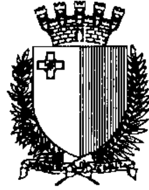

FIL-QORTI CIVILI

(SEZZJONI TAL-FAMILJA)

L-ONOR. IMHALLEF ANTHONY VELLA

Hearing of Thursday, the 30th May, 2019

Application nru: 44/18 AGV

AB

Vs

CB in her own name and as curator ad litem to represent the minor DB and the Director of Public Registry

The Court,

Having seen the application filed by plaintiff filed on the 22nd February, 2018 whereby he premised and requested as follows:-

1. Whereas parties were involved in an intimate relationship.

2. Whereas in the course in the course of this relationship, the minor DB was born, as results from the relative certificate of birth, herewith attached, exhibited and marked as Dok. A.

3. Whereas defendant CB always led plaintiff to understand that the minor child was plaintiff's daughter and even though plaintiff was aware that at the same time defendant had a relationship with an Englishman, but she always made him believe that he was the minor's father and he chose to believe her and therefore always recognised the minor DB as his daughter, so much so that he is indicated as the aforementioned minor's father in her Act of Birth.

4. Whereas this premise led parties to marry on the 5th November, 2010, with the civil rite, as per copy of the marriage certificate herewith attached, exhibited and marked as Dok. B.

5. Whereas it was only after parties were legally separated, recently, that plaintiff discovered that in fact the minor DB was not his progeny, as resulted from a DNA test, a copy of which is herewith attached, exhibited and marked as Dok. C.

6. Whereas now that he discovered that she is not his progeny after the DNA test was carried out on the 30th November, 2017, plaintiff does not want to be indicated as father to the minor DB , as this does not reflect the truth.

7. Whereas this is why this lawsuit had to be lodged – in order for plaintiff to obtain a declaration that the minor DB is not plaintiff's daughter and to order that the relative Act of Birth be duly corrected, because clearly there is no parental relationship between plaintiff and said minor.

8. Whereas these facts are known personally to plaintiff.

9. Whereas the inclusion of defendant Director of the Public Registry is required procedurally, even for the validity of the second demand.

Defendants are to state why this Honourable Court should not:-

1. Besides any further necessary medical tests, if need be through the services of nominated referees, declare and decide that the minor DB is not the plaintiff's natural daughter.

2. Order that the Act of Birth 3757/2008 be corrected by defendant Director of Public Registry in the sense that plaintiff's name and surname be erased from the column "Name and Surname and Place of Birth of the father," and in the column "Name and Surname and Place of Birth of the mother," there be erased the words "wife of the said AB," and/or take all necessary action so that plaintiff no longer appears formally on the Act of Birth as father to the minor DB.

With costs against defendants, who are being summoned from now with reference to their oath.

Having seen the Reply of the Director of Public Registry who pleaded as follows:-

1. Whereas defendant is not aware of the facts of the case as indicated in the sworn application.

2. Whereas plaintiff has failed to indicate in his sworn application on the basis of which article of law his case is based, it is being assumed that the case has been filed in terms of Article 73 of Chapter 16 of the Laws of Malta.

3. Whereas notwithstanding the above, the plaintiff must prove and satisfy at least one of the requisites listed under Article 70 (1) of Chapter 16 of the Laws of Malta. For such a purpose, the plaintiff exhibited a report of the genetic tests that indicate that he is not the natural father of the minor DB. This report still needs to be confirmed on oath by Dr. Marisa Cassar.

4. Without prejudice to the above and considering that the minor is nearly ten years old, the plaintiff must overcome the legal presumption in terms of Article 81 of Chapter 16 of the Laws of Malta, since it adequately and convincingly proves that the status of the minor DB, does not agree with his birth certificate.

5. Without prejudice to the above, the parties must agree definitely, which surname the minor must assume in accordance with Article 92 (6) of Chapter 16 of the Laws of Malta.

6. Furthermore, and without prejudice to the above, in case that this Honourable Court accepts plaintiff's claims, it is important that the words "*the said*" found infront of plaintiff's name, precisely under the column

and row wherein there is indicated details related to plaintiff, have to be removed from the birth certificate of DB.

7. Finally, the defendant states that in any case, the said claim is not the result of some shortcoming from the Public Registry and consequently, cannot be made to bear the costs of the case.

8. Reserving the right to further pleas.

   With all costs to be borne by plaintiff.

