FAMILY LAW

CVL2000

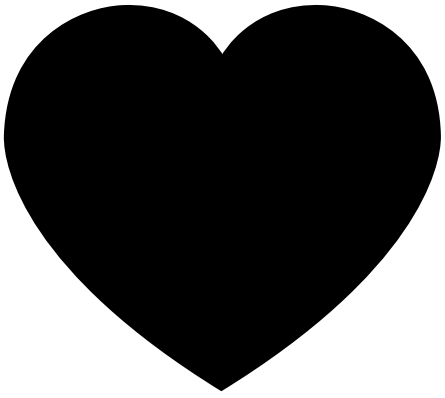


Table of Contents

Matrimonial Regimes

Of Marriage Contracts - Article 1236-1247

Article 1237 - Parties may enter into other agreements not contrary to morals, etc.

1237. (1) It shall, however, be **lawful for the future spouses** to enter into **any other agreement,** which is **not contrary to morals**, or inconsistent with the rules contained in this and the following articles of this Code.

(2) The **spouses may,** in an **ante-nuptial or post-nuptial contract** agree that their property acquired during their marriage shall remain separate or that it shall be governed by the system of community of residue under separate administration under Sub-title V of this Title, and without prejudice to sub-article (3) hereof, no partnership or community of property in general, may be established between the spouses except that referred to in this article or in article 1236.

Article 1238 - Certain agreements may not be made.

1238. (1) It **shall not be lawful** for the **future spouses** to **enter into any agreement** whereby either of them is established as head of the family, or into any agreement in derogation of any of the rights **deriving from parental authority,** or of the provisions of law relating to minority, or of any prohibitory rule of law.

(2) Nevertheless, any stipulation that all the children, or any of them, shall be brought up in the religion of either of the spouses shall be valid.

Article 1240 - Validity of certain promises made in marriage contracts

1240. (1) A promise made in a marriage contract by the parent of one of the future spouses to such future spouse -

(a) not to leave to such future spouse out of his or her estate a portion smaller than that which such future spouse would take on an intestacy; or

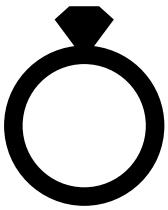
(b) not to diminish such portion by any donation in favour of his or her other children or of any other person; or

(*c*) not to give or leave, by donation or will, to any of his or her other children more than that which he or she would give or leave to such future spouse, shall be valid.

(2) It shall also be lawful for either of the future spouses to renounce the succession of any of his or her own parents or other ascendants in return for what is given to him or her by such parent or other ascendant by way of donation in contemplation of marriage.

(3) Any such waiver, however, shall not be valid unless it is expressly stated.

Article 1241 - Marriage agreements by minor



1241. **Marriage agreements** entered into **by a minor** with the consent of the parents or parent exercising parental authority, or where both parents are absent, dead, interdicted, or have a mental disorder or other condition, which renders them **incapable of managing their own affairs**, with the authority of the court, are valid.

Person under disability to contract.

1242. The authority of the court shall, in all cases, be necessary for the validity of a marriage agreement entered into by a person who is under disability to contract.

Variation of marriage contract before marriage.

1243. Any variation or counter-declaration made in respect of the marriage contract by the future spouses before the celebration of marriage shall not be effectual unless it is made with the consent of all the parties to that contract.

Post nuptial agreements

1244. (1) After the celebration of the marriage, the spouses may, with the authority of the court, vary their marriage agreements, without prejudice to the rights of the children or of third parties.

(2) Where no ante-nuptial agreement was made, the spouses may also, with the authority of the court, enter into a marriage contract.

(3) Any agreement prohibited by law in respect of a pre-nuptial agreement is also prohibited in any post-nuptial agreement.

(4) After the celebration of the marriage the spouses may, without the necessity of any authority of the court, substitute a special hypothec for any general hypothec established in the marriage contract.

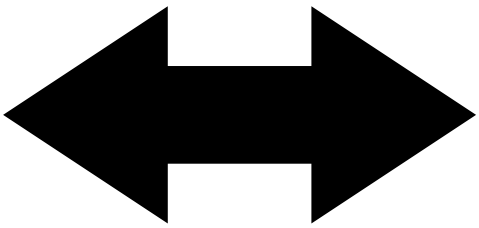
Marriage contracts to be expressed in public deed,

1245. Any marriage contract, as well as any variation or counter- declaration made in respect thereof, shall, on pain of nullity, be expressed in a public deed.

and registered in Public Registry.

1246. No marriage contract, variation or counter-declaration shall be operative in regard to third parties, unless it is registered in the Public Registry Office.

Changing Matrimonial Regimes



- Spouses CAN change their matrimonial regime after the celebration of the marriage. However, to do so after marriage, they must obtain **authorization** from **the Court** of Voluntary Jurisdiction.

