



**QORTI CIVILI
(SEZZJONI TAL-FAMILJA)**

**ONOR. IMHALLEF
ROBERT G MANGION**

Seduta tat-12 ta' Novembru, 2013

Citazzjoni Numru. 7/2013

A A pro et noe

Vs.

C B et

Today, the 12th of November 2013.

Introduction,

On the 23rd April 2013, plaintiff filed an application seeking an order against defendant B. The following is the full text:-

“1. Applicant in her own name, as well as on behalf of her minor daughter D A, has instituted these court proceedings in order of the defendant C B to be recognized as the biological father of the said minor.

2. Applicant has no doubt whatsoever that the said defendant is the biological father of the minor in question, however defendant, is denying this or at best trying to cast doubt on this fact. Applicant has filed evidence in the form of various sms conversations and other chats with defendant, clearly showing that right up until these proceedings were initiated, there was no doubt in defendant's mind as to the fact that the minor is his daughter.

3. Applicant on oath hereby denies all allegations made about her being promiscuous or having other relationships whilst she was in a relationship with defendant and most specifically at the time when the minor was conceived. She therefore has no doubt at all that there can be no other person who is the biological father of the minor.

4. Applicant believes that defendant's reluctance to admit to being the biological father of the said minor is based on purely selfish reasons and motivations but surely have nothing to do with the minor in question. This is being said because all reference to defendant having another family, who could be adversely affected by this recognition, is totally alien to the said minor. The minor has every right to be recognized as her biological father's daughter and who should benefit from all the rights, be they legal, medical, financial, moral or factual, that any son/daughter are entitled to.

5. Defendant C B, is adamant to nor recognize this child and escape from all responsibility towards her and has to date not given his consent to undergo a genetic paternity test.

6. Applicant is therefore availing herself of the right granted to her as mother of the said minor, by virtue of Article 100A of Chapter 16 of the Laws of Malta, and is hereby requesting that the defendant and the said minor, undergo a genetic paternity test and take the genetic sample appropriate for the test, in order to establish, without any doubt, that defendant is in fact the biological father of the minor in question.

7. That there exists no possible adverse effect on the best interests of the minor child, and it is moreover in the minor's best interest that the said paternity is confirmed.

In light of the above, and in virtue of Article 100A and more specifically Article 70A (2) of Chapter 16 of the Laws of Malta, applicant humbly requests that this Honorable Court order that both D A and defendant C B, undergo a genetic paternity test and take the genetic samples appropriate for the test, in order to establish, without any doubt, that defendant is in fact the biological father of the minor in question.

Defendant B replied on the 14th June 2013:-

"1. Defendant is opposing plaintiff's demand that he undergo a genetic paternity test.

2. Defendant contents that he is not the natural father of plaintiff's son and he shall in this reply make submissions without prejudice to the overriding contention that defendant is not the child's natural father and shall bas this present such reply on the possibility that defendant my be the child's father.

3. Defendant submits that the evidence sought by plaintiff, if positive, will result in considerable adverse effects on the best interest of the minor child and this on the basis of the following circumstances:

a) The relationship between plaintiff and defendant was adulterous and clandestine. The parties never had a stable or open relationship and frequented each other very rarely and always clandestinely. Should defendant be the father, minor child would be the child of parents who have no ongoing relationship today is mutually antagonistic.

b) Defendant has absolutely no interest in the child and only saw the child casually and on occasions

engineered by plaintiff. It is not in the child's interest to have a father who has absolutely no interest in him. Defendant is temporally stationed in Malta with the Italian Armed Forces and scheduled to permanently leave Malta in due course. Defendant believes that, even had he possessed a relationship or the potential to form a relationship with the minor child, that relationship would effectively terminate upon his relocation.

c) Plaintiff has started another relationship with another man. Defendant knows little else of this relationship. It is nonetheless likely that plaintiff will eventually form a stable relationship with a third party and may possibly have children with this third party. By establishing defendant's paternity, plaintiff would effectively be excluding the possibility of her integrating the child in her future family – even by adoption – and thus will be guaranteeing that the child remains isolated and separated from the rest of plaintiff's future family.”

