well on the idea of this right being an equal right. In a not too remote judgement, '*Vucinovic vs Vucinovic*'⁶⁴, the Court did not accept the father's request for an increase in access, arguing that unless the father improves his behaviour, he should not be permitted to have access. Article 56(4) was applied by the court in the ambit of consensual separation in '*Debattista vs. Cutajar*'⁶⁵ where the court revoked the previous custody order in the best interest of one of the children. The spouses had consensually agreed on joint care and custody of both sons. The two children lived with their mother in England but spent summers in Malta with their father. One summer, one of the sons expressed his wish to remain in Malta with his father because he alleged that his mother's partner was aggressive. Considering the psychologist's report, confirming the child's statement, the Court stated that it is in the child's interest not to go back to England and gave the father full physical custody. What is interesting is that the court ordered the husband to provide his wife with money each year to visit the child in Malta. This illustrates that even when the court entrusts care and custody to the father, it may still burden the father in the name of the child's principal interests.

5.2 The Veracity of Allegations Of Child Abuse Or Domestic Violence Surfacing In Child Custody Proceedings In Light Of Maltese Jurisprudence

In child custody proceedings, it is quite common for the legal system to become a symbolic background for the continuation of the domestic violence⁶⁶. Custody, together with child maintenance and access become nothing more than primary issues of

⁶³ "the minor's interest remains supreme and therefore notwithstanding any agreement which may exist between the parties regarding the minors may be annulled by the court if 'such is required for the minor's welfare' and this according to the disposition of article 61 of chapter 16"

⁶⁴ *Lorraine Vucinovic pro et noe v Radislav Vucinovic*, Court of Appeal, per Mr. Justice J. S.Pullicino, 4 December 1998

⁶⁵ *Godfrey Debattista pro noe v Dr. Anthony Cutajar et noe*, Civil Court, First Hall, per Mr. Justice A. J. Magri, 6 October 1997

⁶⁶ J. Bow & P. Boxer, 'Assessing Allegations of Domestic Violence in Child Custody Evaluations' [2003] 18(12), *Journal of Interpersonal Violence*, 1395.

domination for the perpetrator of violence. Perpetrators are masters at refuting and minimising the victim and at conveying a non-abusive picture. They can easily project themselves as loving people to the court. That being said, custody evaluators face multiple difficulties when attempting to ascertain the veracity of abuse allegations.

Child abuse ranges from physical, neglect, psychological, maltreatment, and sexual abuse⁶⁷. Article 2 of the ‘*Domestic Violence Act*’⁶⁸ defines domestic violence as:

“any act of violence, even if only verbal, perpetrated by a household member and includes any omission which causes physical or moral harm to the other”.

Whenever allegations of domestic violence or child abuse are made by the parties during child custody proceedings, the Court will have to be extremely vigilant because parents often cook up false allegations with an intention to deprive the other parent of custody. Because the well-being of the child is a primary consideration and because the child might be in danger, the Court should never reject an allegation without having investigated it. Besides, the alleger must substantiate his allegations by bringing convincing proof to the satisfaction of the court. Otherwise, such allegations would easily be eliminated. For instance, in case 20/2002/1⁶⁹, allegations brought against the father for sexually abusing his daughter had to be discarded since there existed factual considerations which seriously weakened their veracity. The Court acknowledged the applicant’s constant denial that he had ever sexually abused his daughter, the negative result of the forensic tests carried out on the girl’s underwear and the existence of the defendant's influence on the girl which could have impelled her to believe that she had been abused.

To limit these cases, many states have enacted statutes rendering false allegations punishable. In a case delivered by the Kansas’ Court of Appeal in 1996⁷⁰, the mother, during proceedings designed to modify their joint custody arrangement, falsely accused the father of sexually abusing the children. The Court sanctioned her thousands of dollars for failing to substantiate her allegations on reasonable grounds. The investigator

⁶⁷ Sage Publications, ‘APRI National Center for Prosecution of Child Abuse, Investigation and Prosecution of Child Abuse’, [2004] 3, *Sage Publications*, 5-10.