If during marriage they the COA (default regime) they can decide into a post nuptial contract, in front of a notary, with the consent of the spouses. Now however it is not only their consent that is needed but the law seems to want to protect the spouses.

How does the law intervene? The draft deed drawn up by the notary public would need authorisation by the court. The draft contract would be drawn up, an application (recourse) is filed attaching the draft contract and requesting the court to approve it. The judge will go through the contract and would see if the conditions are fair and then would approve it by signing on the draft and then put a rubber stamp 'AUTHORISED'. Following, there would also be issued a decree by the court, which once it is issued, the couple would go to the notary and the notary would later on publish it in the public registry.

Matrimonial Regimes

- When a couple enter marriage, they will have assets which they acquire throughout term of marriage and liabilities (home loan, or other personal effects) and when you have this situation of acquisitions and liabilities within a marriage, the issue of who administers arises, what sort of administration do the spouses have ?

Matrimonial Regime 1: Community of Acquests

or - Default System/ Regime of administration - spouses before marriage, did not enter into a prenuptial contract, eliminating the operation of community of acquests , automatically, community of acquests is established as soon as they get married.

Example: When someone is employed and receives the monthly pay check, that pay check is split in half as it is community money. Actual salary belongs to both spouses. They have to share the salary - reminds us what was stated in that white paper - you had a situation where women did not work, one of the reasons where community of acquits.

- Whatever income is generated, is shared in equal shares between the spouses

Matrimonial Regime 2: Separation of Estates

- Separation of estates - couple will acquire and administer the assets individually.
- That loan is the responsibility of that particular spouse and **will not spill** on the other spouse if the other spouse in default of payment so each will give fault of assets and liabilities.

The law provides that although there might be a separation of property they can always be co-owners. You might have the regime of separation of property, but there is nothing stopping them from becoming co-owners. It is n

Matrimonial Regime 3: CORSA ***Community of residue*** *under* ***separate*** *administration****(CORSA)***

- A mixture of Matrimonial Regime 1 &2 - it is in the law.

- The two spouses begin to administer the liabilities and assets separately, until these has to be liquidated. At the end when calculating the residue, when they have 2 subtotals, ideally the 2 sub totals match - the spouse with the larger balance would have to compensate the other spouse by equalising.

- You need a formal contract- establishing this regime, if after marriage the contract would need approval of court.

Once set, whatever each spouse acquires whatever that spouse incurs, belongs his or hers, as it is administered, so the administration and management is vested entirely in that single individual - that pay check will be appropriated entirely by that spouse - now but isn't this separation of estates? Yes, it is an example during the lifetime of CORSA, that is how it operates. Whatever is acquired is in the name of that particular spouse.

The community however comes in - if there are problems in the marriage and they need to separate - when a separation occurs, the assets and liabilities will be liquidated and is transferred accordingly - if CORSA is in place, during separation at that point in time, an inventory and evaluation of all assets and liabilities of individual spouse are listed - the same thing occurs, - and you get a total

EXAMPLE OF CORSA: *The spouse with the total has to share that total with the other spouse, to equalise the totals, so the person who has 12k extra, in order to have a balance, would need to supply the other side with 6k for example and they equalise. So the net balance is the amount that they will share in equal shares.*

Matrimonial Regime	**During Marriage**	**In a case of separation**
Community of Acquests	One common fund in which everything that is accrued after marriage goes (ex: property bought, earnings, debts due etc.)	Everything is divided in half if the couple come to separate, if the marriage is annulled or upon the death of one the spouses.
Separation of estates	The property acquired during marriage remains paraphernal, i.e. belongs to the party who paid for it or earned it. Ex: If the husband buys a car, it is his only.	If the couple come to separate, his wife is NOT entitled to half of it.
CORSA - Community of residue under separate administration	During the marriage, the spouses have separate estates	At the end of the marriage (if they come to separate or upon death), everything left (the residue) is pooled and divided equally in two.

OF PARAPHERNAL PROPERTY

Articles 1334 -1337 of the Civil Code

Definition of Paraphernal property

1334. (1) Where the community of acquests or the community of residue under separate administration operates between the spouses, all property which is not included in paragraphs (*a*) to (*f*) of article 1320 or is not dotal is paraphernal. Where the property of the spouses is held under the system of separate property all property which is not dotal is paraphernal.

—— Definition of paraphernal property. Paraphernal property **is not** a regime like the other (community of acquests and corsa). When we are speaking of paraphernal property do not confuse it with separazzjoni tal-beni.

—— So paragraphs a-f of article 1320 do not exist or it is not dotal, then these items would be considered **paraphernal**, hence **belonging entirely to one spouse.**

(2) The **management** of **paraphernal property** shall **appertain exclusively to the spouse to whom such property belongs.**

——- The law in 1334(2) states that the administration of paraphernal property has to be administered entirely by that individual spouse.

