



Appendix 11

State Allocation of Maintenance in the Best Interest of the Child
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When dealing with maintenance we usually think of a sum of money a spouse owes the other following separation. Although this is the most common scenario in which maintenance is dealt with, maintenance can also be thought of as a series of obligations the state has towards its citizens, especially towards the children in its country. When speaking of state maintenance in connection to children, we are referring to the duty of the state to assist parents in need, to raise their children.

Children are amongst one of the most vulnerable groups of our society. They are one of the categories who is most at risk of poverty and social exclusion. In fact in the EU the number of children living in households with less than 60% of the national median income is shockingly high with the latest statistics, taken in 2004 indicating 20% of children living in relative poverty when compared to the 16% of the wider population. In Malta the situation is not much better and although many people believe that there are no people living in a state of poverty the stark reality that statistics show is that 21.9% of children under 16 years of age are at risk of poverty and social exclusion.

For instance, studies by University researchers Dr Angela Abela and Reverend Dr Charles Tabone who carried out work for the National Family Commission, have also corroborated that poverty levels which affect children in Malta are at these levels.

Traditionally, the child has been seen as a dependent, invisible and passive family member. It is only recently that the child has become "seen" and, furthermore, there is a growing faction and awareness to give such child the space to be heard and respected. Dialogue, negotiation, participation have come to the forefront of common action for children. The family becomes in turn the ideal nucleus for the initial stage of the democratic experience for each and all of its individual members, including children. Every child has the right to basic necessities including:

- Food
- Shelter
- Clothing
- Medical Care
- Schooling

Children have the right to receive these basic needs from their parents or guardians. Parents have both legal responsibilities towards their children as well as rights in relation to them. Brussels II¹ echoes our own civil code and defines parental responsibility as all rights and duties relating to the person or the property of the child which are given to a natural or legal person, by judgment, by operation of law, or by an agreement having legal effect.

In family law and government policy, child maintenance is the ongoing obligation for parents to support their children. In cases in which the parents are not in a relationship anymore child maintenance deals with a periodic payment made directly or indirectly by a non-custodial parent to a custodial parent, caregiver or tutor, or the state, for the care and support of children of a relationship or marriage that has been suspended or terminated.

¹ Council Regulation EC number 2201/2003 of 27th November 2003 concerning the jurisdiction and the recognition and enforcement of judgement in matrimonial matters and matters of parental responsibility.

The right to child support and the responsibilities of parents to provide such support have been internationally recognized. The 1992 United Nations CRC, declares that the upbringing and development of children and a standard of living adequate for the children's development is a common responsibility of both parents and a fundamental human right for children, and asserts that the primary responsibility to provide such for the children rests with their parents.

This concept is also followed by our Court and in fact in **AB vs. CDB**² it was argued that both spouses have equal responsibilities to look after their children. Another case which shows this is that of **Tabone Joanne pro et noe vs. Tabone Jesmond**³ where it was held that: *Hu veru li l-ligi civili ma tisforza lil hadd mill-mizzewgin biex imur jahdem bilfors pero` hu daqstant veru li l-ligi civili timponi fuq l-konjugi l-obbligu li jipprovd u manteniment reciproku lil xulxin u manteniment ghall-ulied.*

In cases of separation, the maintenance due to children should be calculated in proportion “*to the want of the person claiming it and the means of the person liable thereto*”⁴ In **Schembri Giorgina vs. Schembri Dino**⁵ the court explained the notion of maintenance under Maltese law and held that the quantum given as maintenance varies from case to case according to the means of the parties and that it must always include a

“kontribuzzjoni ghall-ikel, ilbies, sahha u abitazzjoni u spejjez mehtiega ghall-istess sahha u ghall-edukazzjoni taghhom u skond il-bilanc bejn il-bzonn u l-mezzi, kkalkulati ai termini tas-sub-artikoli tal-istess artikolu 20.”