⁶⁸ Chapter 481 of the Laws of Malta

⁶⁹ *ABC vs DBC*, Civil Court, Family Section, per Mr. Justice N.Cuschieri, 24 February 2011, p.7 available at <justiceservices.gov.mt/courtservices>

⁷⁰ Casemine, ‘In Re Marriage of Stockholm’ [2017] available at <<https://www.casemine.com/judgement/us/59148266add7b04934495322>>

appointed independently by the Court found no evidence of abuse and she had disregarded her attorney's warning not to make the accusations.

In case 201/2004⁷¹, allegations of neglect and of '*infringing on the minor children's intimate space*' were brought against the father of twin daughters. The mother accused the father of sexual abuse for rubbing cream on one of the girl's intimate part. It transpired that the mother's intention was to deprive him of access. The parties, consensually separated, had agreed that the mother shall have custody and the father shall have access. Problems arose when the time of access clashed with classes which the applicant had to attend as part of his work programme, which although not compulsory, were indispensable for his career. The applicant reached an amicable agreement with the defendant to alter the time of access, but it did not last long. The court considered that an agreement to vary access hours, in the interest of both daughters, could have easily been achieved but the defendant was determined not to cooperate. Not only did she fail to honour their amicable agreement, but she had also failed to attend mediation sessions.

It was clear that:

*"hija allegat diversi affarijiet fil-konfront tal-attur li ma gewx ippruvati. Per eżempju hija ssostni li t-tfal wara l-access imorru d-dar mahmugin u bil-guh, allegazzjoni li ma' gietx ippruvata pero' sadanittant dak inhar fejn wara l-access baqghet hierga bihom ma hasbithiex darbtejn u din hija evidenza cara li dak li qalet mhux minnu"*⁷².

The court concluded that in attempting to disallow the applicant from accessing his children, the defendant did not act in the children's interest which includes having a good relationship with their father. It further stated that the ongoing bicker between the parties does not do any good for the offsprings and increased the hours of access accordingly.

⁷¹ 'A vs B', Civil Court, Family Section, per Mr. Justice R.C.Pace, 16 March 2005, <justiceservices.gov.mt/courtservices>

⁷² "she alleged several things against the plaintiff which have not been proved. For example she claimed that after access the children return home dirty and hungry, an allegation which has not been proved yet on the same day after access she went out with the children without thinking twice and this is clear evidence that what she said is not true"

In the recent case 51/2013⁷³, in a counterclaim put forward by the father to be awarded sole custody of his four-year-old daughter, following the mother's allegations of abuse and corruption on his part which transpired to be false, the Court held:

“L-imgieba tal-attrici hija tali illi ma ghandhiex tigi affidata bil-kura u kustodja esklussiva tat-tifla minuri W. L-attrici holqot allegazzjonijiet foloz u serjissimi fil-konfront tal-konvenut fis-sens illi huwa kien b'xi mod abbuzza mit-tifla W. Propju ghaliex dawn l-akkuzi huma serji u foloz u servew sabiex ghal dawn l-ahhar erba xhur skorruti, il-konvenut ma rax aktar lil bintu, l-istess konvenut jissottometti illi persuna illi tasal biex tallontana tifla ckejkna mill-imhabba, l-kura u l-attenzjoni ta' missierha ... ma ghandha qatt tigi fdata bil-kustodja tal-istess tifla”⁷⁴.

Following the parties' break-up, the defendant married another woman. He stated that ever since he got married, his rapport with his daughter changed due to the girl's perception that this marriage is responsible for all arising disputes. The father asserted that the mother's police reports that he was corrupting the minor and was showering with his daughter were false.