(3) For the support of the family, the spouses shall first use income deriving from common property before income belonging to one of them exclusively, and they shall first use capital which is their common property or belongs to the community of acquests before the capital belonging exclusively to one of the spouses.

- The legislator made a distinction; in all regimes, you will find paraphernal property. For sure, in the regime of separation of property (separazzjoni tal-beni) the property there, unless it is dotal, is considered parahernal, because the spouses opted to have in place the regime of separation of property.

- With a community of acquests or corsa, you will find applicable all the rules regulating these regimes, but you will also find in the portfolio of the individual spouses, property which can be defined paraphernal.

- When we are talking of paraphernal property, do not confuse it with the separation of property/ estates. Separation of estates is a regime of its own, and whatever each spouse has in that regime is considered paraphernal, because it belongs entirely to that spouse because they opted to keep everything separate from each other. Parahernal property will figure in all three regimes but it does not amount to a regime of its own.

1334 - Definition of paraphernal property. Paraphernal property **is not** a regime like the other (community of acquests and corsa). When we are speaking of paraphernal property do not confuse it with separazzjoni tal-beni.

- Since paraphernal property belongs to that individual spouse, naturally the law under sub-article 2 provides that the administration of the paraphernal property must be administered entirely, with full responsibility, and any burdens, by that individual spouse.
- My property my responsibility. In both situations, the community of acquests and corsa each spouse will have their own property or liability, which is paraphernal. If they opted for the regime having full separation, with regards to administration and acquisition of property and liabilities, all that amounts to the responsibility of each individual spouse.

Josephine Borg Vs Loreto Borg - 14th of August 2001 – FHCC

ISSUE: Mrs. Borg asked the court to issue an order so as to ask the defendant to leave the home for her and her daughter to be able to live in it. The defendant appealed on the grounds that the home was his **paraphernal property.** The court stated that although it is his paraphernal property, if the court deems it fit, it might order his departure *pendente lite*.

REASONING: The defendant had clearly **no relation with his wife and child**; marital and familiar affection are evidently non-existent because the former is interested in his friends and hunting.

Apart from the obvious cases of physical violence on wife and children as well as corruption of minors, the court did not hesitate to order the departure from one's paraphernal property also in those cases where, because of the 'owner's' actions, such tension was created (apart from the natural tension due to separation) that it was in all the family's best interests to separate.This occurred especially if it was clear that the person who had to leave had a place where to live in the meantime. The court held that there existed enough **moral violence so as to order his evacuation and in fact Mr. Borg was asked to leave the premises *pendente lite* within a month**

DECIDE: Although Article 1334 states that the management of paraphernalia property shall appertain exclusively to the spouse to whom such property belongs, the judge may ignore this provision if he deems it beneficial to the family or to the spouse who suffered most or will suffer as a result of the sentence.

History of the Community of Acquests

- The community of Acquests - (default Regime) - the situation we have in place today is pretty recent, up to 1993, only sprain of estates and where it concerned the default regime, the community of acquests, you did not have joint administration, but the spouses up to 1993, the spouses do not administer assets and liabilities jointly. This changed after 1993, whereby the community of. acquests is managed jointly by the spouses.

Before 1993 the administration of COA was vested by law by the husband : he could have done practically anything without the need of the spouse to appear on the contract as the law vested administration in the husband.

*In **1991**: first attempt to change the law. In 1993 it was actually changed.*

Alfred u Alice Brown konjugi vs John Mifsud John, 3 ta' Marzu 2005, Onor. Imħallef Tonio Mallia, il-Qorti qalet:

"M'hemmx dubju li qabel l-1993, ir-rappreżentanza legali u ġuridika tal- komunjoni tal-akkwisti kienet vestita f'idejn ir-raġel biss, li waħdu seta' jaġixxi u jiddisponi mill-assi tal-komunjoni kważi bla xkiel. Bl-Att XXI tal- 1993, li emenda l-Kodiċi Ċivili, il-posizzjoni inbidlet u r-rappreżentanza tal- komunjoni tal-akkwisti ġiet afdata fil-koppja miżżewġa.

"Il-liġi, pero', daħlet distinzjoni bejn l-amministrazzjoni ordinarja u l-amministrazzjoni straordinarja tal-istess akkwisti. L-artikolu 1322(1) tal-Kodiċi Ċivili jiddisponi li l-amministrazzjoni ordinarja tal-akkwisti u l-jedd li wieħed iħarrek jew jiġi mħarrek dwar dik l-amministrazzjoni ordinarja imissu lil kull waħda mill-partijiet miżżewġa. Minn naħa l-oħra, l-artikolu 1332(2) jipprovdi li l-jedd li jitwettqu l-atti ta' amministrazzjoni straordinarja, u l- jedd li wieħed iħarrek jew jiġi mħarrek dwar dawk l-atti imissu liż-żewġ miżżewġin flimkien.