Some countries have a set of rules indicating the amount of maintenance due according to each situation. In Malta the situation is different and at times children get less than they used to since parents end up giving less. In cases of separation, the financial position of the parents and consequently of the children changes drastically since what used to be one amount of money for one unit becomes one amount for two separate units. In some cases, when none of the parties work, the state has to pass on part of the social assistance given to the party that has to pay to the other part. This was explained in **Rita Borg pro et. Noe vs. Borg Mario** where it was held that: *“B'danakollu anke fejn irrizulta li hekk hu l-kaz il-Qorti ma naqqsetx li f'sitwazzjoni konsimili, takkorda persentagg lil parti l-ohra mir-relief ricevut⁶.”* In cases of separation the state intervenes whenever a parent stops paying maintenance to the child because without such help from the state, that child would end up with nothing. In the case of **“Pulizija vs. Marco Attard”** the court outlined the procedure that is due, following, failure of a parent to pay maintenance. In fact in this case as soon as the mother of the child went to the police to report her husband's failure to pay maintenance, the police called the husband in order to try to sort thing out. When the husband failed to go to the police station, further proceedings were taken. In cases in which the party liable to pay maintenance persists in not paying maintenance, he/she is punished by imprisonment and if he/she is employee, the court will ask the employer to pass on the maintenance payment directly to wife or husband as the case may be. Thus in cases of separation, the state intervenes the moment the party liable to pay fails to pass on that payment. Also in cases in which the party bound to pay has social assistance as his/her only income, the state has the duty to pass on part of that assistance directly to the other party if ordered by the court.

The welfare of the child is an overriding consideration in all actions and decisions involving children, including actions involving maintenance. In fact article 18 of the Convention on the Rights of the Child holds that both parents have responsibilities towards their children and that the best interest of the child should be

² AB vs. CDB, Qorti Civili Sezzjoni tal-Familja, Seduta tal- 25 ta' Settembru 2007, Citazzjoni numru 1787/2001/1 – per Mr. Justice Noel Cuschieri -

³ Tabone Joanne pro et noe vs. Tabone Jesmond, First Hall Civil Court, 3rd October 2003, per Mr. Justice Philip Schiberras

⁴ Article 20 of the Civil Code, Chapter 16 of the Laws of Malta

⁵ Schembri Giorgina vs. Schembri Dino, First Hall Civil Court, 28th November 2002, per Mr. Justice Raymond. C. Pace

⁶ Rita Borg Pro et. Noe vs. Mario Borg; 31st January 2003; First Hall Civil Court as per Mr Justice Philip Sciberras

their basic concern. The notion of best interest of the child was explained in “**Magro Lourdes vs. Bonnet Carmelo**”⁷ where the court pointed out that:

“B’gid tat-tfal ghandna nifhmu mhux tant il-profitt materjali kemm il-ben esseri morali taghhom...li l-Qorti f’kazijiet fejn hemm involuti t-tfal ghandha tara li l-gid taghhom jithares, li l-interess suprem tal-minuri dejjem jipprevali fuq l-interess tal-kontendenti fil-kawza...”

The notion of maintenance under Maltese law is defined in the Civil Code in article 19 which states that maintenance includes food, clothing, health, habitation, and education in the case of children. Article 3B of the Maltese Civil Code⁸ imposes on the parents the obligation to look after maintain, instruct and educate the children of the marriage.

However where the parents are incapable or unable to care for their children then it is up to the state to provide maintenance. In a United Nations document dealing with child well-being in rich countries it was held that:

*“The true measure of a nation’s standing is how well it attends to its children – their health and safety, their material security, their education and socialisation and their sense of being loved valued and involved in the families and societies into which they are born”.*⁹

This statement points that it is the duty of the state to provide for children. However in reality to what extent if at all is the state bound to provide for children? According to article 3.2 of the CRC, states have the obligation to provide protection and care for children as necessary for their well-being, taking into account the rights and duties of the parents. Also article 4 of the same convention imposes on the states the duty to “undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention”¹⁰.

The Convention acknowledges that every child has certain basic rights, including the right to life, his or her own name and identity, to be raised by his or her parents within a family or cultural grouping and have a relationship with both parents, even if they are separated. On the other hand it also places a legal duty on states to spend the maximum proportion of available resources on the adoption of measures to protect children’s rights and to act in the best interest of the child.