Judge R.G. Mangion referred to the 2013 decree in which the Court observed that there was no proof on a level of probabilities that the defendant had abused of the minor child and proceeded to nominate a social worker with a view to reconnect the defendant with his daughter following an absence of almost six months. The court attributed the fault to both parties. In fact, it went on to say that the parties are so blinded by animosity towards each other that they are failing to see the damage which they are causing to their children; the same children whom they are supposed to protect. Both parties are incapable of communicating in a civil manner as evidenced by the various appeals presented by them, requesting variations of *pendente lite* decrees and accusations of decree violations. Nevertheless, the Court observed that the applicant was more to blame as she had failed to accept that her relationship with the defendant has ceased. In light of these

⁷³ ZP vs. AFSR, Civil Court, Family Section, per R.G. Mangion, 28 February 2017 <justiceservices.gov.mt/courtservices>

⁷⁴ “The way the plaintiff is behaving shows that she shouldn't be entrusted with the exclusive care and custody of the minor daughter W. Plaintiff made up false and serious allegations against the defendant in the sense that he had in some way abused of the girl W. Precisely because these allegations are serious and false and have resulted in the defendant not seeing his daughter for the past four months, the defendant submits that a person who goes as far as to deprive a young girl from the love, care and attention of her father ... should never be entrusted with the custody of that girl ”

circumstances, Judge G.Mangion feared that an order for exclusive custody may cause the minor to be alienated from the other parent and awarded joint custody.

On the same day, Judge Mangion passed a similar judgement⁷⁵ in which the father, an Austrian citizen, propounded that the mother's allegations regarding drinking, pornography, prostitution, neglect, court decree violations and negligence towards the daughter's needs are simply rumours maliciously fabricated by the mother. In view of the mother's false allegations, the father asserted that an order awarding sole custody to the mother would not be in his daughter's best interest. However, the Court, after assessing the evidence, decided that it would be best for the daughter to reside with her mother like she always did and that decisions concerning health, education and travel should be taken by the mother *qua custodial parent* since the father resides in Austria and communication between them is scarce.

Having said that, albeit the mother's false allegations, the court still granted her sole custody because ultimately the court's priority is the child's best interest. This judgement brought to light the significance of timely decisions, declaring that the prolongation of decisions resulting from the lack of agreement between the parents or the difficulty to communicate with the father, wouldn't be in the minor's interest

5.2.1 What Is The Truth?

The aim behind this section is to examine whether gender issues surfaced in judgements where allegations were either false or not verified. Most notably, in the vast majority of cases examined, the mother was the accuser of abuse.

In custody proceedings, the continued belief is that false allegations are probable and thus the truth becomes very hard to find. In fact, most cases are labelled by the court as 'unsubstantiated', that is to say not that the abuse did not occur but rather that the abuse could not be proven. Although many cases containing accusations of abuse against the father are true, there have been multiple cases where such allegations were declared absolutely false, having the objective to disrupt the father's lawful contact with the

⁷⁵ 'ESL v XPW', Civil Court, Family Section, per R.G.Mangion, 28 February 2017, <justiceservices.gov.mt/courtservices>

children. The present writer observes that the court does not distinguish between the parents' gender and considers these lies to be an indication that the lying party does not have the best interests of the child at heart but simply wishes to manipulate the situation for personal gain.

The present writer does not intend to generalise, but an examination of the above case-law illustrates that women in custody battles often make up or exaggerate claims of violence to increase their chances of getting custody. Fathers' rights groups have propounded that the main villains present in cases involving false allegations against the father are "*the Family Court, which is in the thrall of the feminist lobby, and the vindictive mothers who will do anything to prevent a dad from seeing his children*"⁷⁶. Notwithstanding this strong father group's opinion, jurisprudence has shown that sometimes fathers do make false allegations against the mother especially when they know that there is little chance that they will be awarded custody.

