CIVIL COURT
(FAMILY SECTION)

MADAM JUSTICE
JACQUELINE PADOVANI GRIMA LL.D., LL.M. (IMLI)

Hearing of Monday 24th February 2020

App. No. : 286/2018 JPG

Case No. : 19

RO in her own name and as curator ad literm of the minor P

Vs

1. **IL**
2. **By means of the decree of the 21st December 2018 Dr Joseph Brincat u PL Davina Sullivan were nominated to act as Curators in order to represent the absentee JB, and**
3. **Director of Public Registry**

The Court,

Having seen the sworn application filed by RO, dated 7th November 2018, a fol 1 et seqq., where in it was held:

1. *That on 9th April 2015 the applicant gave birth to the minor named P, certificate hereby annexed and marked Document A.*

2. *That from the act of birth it transpires that when the minor's birth was registered, he was registered on the spouse of the applicant, that is JB and this because the same JB was still seen as being married to the applicant;*

3. *That the father is a certain IL, the real partner of the applicant and this because the same JB of N nationality never came to Malta and he has been afar from his wife for a long time. Thus, there exists the physical impossibility that the minor is the natural child of JB;*

4. *That it is therefore in the best interest of the minor to have his effective real paternity declared;*

5. *That therefore it is also necessary that the birth certificate of the minor also reflects this fact;*

6. *That for this reason this case had to filed;*

Therefore, the applicant humbly asks this Honorable Court to;

1. *Declare that the minor P born on the X is not the son of the defendant JB as indicated in the birth certificate here annexed;*

2. *Declares that the defendant IL is the father of the minor P;*

3. *Orders the Director of Public Registry to carry out the necessary amendments to the birth certificate and relative acts of the minor P by cancelling every reference to the defendant JB and the connotations referable to him;*

4. *Orders the Director of Public Registry in the Act of birth of the minor he carries out all the necessary substitutions in order to pen all the connotations of the biological father of the minor once these are established in the mori of the case;*

5. *Without prejudice to the above mentioned requests and in the absence that the real father is established of minor P, orders the Director of Public Registry so that with respect to the act of birth of the minor the necessary amendments are carried and where in the act there are connotations of the defendant JB, these are substituted with the words "Unknown Father";*

6. *With costs against the defendants who are from now referred to testify under oath.*

Having seen that the application and documents, the decree and notice of hearing have been duly notified in accordance with law;

Having seen the reply filed by the Director of Public Registry, dated 16th January 2019, at page 20 et seqq., where in it held:

1. *That preliminary and at least from the acts which were notified to the exponent there seems to be lacking the required authorisation in terms of Article 77C of the Civil Code. The term established by law, that is the term of six months which start running from the birth of the child, is that period during which the person concerned shall file an action for denegata' paternita' and this according to Article 77A or Article 77B of the Civil Code, which term in this action has elapsed. Therefore, at this stage it shall be declared if the plaintiff was authorised by this Honourable Court to proceed with this action and in the circumstance whereby such authorisation was not granted, the plaintiff should regulate its position immediately;*

2. *That without prejudice to the above and regarding the merits of the case, the exponent states that he is not aware of the facts of the case as stated in the sworn application;*

3. *That in respect to the merits of the case, the exponent pleads that in order for this action to succeed, the plaintiff must prove that at the time between the three hundredth day and the one hundred and eighty days before the child's birth, this plaintiff had had an extra-marital relationship with IL and*

furthermore, the plaintiff should also bring forward any other proof even by means of genetic tests in order to exclude the defendant JB, as the natural father of the said child and this in terms of Article 77B of Chapter 16 of the Laws of Malta;

5. *That without prejudice to the aforementioned, should the demands put forward by the plaintiff be acceded to, the exponent calls the defendant IL to submit his personal details by means of a note specifying namely: (1) ID card number, (2) name and surname, (3) his age when the child was born, (4) the place of his birth, (5) the place of residence when the child was born, (6) the name and surname of his father, and (7) whether that paternal grandfather was still alive when the child was born. Such information is needed so as it will eventually be inserted in child's Act of birth;*

6. *That without prejudice to the foregoing, should the demands be forward by the plaintiff be acceded to, the exponent reveals that the parties to the case should decide definitively what surname shall the child assume in terms of Article 92 of Chapter 16 of the Laws of Malta;*

7. *That ultimately and always without prejudice to the above, the exponent submits that in any event, the applicant's action is not attributable to any act or omission of the same exponent and so the latter shall not be subjected to the costs of the case;*

8. *Saving further pleas*

With costs against the applicant who shall be demanded for a reference to the oath.

Having seen the reply of the Deputy Curators Dr Joseph Brincat and PL Davina Sullivan dated 16th July 2019, at page 63, wherein it was stated:

That although they do not know the facts, and consequently have to be guided by what evidence the parties have, and as it does not appear that the minors had a status recognised and established as legitimate children, the best

interests of the minors should prevail, in conformity with biological truth.

Having heard all the evidence on oath;

Having seen the exhibited documents and all the case acts;

Considers;

Dr. Marisa Cassar testified by means of an affidavit (*fol.* 58 *et seqq)* that she took genetic samples from RO, P and IL and carried out paternity testing. She explained that these tests show that IL is the biological father of P.