Having seen the sworn Reply of Respondent CB who pleaded with respect as follows:-

1. That as a preliminary requirement, plaintiff must indicate the article of the law on which he is basing his claim in order that the respondent be in a position to make her defence and the respondent hereby reserves her right to file an additional sworn reply after the plaintiff complies accordingly.

2. That without prejudice to the foregoing, plaintiff's claims are unfounded in fact and at law and should be denied with costs against the plaintiff.

3. That without prejudice to the foregoing, the plaintiff's claim is time-barred in terms of Article 73 of the Civil Code and this is because it is not true that the defendant concealed from him the fact that the minor child Isabelle was not his daughter as will be proved during the hearing of the case. That therefore, the applicant cannot agree with what the plaintiff has stated in paragraphs 3 to 6 of his sworn application.

4. So unfounded are the plaintiff's claims that in actual fact it was the plaintiff himself who insisted that the child be registered in his name. It was plaintiff who effected the necessary act of birth notifications and insisted that his name be put down and that he be registered as the father of the child.

5. That furthermore, the action is not legally admissible given the fact that no person may disturb the status conferred by the act of birth and the presumption it creates and this action is therefore an attempt to disrupt the good order of the family.

6. That without prejudice to the foregoing circumstances and in the best interests of the child, the applicant requests that the child be allowed to retain the plaintiff's surname.

Save further replies in fact and at law as permissible.

Having seen the note filed by plaintiff on the 26th April, 2018 wherein he stated that his claim is based upon Articles 101, 70 (1) (d), 75 77 (b), 99 of Chapter 16 of the Laws of Malta without prejudice to any other disposition of law that may be applicable.

Having seen the defendant's application dated 21st May, 2018 and the court decree dated 18th June, 2018.

Having seen plaintiff's note dated 12th July, 2018, wherein further to the court decree dated 18th June, 2018, plaintiff indicated that his claims are based on Articles 99, 77(b) and 70 (1d) of Chapter 16 of the Laws of Malta.

Having seen the additional sworn Reply of the Defendant wherein she stated as follows:-

Facts of the case

1. The minor child was born to the defendant on the 24th October, 2008.

2. The pregnancy initiated in February, 2008.

3. Prior to February, 2008 the plaintiff and the defendant had been in a relationship, however, they had become estranged by February and were living apart. Intimacy between them had ceased at the beginning of January, 2008.

4. In August, 2008 the plaintiff and defendant resumed their relationship and recommenced co-habitation.[1]

5. Prior to recommencement of the relationship, defendant had informed plaintiff of her pregnancy and also of the fact that plaintiff was not the father.

6. The child was due in November, 2008, but due to complications was born on the 24th October, 2008 as abovementioned.

7. Within a short time, plaintiff entered his name as the father of the child on the act of birth.

[1] Page 13 of the court bundle. Affidavit of plaintiff.

8. The plaintiff and defendant continued to cohabit *de facto* until November, 2010, when they were married.

9. The plaintiff considered the daughter to be his own legitimate offspring throughout all those years up to filing of his lawsuit, notwithstanding his having known prior to the birth, that she was not his biological issue.

10. Finally, the plaintiff claims in his affidavit[2] that defendant consistently taunted him with the fact that the child was the issue of a relationship which she had during their period of estrangement in 2008. By the 25th March, 2017, when plaintiff left the matrimonial home with the child, he claims she had emphasized once more, the fact that he was not the natural father.

11. The case was filed by plaintiff on the 22nd February, 2018.

<u>Points of Law</u>

1. By means of a note filed on the 12th July, 2018, plaintiff indicated that he is basing his claim on articles 70(1d), 77(b) and 99 of Chapter 16 of the Laws of Malta. Defendant will show that none of these claims are valid.

2. Art.101 of Cap.16 is very clear that any child born out of wedlock, shall be presumed *iuris et de iure* to have been born in wedlock, once the spouses shall have contracted a subsequent marriage.

[2] Page 13 of the court bundle, paragraphs 5 and 6.

3. First, defendant raises the plea that any reference by the plaintiff to article 99 of the Civil Code which contemplates the action of disavowal for children born outside of wedlock[3] is inapplicable and should be dismissed with costs.