⁷⁶ Angela Wylie, 'Trouble in the Family Court' (*The Monthly*, November 2015) <<https://www.themonthly.com.au/issue/2015/november/1446296400/jess-hill/suffer-children>>

CONCLUSION

In this closing section, apart from summarising the salient findings emanating from this research, the author delves into the way these findings contribute to the readers' understanding of the research topic. The principal question generates further sub-questions chiefly: how often does the court award custody to the father? For the sake of determining whether the father is being prejudiced in the name of his children's best interests, the present writer conducted statistical research to trace the court's tendency in awarding custody orders. The statistical findings, attached to Appendix A, reveal that for 63% of the randomly selected cases covering periods 2009-2013 exclusive custody vested in the mother whilst only 16% of the cases granted sole custody to the father. For periods 2014-2018, the percentage of sole custody decisions in favour of the mother dropped to 61% whilst the percentage of sole custody to the father remained at 16%.

A general observation was that despite increased gender equality, fathers are still not the preferred custodial parent. Conversely, most of the cases declaring that the mother shall be the exclusive custodial parent are the result of both parents agreeing between themselves to that effect. Naturally, this raises the question as to how there can be gender bias towards mothers when such custody decisions are made without interference from the family court. The author deduced that certain fathers are unwilling to change their role of non-custodial parents and readily accept visitation rights without protest. Notwithstanding, the father is awarded exclusive care and custody under exceptional circumstances; only where the best interest of child so requires, such as when the mother had abandoned the children, when the mother lost all interest in the children or when she was declared unfit by the court due to some mental illness.

The present writer observed that the percentage for joint custody decisions (19% for both set of periods) is higher than the percentage for sole custody to the father. Although the percentage for joint custody orders remained static for both periods, which was quite surprising, a general observation was that the court is very reluctant to order joint custody arrangements when the parties are unable to civilly communicate and cooperate. The reason is that a joint custody order under such circumstances would not be in the child's best interest. Besides, in joint care and custody cases, the court usually rules that the children shall reside with the mother whilst the father shall have access rights. This proves that even though joint custody arrangements have increased, the mother is still the preferred residing parent.

What's more, in cases where the child has been residing with the mother *pendente lite*, the court is hesitant to alter the *modus vivendi* even if the father himself requests sole custody. The court argues that this change would defeat the child's best interest. Henceforth, in deciding that the child shall remain in the custody of the mother, the court fails to consider the implications on the father who would have suffered a prejudice to his custodial right. What's more prejudicial to the father's rights are those cases which take a substantial amount of time to reach a final decision with the consequence that children come of age. When this happens, due to a possible *de facto* determination of the issue, the father's protests are never resolved, further curtailing his relationship with the child.

The final observation is that many decisions affording sole physical custody to the mother were not backed by motivations for reaching that conclusion. After having thoroughly scrutinised the statistical findings, the author deduced that although there has been a fluctuation in the rate of cases in which the father received sole physical custody, the mother remains the favoured custodial parent. Whilst it is true that sometimes courts encroach on parental rights, it is held that this encroachment is the only way to safeguard the best interest of the child.

In conclusion to the term paper question as to whether the best interest of the child standard governing custody proceedings prejudices the father's rights, it is fair to state that, to a certain extent, it does. If the child's interest lies with the mother and if the father is only awarded sole custody when the mother is entirely unfit or absent, then there can be no doubt that the father is highly prejudiced. The father deprived of custody will more often than not lose his right to continue residing in the matrimonial home because removing the child therefrom would go against the child's best interest. Irrespective of whether the father is awarded custody or not, he is not released from the obligation to pay maintenance to the children. This transmits the idea that the father is merely the financial support provider. The case-law examined illustrates that determining what's "best" for the child is not an easy task for the court. There are many questions which must be asked by the court such as whether the criteria for determining the child's best interests are objective or whether they are based on the child's subjective wishes. Then again, the child's wishes can never truly be realised because if they could really choose they would want their parents to stay together. The sad reality is that sometimes the best interest standard fails the child.

What is particularly worrying is the supposition that fathers involved in custody battles can be deprived of their fundamental parental right solely to make the child's life more bearable. That is not to say, however, that the issue of child protection is to be taken lightly. Courts should take an adamant approach in keeping the children's best interest as the true compass of direction. Certainly, children should be safeguarded from abuse and neglect because their vulnerability renders them incapable of protecting themselves. This is why the court must be circumspect when determining the veracity of child abuse allegations in the context of custody proceedings.