The parties filed further written submissions on the 11th July 2013 and on the 5th November 2013 respectively.

During the court sitting of the 17th September 2013 the application was adjourned for today for a decision.

Background.

The application which is the subject of this decree was filed in a pending case filed earlier by plaintiff requesting the Court to declare that defendant C B is the biological father of her daughter, D A, born on the 17th December 2011. To substantiate her case plaintiff invokes articles 70A (2) and 100A of Chapter 16 of the Laws of Malta and seeks an order against defendant C B to provide genetic samples for the purposes of DNA testing.

This is opposed by defendant. He argues that it is not in the best interest of the minor child for the Court to declare defendant as the biological father of plaintiff's minor daughter.

Legal framework.

Article 70A of the Civil Code provides that:-

“(1) Whenever the clarification of natural parentage of a child is required –

(a) the father may require the mother and the child;

(b) the mother may require the father and the child;

(c) the child may require both parents; and

*(d) the alleged natural father may require the husband,
the
mother and the son,*

to consent to a genetic paternity test and to acquiesce in the taking of a genetic sample appropriate for the test, which sample must be taken according to the then current provisions of the law.

(2) On the application of a person entitled to clarify, the Civil Court (Family Article) must substitute consent that has not been given and order acquiescence in the taking of a sample.

(3) The Civil Court (Family Article) shall dismiss the application if and as long as the clarification of the natural parentage would result in a considerable adverse effect on the best interests of the minor child, which would be unreasonable for the child, even taking into account the concerns of the person entitled to clarify.

(4) A person, who has consented to a genetic paternity test and has given a genetic sample, may require the person entitled to clarify who has had a paternity test made, to permit inspection of the genetic paternity test report or to provide a copy. The Civil Court (Family Article) shall decide disputes arising from the claim under sub-article (1).

Article 100A of the Civil Code provides that:-

“In causes to which this Sub-Title makes reference, the court may, without prejudice to any evidence that may be produced by the parties according to law, require the parties to submit to examinations as referred to in article 70A, and in the same manner and in the same circumstances”.

In his submissions defendant invokes Article 70A (3) which provides that the Court should not allow a request to clarify natural parentage if it results that a judicial declaration about the child's natural parentage would have a “considerable adverse effect on the best interests of the minor child” which would be “unreasonable for the child”.

Defendant's Pleas.

Defendant argues that he should not be ordered by the Court to give genetic samples for DNA testing for the following reasons:

(1) establishing in a court of law that defendant is the minor child's father is not in the minor child's interest since the child's parents would have no on-going relationship or rather their relationship is mutually antagonistic; (2) since defendant has absolutely no interest in the child, a declaration of paternity will not foster a relationship between him and the child; (3) it would be in the interest of the child that the minor be fully integrated within the new family that plaintiff shall form with her partner in future without having any communications with defendant; (4) the Court must suppress a request for clarification of parentage if this can have considerable adverse effects on the minor; (5) the law acknowledges circumstances where natural parentage clarifications would be detrimental to the minor child and therefore inadmissible; (6) the law emphasizes the best interest of a *minor*. The interests of a minor may defer from those of the parent representing the minor child. (7) Article 70A (3) is not limited to those cases where the minor child was born in

wedlock; (8) if plaintiff's request is accepted, the minor would be declared the daughter of a man "she does not know and will never know" who has no relationship with the mother; (9) to establish that a parentage clarification is not in the best interest of a minor child, "considerable adverse" effect is sufficient without the requirement of "serious" or "grave" adverse repercussions. Where the Court concludes that parentage clarification is not in the minor child's best interest the matter is only being postponed to when the child is no longer a minor. Once the child reaches adulthood the limitations discussed above will no longer be applicable.

The Court's deliberations.

It must be kept in mind that the present court case is not a child custody dispute where the Court has to establish whether to grant care and custody to the father, or to the mother, or to both jointly or to none of them. None of the issues normally decided in a care and custody dispute between parents is going to be decided in this case.