4. Second, Article 77(b), also indicated by plaintiff, provides that ***"without prejudice to the provisions of Art.81, the filiation of a child born in wedlock may also be impeached by any person interested if he proves that, during the said time, the wife had committed adultery…."*** From this it is clear that no one (not even the child himself) can contest the status of a child, conceived or born in wedlock in respect of a person who possesses a status in conformity with his act of birth. In this vein, Art.80 also establishes a series of facts which demonstrate the filiation connection – eg. That the child has always borne the name of the father and that the parents have treated the child as their own and provided for the child's maintenance etc.

5. From this it is clear that if a child's birth certificate indicates that such child was born in wedlock (as in this case) and the child has held the status of a legitimate child (as in this case) nobody can claim a status to the contrary and therefore any action based in this article must also be dismissed. Moreover, the action under Art.77 (b) further requires plaintiff to prove that the defendant (wife) had committed adultery, which is factually impossible, since plaintiff and defendant were not yet married in 2008.

6. The only person who committed adultery during that time was plaintiff since he was still married and had not yet obtained an annulment.

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[3] In this respect the Maltese text is relevant "l-att li bih jigi maghrux tifel imnissel u mwieled barra z-zwieg jista' jigi attakkat mit-tifel kif ukoll min ikollu interess."

7. Finally, with regard to Art.70 (1)(d), this action requires the existence of one of out of two elements, namely the commission of adultery, or the concealment of the pregnancy and the birth. The facts of the case show clearly that this action cannot succeed. In primis, as already stated, the defendant did not commit adultery, as she was unmarried at the time of conception. Secondly, the pregnancy was not concealed[4] and the plaintiff even attended the event of the birth at the hospital. Therefore, just on these facts, the action should be dismissed with costs.

8. Additionally, and without prejudice to the above, the action is clearly time barred by operation of article 73(a) and (c) in that:-

- He acted well outside the period of six months after the birth as contemplated in paragraph (a);
- The birth was never concealed from him and therefore paragraph © is inapplicable, however, had it been applicable, the action would still be time-barred because his attendance at the birth would have alerted him to the event.
- Even if plaintiff were to argue that the child was the issue of an adulterous relationship, which relation had been concealed from him, by his own admission, he was confronted directly with the "fraud" by not later than the 25th March, 2017,[5] which is still more than the six months prior to the filing of the action 22nd February, 2018 and therefore time-barred.

[4] Affidavit of plaintiff p.13 of the court bundle para.3.
[5] This is hypothetical, as defendant maintains that plaintiff knew all along and by his own admission defendant had told him that the child was not his biological issue several times during their marriage.

9. The proviso to Art. 73 provides that any action under Art.70 can be filed outside the six month statute of limitation, after an application is filed and authorisation sought: once the court – after having heard the parties involved and considering the rights of the applicant and of the child – authorises the applicant to institute the action. This measure was not requested by the plaintiff and consequently:

10. The action is null and in any case this authorisation is not open to plaintiff, because as indicated supra, the facts of the case exclude the operation of Art.70(1)(d).

11. Therefore, for these reasons also, the claim should be dismissed with costs.

12. Save further pleas in fact and at law.

Having seen the addition sworn Reply of the Director of Public Registry who raised the following pleas:-

1. That in view of the Court's minutes of the last sitting, the Court authorised the Director of the Public Registry to file further pleas to the ones which were already raised in the Director's sworn reply dated 27th March, 2018. The following are the additional pleas of the Director;

2. That in *limine litis*, the Director pleads that first and foremost, Article 99 of the Civil Code cannot apply to the case in question since such article of the law can only be applied in those scenarios whereby a child was conceived and born out of wedlock. Despite the fact that the minor in question was indeed conceived and born out of wedlock, she was subsequently presumed to be conceived and born in wedlock by means of

application of Article 101 of the Civil Code, due to the celebration of marriage of the parents.

3. That in *limine litis,* and without prejudice to the aforementioned, the Director pleads that for actions of disavowal of a child who was conceived and born in wedlock, the action has to be filed within 6 months (i) from the day of birth, if the spouse was then in Malta, (ii) of his return to Malta, if the spouse was absent at the time of the birth, or, (iii) of the discovery of the fraud, if the birth was concealed. Therefore, depending from which circumstance applies to the present action, the plaintiff must prove to the satisfaction of the court that the action was indeed filed within the time stipulated in Article 73 of the Civil Code. Should the 6 months have elapsed and in view of the proviso of article of law referred to, the Director is of the humble opinion that the plaintiff should remedy the situation by filing an application demanding the authorisation of the Court to proceed with the action in terms of the law.