“A State’s budget allocation is... a visible measure of the priority and value given to specific rights of children as it maps out in financial terms the areas of action which the State will promote...”¹¹

The state usually intervenes through family policy measures. Many times these policies are often conceptualized and understood as 'state intervention into family life'. State intervention can take many forms such as universal financial support, combine paid work and family life and health care services for pregnant women and young children.

⁷ “Magro Lourdes vs. Bonnett Carmelo” – 11th December 2003 – Civil Court First Hall – Mr. Justice Raymond Pace

⁸ Chapter 16 of the Laws of Malta

⁹ Ibid. (no.3)

¹⁰ Article 8 of the Convention on the Rights of the Child.

¹¹ Social Welfare, State Interventions and Value Judgements, by Pierre Lemieux, Volume XI, Number I Summer 2006 (http://www.independent.org/pdf/tir/tir_11_01_02_lemieux.pdf), Retrieved on 08.12.2007

When parents are unable or unwilling to care for their children, the state must help both the parents to improve the situation of their children or help the children directly to live better. However the state may be limited on the amount of assistance to offer. In fact Article 8 of the European Convention on Human Rights protects families from any intrusions by the state to family life. This article guarantees the right to respect for private and family life and prohibits any state interference with that right which is not in accordance with law in pursuit of a legitimate aim and necessary in a democratic society. The scope of article 8 is very broad and it has been interpreted in a dynamic fashion by the Commission and the Court of Human Rights. When it comes to interference with family life, under article 2 the State must identify the aim which it pursued as a basis for its interference under article 8 (1). In cases involving children, the best interest test is the accepted principle by which the consistency with article 8 (2) of state interference is determined^{12, 13}.

Since it is the parents' primary responsibility to raise their children, the state may indirectly help parents by providing services such as child care. By making available free good quality child care parents would be able to leave their children in a safe place and go to work. Child care in many cases is the key option for parents who want to work although in some cases it has been proved that when the type of child care provided is not of good quality the experience may be a traumatic one for the child. On the other hand many studies have shown that good standard child care may be positive and beneficial to children.

In Scandinavian countries a lot of investment is made on child care centers and a large number of subsidies are given. On the other hand in the European Union, with the Lisbon Agenda an attempt to make free child care available to everyone is being made although most of the EU is still well behind the Scandinavian Countries. A lot of importance is being given to child care, however this is only being done because states need more women to join the labour force and not because they are necessarily looking at the best interest of the child. For this reason the best option would be that to open child care centres for every one so that whoever believes that the child would be better off in child care centre rather than staying home with the parent who may have less available income or leaving the child with a relative would have some where of good quality to send the child to.

State Responsibility to help Parents in need

Article 4 of the CRC imposes on states the duty to take all the necessary measures in order to help parents in providing maintenance for their children. When speaking of economic, social and cultural rights, this article refers to the right to health and health care¹⁴, the right to social security¹⁵, the right to an adequate standard of living¹⁶, the right to education¹⁷, and the right to play, rest and leisure¹⁸. One of the things this convention imposes on states is the duty to provide financial support to children, either directly or through their parents, when parents are unable to provide adequately. This is discussed in Article 26 which states that everyone has a *right to benefit from social security*.

¹² "The only reference to this principle in the Convention is in Article 5 of Protocol no 7 which provides that equality of rights and responsibilities between spouses and in relation to their shall not prevent States from taking such measures as are necessary in the interests of children". – as cited in *The Child and the European Convention on Human Rights* by Ursula Kilkelly; Ashgate Dartmouth

¹³ *The Child and the European Convention on Human Rights* by Ursula Kilkelly; Ashgate Dartmouth (page 201)

¹⁴ i.e. Article 24 of the CRC

¹⁵ i.e. Article 26 of the CRC

¹⁶ i.e. Article 27 of the CRC

¹⁷ i.e. Articles 28 and 29 of the CRC

¹⁸ i.e. Article 31 of the CRC

Allowances

Evidently poverty is the direct consequence of a number of financial issues the family may have. Financial difficulties may be the result of various things namely unemployment, separation and court cases, illnesses, debts and other dependencies which may lead to monetary problems and consequently to poverty.