What the Court is being asked by plaintiff to decide in the present court case is to declare defendant B the biological father of the minor child and have his name inserted in the minor child's birth certificate which to date states that the child has an "unknown father". To prove her case plaintiff seeks to establish defendant's fatherhood by means of a DNA test. Since defendant B has refused to voluntarily provide his genetic samples for DNA testing purposes, the mother has filed an application in terms of Articles 70A (2) and 100 of Chapter 16 of the Laws of Malta asking the Court **to order** defendant B to undergo a genetic paternity test and that genetic samples are taken in order to establish that defendant is the biological father of the minor child.

In scenarios similar to the one under discussion it is the duty of the Court to conduct a comparative exercise in order to establish whether it is in the best interest of the minor child to remain with a birth certificate declaring to all that her father is "unknown" or whether it is in the best

interest of the child to have a birth certificate declaring who her biological father is.

After due consideration it is the Court's strong view that in the particular circumstances of this case a judicial declaration establishing that the minor child's father is known will **not** adversely affect the child.

The Court is of the opinion that it more harmful to the minor child to have a birth certificate stating that the child's father is unknown than having a birth certificate declaring an identified person as the biological father, even though such person does not want to recognise his daughter.

The negative psychological consequences on a minor child, especially during adolescence, discovering that her birth certificate states that the biological father is not known should not be underestimated. The situation might have been different, and the Court emphasizes the word 'might', had the minor child been raised for a number of years in a family nucleus with another person as the father figure. In the particular case no emotional disruption will come in the child's way as a result of a judgment declaring who the biological father is since no one else has assumed that role yet.

Another important aspect which the Court took into account is the fact that through the ever increasing scientific advancement DNA samples are increasingly being used to predict and treat genetic diseases. Is a child with an unknown father disadvantaged when it comes to medical care? The Court believes the answer is yes.

From a purely patrimonial point of view, the best interests of the child are not served if the possibility of establishing that the minor child has a known father is denied. Inheritance rights as well as alimony should be taken into account.

No evidence has been produced to substantiate defendant's submission that a parentage judicial declaration shall cause disruption in the child's family. On the contrary the Court believes that the reassurance which comes from knowing one's parentage is a valuable source of psychological security. Cases where adopted children are a success story but still want to know who their biological parents are is proof of the negative psychological consequences on a child whose biological parents are not known.

Although defendant clearly states that he does not want to have anything to do with the minor child, even if it is proved that the girl is his daughter, his attitude does not exempt him from carrying out his statutory duties towards his biological daughter. Although a Court cannot order an unwilling father to love his daughter, it can order him to provide for the child's maintenance and her educational and health needs in terms of **Article 7 of the Civil Code**.¹

7. (1) Parents are bound to look after, maintain, instruct and educate their children in the manner laid down in article 3B of this Code.

It is the Court's opinion that putting a face and a name to one's father in one's birth certificate is better than a birth certificate declaring that one's father is unknown. There is no evidence to show that the inclusion of the father's name in the minor child's birth certificate will adversely affect the wellbeing of the minor child, let alone "considerably adversely" affect the minor. Nor is there evidence to suggest that such an amendment to the minor child's birth certificate would be "unreasonable".

Decide.

For these reasons the application filed by plaintiff A A on the 23rd April 2013 is being upheld.

¹ 7. (1) Parents are bound to look after, maintain, instruct and educate their children in the manner laid down in article 3B of this Code.

In terms of Article 70A (2) and of Article 100 of Chapter 16 of the Laws of Malta, the Court orders defendant C B to acquiesce and submit himself for a DNA test by not later than a month from today.

The Court appoints as court expert, at the provisional charge of plaintiff, Dr. Marisa Cassar in order to collect by means of a buccal swab a genetic sample from defendant to be used for the purposes of preparing a DNA test report.

Dr Cassar will also collect genetic samples from plaintiff and from her minor daughter in order to establish whether defendant is the biological father of the minor child or not. Court expert Dr Marisa Cassar is to file her DNA test report during the next court sitting.

< Sentenza In Parte >

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