4. Without prejudice to the above, the director pleads that Article 101 and Article 75 of the Civil Code, are merely being referred to in order to explain the procedure followed by the plaintiff, but not being used as the legal basis upon which the action was filed.

Such are the defendant's additional pleas for the esteemed attention of the Honourable Court. With costs.

FACTS

1. Parties met in 2004 when plaintiff was on holiday in Russia. In March 2006 defendant came to Malta and they started a relationship, that then became intimate when she returned in October, 2007. Defendant remained pregnant and they had a daughter D.

2. Plaintiff states that there was a period when they broke up for around five months and he suspects that during such a period she was seeing another man, however C always assured him that the child was his.

3. The parties got married on the 6th November, 2010 because plaintiff wanted to assume his responsibilities towards his daughter, who at the time of marriage was two years old. However, straight after the honeymoon, plaintiff states that defendant's attitude changed and started to deteroriate. During their arguments, she would mention that plaintiff was not the natural father of the minor. Defendant also told him that before their marriage, she had cheated on him with an Englishman.

4. By the 30th October, 2017, they got legally separated and after that plaintiff submitted himself to the DNA tests to confirm his doubt as to whether the minor Isabelle was his daughter.

5. From the DNA results it resulted that he was not the minor's natural and biological father.

6. EB, plaintiff's brother, confirmed all the above and he added that he had received a message on Facebook from a certain FG who informed him that he was the natural and biological father of the minor D, as he had done the DNA tests that confirmed all this. When his brother had broke the news to

him, as he really cared for D, he told him about the message he had received from this Englishman.

7. CB, defendant explains that she met plaintiff when he used to go out with a friend of hers in Russia. After he broke up with her friend he contacted her and in January, 2005 she communicated with plaintiff through texts and messages, but eventually their relationship developed into a romantic one and in March 2006 they move permanently to Malta.

8. Defendant explains that their life together was a rollercoaster, because plaintiff suffered from mood swings and they used to argue very often, so much so that by December, 2007 things between them had become so bad. She used to open up with her colleagues, in particular a certain F, who then admitted to having feelings for her. This was in January, 2008 and she decided to leave A and she moved in with F about two or three weeks later and during such period she states that she did not have intimate relationships neither with Plaintiff nor with Defendant.

9. On the 15th February, 2008, defendant moved in with F and in March 2008 she found out that she was pregnant. She admits that the child was F's and not plaintiff's. However, she explains that plaintiff did not give up and kept on trying to convince defendant that he would change and that it would be best for the child to be brought up within a family. She admits that plaintiff had told her that the best solution would be to register the child in his name, even more so because he was her legal partner and it was also to be able to retain her visa. Defendant confirms that they reunited in September 2008 and when D was two years old they got married.

10. Defendant explains that after they got married, A's mood swings did not change and at times he would get angry at D or reiterate that he couldn't get over the fact that she had a child from another man.

11. In March 2017, defendant left the matrimonial home with D however she explains that both she had plaintiff had remained on good terms for the sake of the child. Until the separation she confirms that plaintiff helped out financially to prepare the minor for school, buy clothes and organise her birthday party. She explains that plaintiff acted as a father-figure for D.

12. After the separation, defendant explains that plaintiff asked her to carry out DNA tests on the child and although she didn't object, she couldn't understand why he was doing these tests, when they both knew that D, was not his daughter. It ultimately transpired that he intended to open an annulment case on the grounds of deceit from defendant's end and for this reason he needed to open up a case to contest the paternity of the minor child and then he planned to adopt her at a later stage.

13. Defendant is opposing the change to the minor's surname in view of the fact that she has always been known as B and it would be very heartbreaking and confusing for her to have her identity taken away from her.

Having made the following considerations:-

Plaintiff is basing his claims on Articles 99, 77B and 71 D of the Civil Code. Defendants are claiming the nullity of plaintiff's actions

The Court is going to analyse the respective pleas raised by defendants in this case with respect to plaintiff's claims on the basis of the aforementioned articles of the law.