All things considered, the child's best interest should not be achieved at the expense of the father's rights. When assessing what's best for the child, the court should be particularly attentive not to violate equal protection. It is recommended that, on a case-by-case basis, the court weighs what is believed to be in a child's best interest against the harm which the father will eventually endure and strike a fair balance between the two. In the balancing process, considerable importance should be affixed to the best interest of the child, which, depending on their nature, may override those of the parents. All children deserve to be treated as a priority. It is not something which should be dependent on their parent's exigencies. After all, children should not be treated as pawns in some ideological chess game, especially considering that pawns are the first pieces in a game to get knocked off.

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APPENDICES

APPENDIX A:

Custody for the years 2014-2018

		Frequency
Valid	Joint Custody	19
	Custody to the mother	61
	Custody to the father	19
	Split Custody	0
	Custody to third party	1
Total		100

Table 1: Frequency table for custody during the years 2014-2018

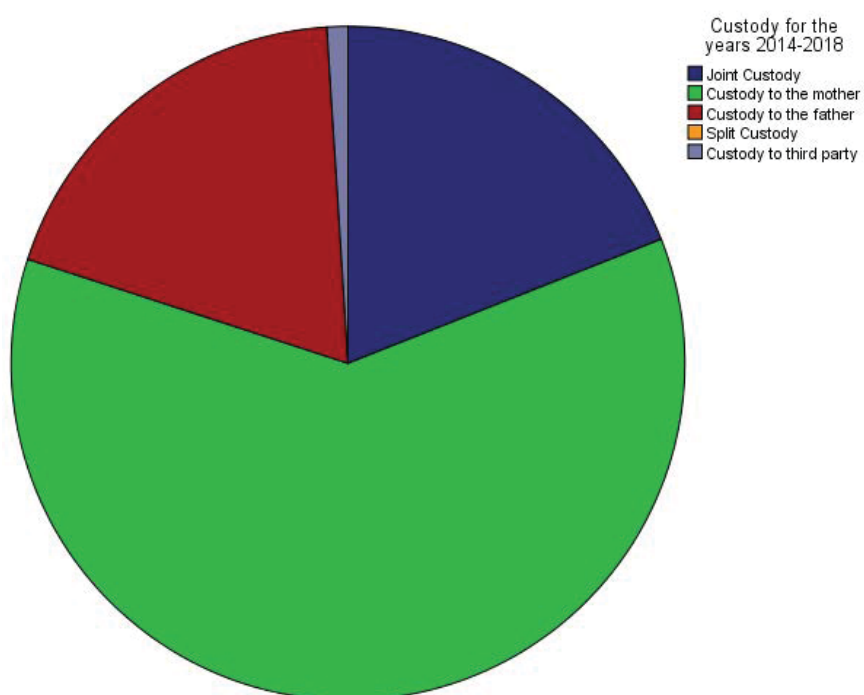


Figure 1: Pie chart for custody during the years 2014-2018

Custody for the years 2009-2013

		Frequency
Valid	Joint Custody	19
	Custody to the mother	63
	Custody to the father	16
	Split Custody	2
	Custody to third party	0
Total		100