In such situations, the state has the duty to effectively provide assistance to parents by for example issuing allowances for children. In providing this help however, the state must ensure that parents are not abusing of these allowances schemes and that they are doing their best in order to be able to provide for their family themselves without any help from the state.

Legislation dealing with abuse of allowances schemes should be enforced more and were there is the well-being of the child at stake, the state should take the necessary precautions in order to ensure assistance for example by issuing some coupons/vouchers which make it possible to get food for children or otherwise to reduce the allowance in such a way that the parent would have no alternative other than that to find a job.

The following are some allowances the state provides to children.

The Children's Allowance

The system of the Children's Allowance was created for children coming from less privileged families. With this system, the state would pass some income to the children with which parents can attend to their needs. Thus it was created in order to assist parents to cope with some of the expenses related to their children.

With the latest amendments, the children's allowance system seems to have redirected its scope since every one will be getting it and thus it is no longer a source of income for those in need, it has become a source of income for everyone. The purpose of social policy is to correct inequalities left by the initial distribution of the market. Sociopolitical measures contribute to the attainment of basic social goals (e.g., equality) without intervening in the functioning of the basic social mechanisms, especially the economic ones¹⁹. With the way the children's allowance is being distributed now no inequality is being corrected since everybody is getting the same amount.

Another purpose behind the children's allowance system is that of an allowance directed to children. Thus the state issues a sum of money in the name of the mother in order to be spent or put aside for the children. Again, in certain cases, even this aim is being missed since sometimes children do not even benefit from a penny from it. In fact a survey conducted in the United Kingdom in 2003²⁰ showed that child benefits were spent on alcohol and women's clothing. This study together with other where however contrasted in 2006 by Gregg et al. which concluded that low-income families spend a higher share of their budget on children's clothing and footwear and less on adult's clothing than before. Thus these studies may show that the situation may be changing and that parents are spending child benefits on their children and not on themselves.

Other allowances available to children are the Disabled Child Allowance and allowances available to single parents.

¹⁹ Child Poverty in the Nordic Countries, http://vanha.soc.utu.fi/sospol/julkaisut/child_poverty/childpov.pdf (Retrieved on the 8th January 2008)

²⁰ Study by Blow et al. (2003)

Food

The Right to Food is the right of every person to have regular access to sufficient, nutritionally adequate and culturally acceptable food for an active, healthy life. When it comes to children, it is the duty of the state to help parents to provide healthy food for their children and to help parents whose children require special food to get such food. The CRC deals with the right of the parents to receive assistance for the nutrition of their children in article 27 (3). This article points out that the state has the duty to help parents in providing nutritious food for their children. This can be done in a number of ways. It can be done directly through school meals, coupons for parents and allowances to buy particular foods or indirectly by increasing the cost of junk food and lowering the prices of healthier food. The state could also introduce healthy food at school. One initiative which tried to do this is the healthy breakfast initiative where children were given breakfast at school. This promotion of a healthy breakfast or a healthy lunch should not be a one time thing and should be offered for free to all children coming from low income families and at a small charge to other children.

Clothing

Another component of maintenance is that of clothing. Parents have the primary responsibility to ensure that the child has an adequate standard of living. Clothing is one of the things discussed in the CRC when dealing with the provision of an adequate standard of living for children. This is done in article 27 (3) which binds states to assist parents in providing an adequate standard of living by “*providing material assistance and support programmes particularly with regard to nutrition, clothing and housing*”²¹.

Clothing is so important that in Minnesota the failure to provide and maintain adequate clothing, which is appropriate to the climate and/or environmental conditions to children is deemed to be a major factor in child maltreatment.

Problems dealing with clothing usually arise with regards to school uniforms. Since the price of school uniforms is usually too high. This problem could be solved by issuing vouchers to buy uniforms or by opening shops selling second hand uniforms.