IL testified that he arrived in Malta in 2009 and has been in a relationship with plaintiff since 2010. He testified that the parties have three children today, but although they were allowed to register the first two as his children, when they went to register the child in these proceedings they were informed that the procedures had changed and that they needed to go to Court in order to have the child registered as his biological son, as opposed to the biological son of plaintiff's wife, which is why they had to institute these proceedings. He explained that plaintiff had married in N according to the traditional rites, so the child was registered under her husband's name. He confirmed however that the child was conceived from his relationship with plaintiff.

Plaintiff testified and confirmed the version of events as described by IL.

Deliberates;

Regarding the preliminary plea raised by the Director of Public Registry to the effect that fact that plaintiff had not obtain the required authorisation to proceed with this action, the Court notes that while it is true that plaintiff did not have the necessary authorisation before filing these proceedings, she subsequently filed an application to request this authorisation on the 15th of April 2019. This authorisation was in fact granted by means of a decree give on the 24th of June 2019. The Court considers therefore that plaintiff has duly regularised her position, and that this action can proceed to be examined on its merits.

This is an action based on article 77B of the Civil Code, according to which:

> ***"A judicial demand for a declaration of parenthood as mentioned in the previous article may also be exercised by the parent who gave birth by sworn application before the competent court against the other spouse, the natural parent and the child born in wedlock, provided that the applicant produces evidence that during the time from the three-hundredth day to the one-hundred-and-eightieth day before the birth of the child that parent had committed adultery with the person who the said parent is demanding to be declared as the natural parent and furthermore produces evidence of any other fact which may also be genetic and scientific tests and data that tends to indicate that person as the natural parent of the child."***

The Court notes that article 81 of the Civil Code provides that:

> ***"(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."***

Furthermore, article 80 of the Civil Code states that:

> **"*(1) Such possession* [of the status of a child conceived or born in wedlock] *shall be established by a series of facts which, collectively, go to show the connection of filiation and relationship between an individual and the family to which he claims to belong.***
>
> ***(2) Such facts are chiefly the following:***
> ***(a) in the case of spouses who have contracted marriage before the coming into force of the Marriage Act and other Laws (Amendment) Act, 2017* that the individual has always borne the surname of the father of whom he claims to be***

the child;
(b) in the case of children born to spouses who have contracted marriage after the coming into force of the Marriage Act and other Laws (Amendment) Act, 2017, that the individual has always borne the Family Name of the spouses of whom he claims to be the child;
(c) that the parents have treated the child as their own, and have, as such, provided for the child's maintenance, education, and establishment in life;
(d) that he has been constantly acknowledged as such in society;
***(e) that he has been acknowledged as such by the family*.**"

Regarding the above mentioned article 80, in the judgement in the names of **Pierre Travers Tauss vs Direttur tar-Registru Pubbliku et noe** decided by the First Hall of the Civil Court on the 10th of May 1996, it was stated that nowadays the notion of what constitutes family is no longer restricted to relationships based on marriage, but applies also to *de facto* family ties, and it is the State's duty to act in such a way so as to enable the continued development of these relationships in the interests of children themselves, and that therefore article 81 of the Civil Code may not be an obstacle for the acceptance by the Court of requests such as those made by plaintiff in this case.

The Court has seen that P was born on X and was registered as the son of defendant JB, who at the time was legally married to plaintiff. However, it results from the acts of the case that it was physically impossible for JB to have fathered the child since he never came to Malta with plaintiff, and they have been physically separated for a lengthy period which excludes the possibility of the child being JB's son. Furthermore, it results from the testimony of plaintiff and defendant IL that the two have been in a relationship since 2010 and from this relationship three children were born, including P. It results that the parties had actually attempted to register all children as being the children of IL, however they were only allowed to register their two elder children, and were subsequently informed that the procedures had changed when they went to register their youngest child. It results that IL acknowledges that the child is his biological son, and that the parties live together as a family together with their three children.

The Court has seen furthermore, that the genetic tests conducted on IL and on the child, shows that IL is the child's biological father. It is understood that genetic testing is a most crucial evidentiary factor in these cases. Therefore, the child's paternity has been established without a

shadow of doubt and from this it follows that plaintiff's requests are well-founded both in fact and at law and ought to be accepted.

The Court has seen that the parties declared in the minutes of the hearing of the 29th of January 2020 that they wish for the child's surname to be changed to IL. The Court considers that in light of the child's young age and the fact that he has just started school, it would not be contrary to his best interests to allow this change to his surname.

For these reasons, the Court, while abstaining from taking further cognisance of the preliminary plea of the Director of the Public Registry, accepts plaintiff's requests and therefore,

1. **Declares that P born on the X is not the biological son of JB as indicated in the child's birth certificate;**
2. **Declares that IL is the biological father of P;**
3. **Orders the Director of the Public Registry to take the necessary steps to make the necessary substitutions in P's birth certificate so that instead of the name 'JB' there shall be indicated 'IL' as the biological father of the child, holder of the identity card with the number Y, born in N, resident in PB, son of PL (deceased) and W years of age, and furthermore orders the Director of the Public Registry to remove the words "the said" from the column indicating the mother's particulars;**
4. **Orders that the child's surname be changed to L, and orders the Director of the Public Registry to take the steps necessary for these amendments in the child's birth certificate be carried out.**

All the expenses of these proceedings are to be borne by plaintiff and the first defendant IL.

Read.

Mdm. Justice Jacqueline Padovani Grima LL.D. LL.M. (IMLI)

Lorraine Dalli

Deputy Registrar