ARTICLE 99

The English version of the law and the Maltese version are not identical. The English version speaks of the impeachment of "***An acknowledgment of a child conceived or born in wedlock***," whereas the Maltese version refers to the right of impeaching the acknowledgement of a child "***imnissel u mwieled barra miz-zwieg."*** This creates an anomaly as the English version is speaking of a legitimate child, whereas the Maltese version refers to an illegitimate child. In view of this conflicting interpretation, the Court believes that the Maltese version is the one that should prevail.

Essentially, this means that plaintiff brought forward his action for a disavowal of paternity, therefore attempting to impeach an acknowledged illegtimate child.

Both defendant and the Director of Public Registry are pleading the inapplicability of Article 99 to this claim. The Court has to agree with this plea, as from the facts of the case it transpires that the minor child was born outside wedlock, after defendant had a relationship with another man and later, plaintiff and defendant who had previously been in a relationship, decided to reconcile, get married and legitimate the child through the subsequent marriage.

Hence, having legitimated the child himself through marriage, the child cannot be conceived as an illegitimate child any longer and the presumption is that he/she was always conceived and born in wedlock and this is confirmed in Article 101 of the Civil Code that states as follows:-

“Where parents of children conceived and born out of wedlock subsequently marry, or where the court of voluntary jurisdiction so decrees, such children shall be deemed *iuris et de iure* to have always been conceived or born in wedlock.”

Once the parties celebrated a marriage and the child is considered for all intents and purposes at law as a legitimate child, the defendants plea on the inapplicability of Article 99 of the Civil Code are to be upheld.

ARTICLE 70(1)(d)

Article 70 (1) (d) states as follows:-

“(1) Any spouse, except for the spouse who gave birth to the child, may bring an action to repudiate a child born in wedlock:

(d) if such spouse proves that during the said time the spouse who gave birth had committed adultery or that, the spouse had concealed the pregnancy and the birth of the child.”

The interpretation of this disposition of the law is then subject to Article 73 that states:-

“Where it is competent for the spouses to bring an action to disown a child, they must bring such action:

© ***within six months of the discovery of the fraud, if the birth was concealed.***

Provided that, without prejudice to the provisions of article 70(4), the Family Court may, upon an application of any one of the spouses and, if possible, after having heard all the parties interested, and after having considered the rights of the applicant and of the child, at any time authorise the applicant to institute an action to disown a child born in wedlock to the other spouse."

From the evidence produced throughout the case, the parties only got married two years after the minor was born, so essentially there could have never been any adultery committed by the defendant. In his submissions, plaintiff has argued that since Article 101 leads to the presumption that the minor was always born in wedlock, then the presumption with regards the spouses has to be that they were married too when the child was born. Though the Court believes that it is justifiable to apply all dispositions of law that refer to the child conceived and born in wedlock, it cannot agree with the wide interpretation, plaintiff intends. The aim of the legislator by such a disposition of the law was to eradicate completely the distinction between a legitimate and an illegitimate child. His main concern was solely regarding the status of the child and marital status is not the scope behind such dispositions. Therefore, repudiating the child born in wedlock because of adultery stands no ground for the aforementioned reasons.

Again, plaintiff is attempting the repudiation of the child born and conceived in wedlock because the birth in his opinion was concealed from him. The Court finds it hard to believe that this was the case, since from the evidence gathered, the parties kept a good relationship between themselves and their respective partners. It is inconceivable, as defendant pointed out, that they used to frequent each other during the time of pregnancy and therefore her protruding tummy was more than visible and he still insists that the pregnancy was concealed to him.

The Director of Public Registry also pleaded that before the said action under Article 70(1)(d) could be satisfied, the time-limit of six months as contemplated under Article 73 had to be adhered to. Nevertheless, he reiterated that in case of default, an application filed by the party after the lapse of the six months would save the day. Article 73 © necessitates that the six months start to run as from the date he discovers the fraud or concealment of the pregnancy. Considering that there seems to be no ground of fraud or concealment of the pregnancy from defendant's part, the application of the six month period becomes futile. In addition, from the acts of the case, it does not seem that at any stage of the proceedings did plaintiff file an application after the six-month period had elapsed.

Therefore, basing the claim on Article 70(1)(d) is not justifiable.

ARTICLE 77 (b)

Article 77 (b) reads as follows:-

"Without prejudice to the provisions of article 81, the filiation of a child born in wedlock may also be impeached by any person interested:

(b) if he proves that, during the said time, the wife had committed adultery, and furthermore produces evidence of any other fact which may also be genetic and scientific tests and data that tends to exclude the husband as the natural father of the child."