Health

The Universal Declaration of Human Rights, proclaimed that “*everyone has the right to a standard of living adequate for the health and well-being of oneself and one’s family, including food, clothing, housing, and medical care...*”²². This means that if someone is ill physically or mentally s/he still has a right to seek help and to find that help even if s/he can not afford it.

In Malta the state still offers free health care to everyone. However if a system of payment had to be introduced, at no point the state has a right to refuse to cure someone in its health care institutions especially in life-threatening situations. In fact where the failure to provide medical services would result in a life-threatening situation, this might raise an issue under the right to life under Article 2 as happened in X vs. Ireland or under Article 3, both of the European Convention on Human Rights, which prohibits inhuman and degrading treatment.

Besides offering treatment to people when in need, the state has also the duty to invest in good quality preventive health care. This means that the state has the duty to provide vaccines for all children. These vaccines should not be of an inferior quality of vaccines taken privately since all children have the right to the same good quality health care. The Manifesto for Children issued by the Office of the Child

²¹ Article 27 (3) of the CRC

²² Article 25 of the Universal Declaration of Human Rights

Commissioner made the point that there is in fact this discrepancy and that therefore the vaccines given by private doctors are of better quality than those provided by the state.

Habitation

Although children's housing rights are well-defined under international human rights law, and protected under several international and regional human rights treaties, the rights to habitation are not always respected. In Malta the problem is not as serious as it may be in other countries in which children are homeless or in which entire families are evicted. However it is serious enough to have a number of dwellings with children living in them who do not even have an access to basic facilities such as a bathroom or a kitchen. In fact the 2005 census showed that a total of 2479 occupied dwellings do not have a bath or a shower facility and 918 occupied dwellings do not have a kitchen or kitchenette. When it comes to habitation rights, the International Covenant on Economic, Social and Cultural Rights identified a number of criteria which are necessary for a state to observe in order to safeguard the housing rights of everyone especially of children. Amongst other things it held that when it comes to housing people should have the following available:

1. Legal Security of Tenure
2. Availability of Service, Materials, Facilities and infrastructure
3. Affordability
4. Habitability

Education

The CRC also grants all children the right to education. This is done in article 28 which holds that all children should have equal access to education and that primary education should be compulsory and available free to all. Besides it also encourages states to invest in secondary education, both in general as well as in vocational education. It holds that secondary education should also be made available to everyone and that where children need financial assistance in order to continue their studies, states should provide it.

Unfortunately although this right is enshrined in the CRC, not all countries follow it because of problems related to funding. Funding for education tends to be treated as discretionary, contrary to what international human rights law demands. *"Few countries in the world have effective constitutional guarantees which oblige the government to allocate to education a determined proportion of its budget. A rare example is the 1947 Constitution of Taiwan which has specified: "Expenditures of educational programmes shall not be, in respect of the central government, less than fifteen percent of the total national budget, in respect of each province no less than twenty-five percent of the total provincial budget, and in respect of each municipality, no less than thirty-five percent of the total municipal budget".*"²³

Making education compulsory requires parents and governments to perform their obligations towards children. This logic was aptly summarized in 1956:

*"Just as school legislation imposes upon the parent the duty of sending his children to school, States should accept the obligation of providing enough schools to educate all children."*²⁴

²³ Ibid. (no. 42)(page 11)

²⁴ Report on the Regional Conference on Free and Compulsory Education in Latin America, UNESCO, Paris, 1956, (page 8)

The constitution of Malta grants this right to education in article 11 which holds that even students coming from low income families have the right to attain the highest levels of education. It also holds that the state shall make it possible for students who come from low income families to attain the higher level of studies by issuing scholarships and other contributions.

In conclusion, all parents have a right to ask the state to assist us when ever they are in need and can not cope with the expenses children bring with them. However one must make sure that this help is not abused of and that the parents makes their best in order to provide the best for their children themselves. On the other hand the state should try to help the parents by educating them on how to raise their children without necessarily relying on social assistance. This way more children would have the possibility to have a better standard of living and less parents would be relying on the state and their sole source of income.