Table 2: Frequency table for custody during the years 2009-2013

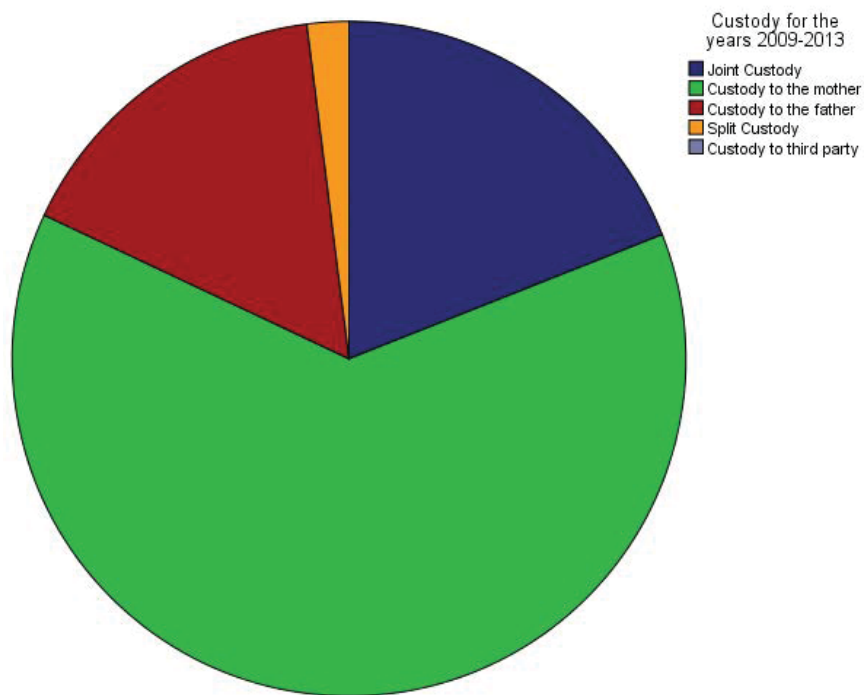


Figure 2: Pie chart for custody during the years 2009-2013

Custody for the years 2014-2018

Count		Years 2014-2018					Total
		2014	2015	2016	2017	2018	
Custody for the years 2014-2018	Joint Custody	3	2	5	6	3	19
	Custody to the mother	13	14	11	16	7	61
	Custody to the father	4	3	3	6	3	19
	Split Custody	0	0	0	0	0	0
	Custody to third party	0	1	0	0	0	1
Total		20	20	19	28	13	100