This disposition of the law is subjected to the prevailing article 81 of the Civil Code, which goes on to state:-

"(1) No person may claim a status contrary to that which is attributed to him by the act of birth as a child conceived or born in wedlock and the possession of a status in conformity therewith.

(2) Likewise, it shall not be lawful to contest the status of a child conceived or born in wedlock in respect of a person who possesses a status in conformity with his act of birth."

For the plaintiff to proceed under Article 77 (b), the Court must first and foremost ensure that by proceeding by such an action, no prejudice would be caused to the minor in terms of Article 81. By creating such presumption at law, the legislator wanted to uphold the social and legal interests of the child, more than the biological interests at stake, in the sense that it would be more detrimental to a child to find himself suddenly declared to be illegitimate once again, when he was legitimated for all intents and purposes at law. One cannot simply overturn a child's life upside down after having brought him up within a family structure, with a person who he always considered as his parent, who maintained him and even gave him his surname.

Article 81 also derives from the presumption specified in Article 67 that states:-

"A child conceived in wedlock is held to be the child of the spouses."

The reasoning behind these two presumptions of the law was made clear in the case Anthony Grima vs Josianne Grima[6] - "***l-iskop centrali tal-ligi huwa l-protezzjoni tal-istabbilita' familjari li jkunu ghixu fiha l-ulied u li ghalhekk***

[6] 36/2012 deciza 24 ta' Marzu, 2015

f'din ic-cirkostanza din l-istabbilita' familjari ghandha tipprevali fuq kwalunkwe dritt ta' terzi."

In the case **AB vs Direttur tar-Registru Pubbliku et.** deciza fl-10 ta' Lulju, 2013 the Court reiterated as follows:-

"Ezaminati dawn l-artikoli appena citati, hija l-fehma tal-Qorti illi peress li l-artikolu 77 u 77b A huma subordinati ghall-Artikolu 81, isegwi illi jekk l-att tat-twelid juri li tifel jew tifla huwa imnissla jew imwielda matul iz-zwieg u ghandhom il-pussess ta' stat ta' tifel jew tifla mnissla jew imwielda matul iz-zwieg, allura hadd, lanqas l-istess missier differenti mir-ragel ta' ommhom. Meta jikkonkorri l-elementi kontemplati fl-artikolu 81, il-ligi nostrana taghti valur notevoli lill-pussess ta' stat ta' wild imwieled minn koppja mizzewwga.

Necessarju ghalhekk jigi ezaminat f'hiex jikkonsisti il-pussess ta' stat ta' wild imnissel jew imwieled fiz-zwieg, imsejjah fil-ligi taghna bhala "l-istat ta' iben legittimu."

Artiklu 80 tal-Kap.16 intitolat "L-Istat ta' Iben Legittimu huwa maghmul minn gabra ta' fatti" jipprovdi illi:-

"(1) Il-pussess tal-istat ta' iben legittimu jigi stabbilit minn gabra ta' fatti li mehudin flimkien, jiswew biex juru r-rabta ta' filjazzjoni u ta' demm bejn it-tifel u l-familja li hu jghid li hi l-familja tieghu.

(2) L-ewlenin fost dawn il-fatti huma:-

(a) Illi t-tifel ikun gieb dejjem il-kunjom tal-missier li tieghu hu jghid li huwa l-iben;

(b) ***Illi l-missier ikun trattah bhala ibnu, u, f'dik il-kwalita', haseb ghall-manteniment u edukazzjoni tieghu u sabiex jikkolokah;***

(c) ***Illi t-tifel ikun gie dejjem maghruf bhala tali man-nies;***

(d) ***Illi huwa jkun gie maghruf bhala tali mill-familja."***

The Court continued to explain the raison d'etre behind Article 81 of the Civili Code – ***"Il-kwistjoni ghalhekk tirriduci ruhha ghall-apprezzament tal-provi dwar jekk il-minuri ghandux stat ta' iben imwieled minn koppja mizzewwga jew inkella ghandux stat li huwa imwieled minn relazzjoni extra-matrimonjali bejn mara mizzewwga u ragel li ma hux zewgha.***

Fis-sentenza moghtija mill-Qorti tal-Appell fil-25 ta' Mejju, 2007 fl-ismijiet "Marco Vella vs Pauline Cassar et." iccitata ukoll mill-konvenut Direttur fin-nota tieghu jinghad hekk:-