Table 3: Table showing the frequency of each custody over the years 2014-2018

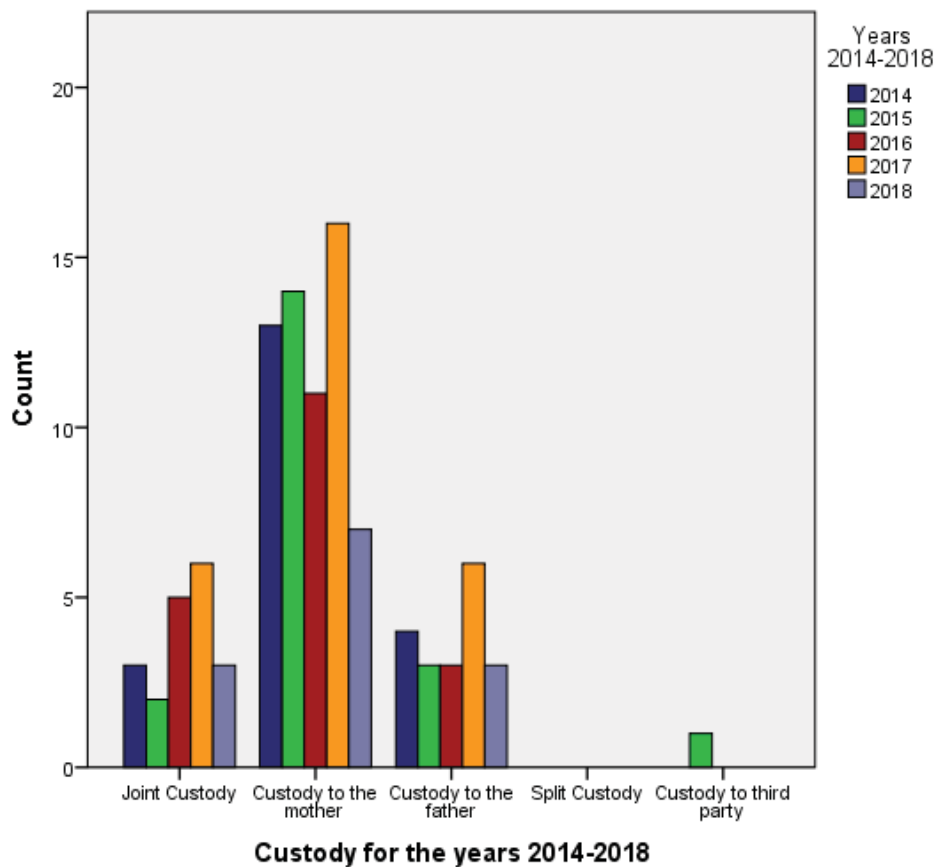


Figure 3: Bar graph showing the frequency of each custody over the years 2014-2018

Custody for the years 2009-2013

Count

		Years 2009-2013					Total
		2009	2010	2011	2012	2013	
Custody for the years 2009-2013	Joint Custody	2	4	4	5	4	19
	Custody to the mother	14	11	14	11	13	63
	Custody to the father	4	4	2	3	3	16
	Split Custody	0	1	0	1	0	2
	Custody to third party	0	0	0	0	0	0
Total		20	20	20	20	20	100

Table 4: Table showing the frequency of each custody over the years 2009-2013

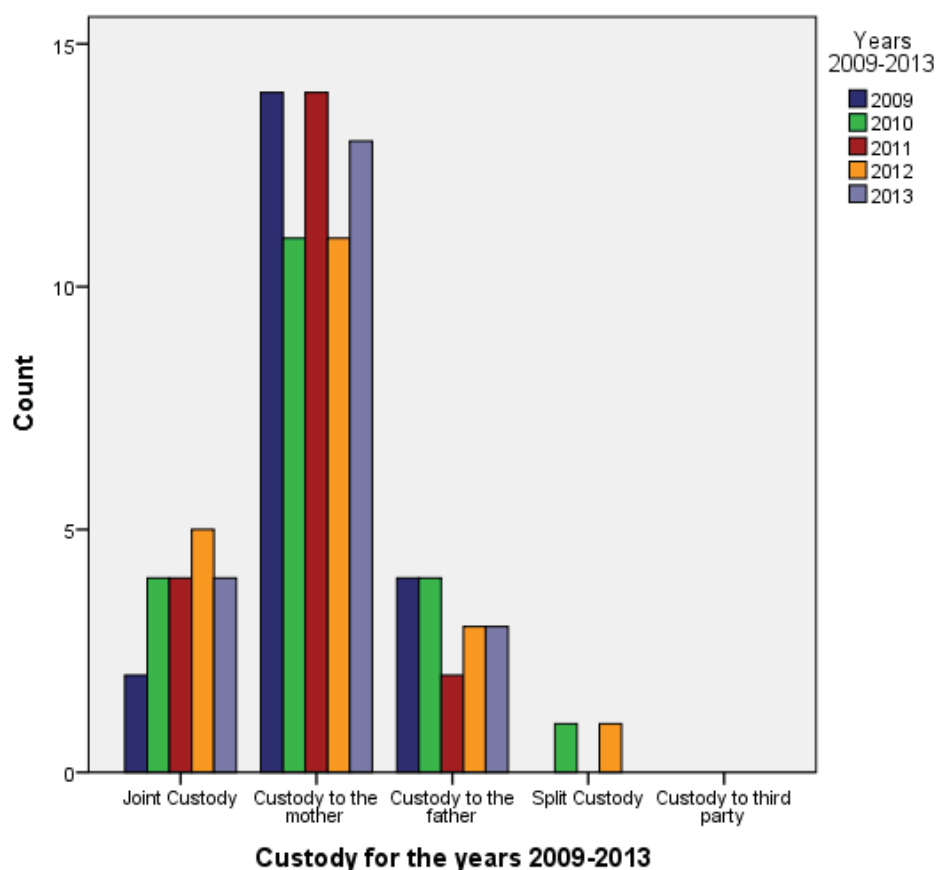


Figure 4: Bar Graph showing the frequency of each custody over the years 2009-2013