"Dak li jissejjah ir-raison d'etre ta' din id-disposizzjoni tal-ligi nostrali jinsab enkapsulat fil-kumment tal-awtur Ricci meta huma jikkummenta dwar disposizzjoni analoga tal-Kodici Taljan "Egli ha osservato esistere nell'ordine stesso delle cose una presunzione che sta per la inviolabilita' dal talamo a per il rispetto della fedelta' coniugale, la quale presunzione viene avvolorata dalla vita comune degli sposi e fa riguardare il marito come il padre dei concepiti da sua moglie durante il matrimonio. I giuconsulti romani intesero questa presunzione come l'incarnazione della formula solenne "pater is est quem justae nuptiae demonstrat." (Diritto Civile Vol. 1 para 49 page 76).

Fil-kawza "Anthony Grima vs Josianne Grima et." deciza fid-19 ta' April, 2012, il-Qorti tal-Appell kellha dan xi tghid fir-rigward tal-Artikolu 81 (2) tal-Kap.16:-

"L-azzjoni tallum hija mahsuba mhux biss biex icahhad lill-ulied mill-istat ta' ulied imnissla matul iz-zwieg izda ukoll biex icahhadhom mill-familja li fiha llum trabbew, interess li ukoll irid ihares l-art.81 (2) u huwa ghalhekk illi l-ligi ma tridx li tinbidel is-sitwazzjoni ta' min tnissel jew twieled matul iz-zwieg u ghandu stat li jaqbel ma' dak li jghid l-att ta' twelid tieghu."

However, the Court went a step further and expressed itself in this way:-

"Din il-Qorti tikkondividi l-fehma tal-awtoritajiet pubblici ntimati li kwalunkwe realtá biologika ma ghandhiex tipprevali fuq il-presunzjoni legali li hija bbazata fuq realta' familjari u socjali. Fil-kaz tal-lum, il-presunzjoni legali hija mera tar-realta' familjari u socjali…..u l-presunzjoni naxxenti minn din ir-realta' m'ghandhiex tigi disturbata minhabba realta' biologika."

"Din il-Qorti hija tal-fehma li l-presunzjoni legali hija skond il-ligi ghaliex parti mhijiex prekluza milli tikkontesta l-paternita'. Il-presunzjoni legali ghandha skop legittimu ghaliex qedgha hemm sabiex tipprotegi d-drittijiet u libertajiet tal-minuri u ghalhekk qeghda tissalvagwardja l-ahjar interess taghhom. Il-presunzjoni legali hija ukoll mehtiega f'socjeta demokratika sabiex thares ic-certezza legali fir-relazzjonijiet familjari sabiex fl-ahjar interess tal-ulied jipprevali."[7]

[7] Anthony Grima vs Josianne Grima, Kost.36/2012 deciza fl-24 ta' Marzu, 2015

The Court felt it was important to highlight the significance of Article 81 in that it contemplates and safeguards what are the rights of the minor child that are ultimately supreme. However, the Court cannot delve into the *rationae materiae* of this Article vis a vis the case at issue, as it would be delving into the merits of the case and its function today, is to determine whether on the facts produced, plaintiff satisfied the grounds to make a claim on the basis of Article 77(b), because this would then lead to a very delicate and sensitive case, which outcome could leave positive or negative impacts on the persons involved.

Essentially, plaintiff produced the genetic tests that confirm that he is not the child's biological father, but these do not suffice for the purposes of Article 77 (b) of the Civil Code. He pleads adultery, but this stands no ground as it has been confirmed by both parties, that they married when the child was two years old and therefore any allegation of adultery is inconceivable. Hence, the genetic tests *per se* are not sufficient and cannot be considered to be conclusive evidence on the biological paternity of the child. Consequently, one of the requisites for the proving of Article 77 (b) does not subsist so it becomes untenable for plaintiff to proceed further on the grounds of Article 77(b) and therefore offers no prejudice to Article 81 of the Civil Code.

DECIDE

For the above reasons, the Court decides that plaintiff's claims for a disavowal of paternity on the grounds of Articles 70(1)(d), Article 77 (1) (b) and Article 99 of the Civil Code are being rejected, whereas it upholds defendants pleas.

All costs are to be borne by plaintiff.

Mr Justice Anthony G Vella

Judge

Cettina Gauci

Deputy Registrar