Old Section before the 1993 Amendments (GOOD TO MENTION IN AN EXAM)

1362 (1) The Administration of the acquests appertains to the husband, who, in regard to third parties, may dispose of the acquests as of his own property.

(2) Any Agreement directly or indirectly contrary to the provisions of this section is null.

-We still have the situation where lawyers use to file application - rikorsi, at that time it was the second hall of the civil court. Today we have the civil court, family section dealing with such matters.

Article 1316 - Marriage produces community of acquests (IMP FOR EXAM)

1316. (1) Marriage celebrated in Malta shall, in the absence of an agreement to the contrary by public deed, produce ipso jure between the spouses the community of acquests.

(2) Marriage celebrated outside Malta by persons who subsequently establish themselves in Malta, shall also produce between such persons the community of acquests with regard to any property acquired after their arrival.

IF -
- *The marriage is celebrated in a foreign jurisdiction*
- *Later on, the spouses establish themselves in Malta*
- *As soon as they set foot on the Island, all property acquired in Malta will form part of the community of acquests*

- When you change domicile, local law will apply to them - this is the law that creates or established community of acquests within their regard, so marriage celebrated outside malta who establish themselves in Malta,

Article 1317 - Communityof acquests may be established after marriage.

1317. It shall be competent to the spouses, even after the celebration of the marriage, with the authority of the court, to establish the community of acquests which in virtue of the marriage contract or other act had been excluded, or to cause the cessation of the community of acquests established by contract or by operation of law.

No legal personality of the Community of Acquests

- No Legal and Distinct Personality: The community of acquests has no distinct legal personality of its own: *Meli Clyde vs Pace Decesare Maurice et - Civil Court, First Hall decided on 24th May 2002:*

> *"Il-komunjoni ta' l-akkwisti ma ghandhiex personalità maghzula mill-personalità tar-ragel u tal-mara. Is-sidien tal-beni tal-komunjoni huma r-ragel u [-mara, mhux il-komunjoni. Mela huwa minnu illi kull wiehed mill-mizzewgin ghandu nofs indiviz tal-fond tal-komunjoni."*

(2) The **spouses may**, in an ante-nuptial or post-nuptial contract **agree that their property** acquired during their marriage shall remain separate or that it shall be governed by the system of community of residue under separate administration under Sub-title V of this Title, and without prejudice to sub-article (3) hereof, no partnership or community of property in general, may be established between the spouses except that referred to in this article or in article 1236.

(3) The spouses may, without the intervention of any court, whether alone or with others, and whatever system regulates their property, form a limited liability company under the Commercial Partnerships Ordinance*; voting rights attached to shares registered in the name of a spouse shall be exercised by the spouse in whose name the shares are registered. The ownership of the shares in any such company shall remain governed in accordance with the system governing the property of the spouses.

Commencement & Termination

1319. *The right of each of the spouses to the community of acquests shall, saving any other provision of the law, commence from the day of the celebration of the marriage and terminate on the dissolution thereof.*

Presumption with regard to acquests

1321. (1) All the property which the spouses or one of them possess or possesses shall, in the absence of proof to the contrary, be deemed to be part of the acquests.

(2) Any property, however, which may have come to either of the spouses under any title anterior to the marriage shall not be included in the acquests, notwithstanding that such spouse may have been vested with the possession of the property only after the marriage.

Assets of Community of Acquests

1320. The community of acquests shall comprise -

(*a*) all that is acquired by each of the spouses by the exercise of his or her work or industry;

(*b*) the fruits of the property of each of the spouses including the fruits of property settled as dowry or subject to entail, whether any one of the spouses possessed the property since before the marriage, or whether the property has come to either of them under any succession, donation, or other title, provided such property shall not have been given or bequeathed on conditions that the fruits thereof shall not form part of the acquests;

(*c*) saving any other provision of this Code to the contrary, the fruits of such property of the children as is subject to the legal usufruct of any one of their parents;

(*d*) any property acquired with moneys or other things derived from the acquests, even though such property is so acquired in the name of only one of the spouses;

(*e*) any property acquired with moneys or other things which either of the spouses possesses since before the marriage, or which, after the celebration of the marriage, have come to him or her under any donation, succession, or other title, even though such property may have been so acquired in the name of such spouse, saving the right of such spouse to deduct the sum disbursed for the acquisition of such property;

(f) fortuitous winnings made by either or both spouses, and such part of a treasure trove found by either of the spouses, as is by law assigned to the finder, whether such spouse has found the treasure trove in his or her own tenement, or in the tenement of the other spouse, or of a third party:

Provided that such part of the treasure trove as is granted to the owner of the tenement shall belong entirely to the party in whose tenement the treasure trove is found.

ADMINISTRATION OF COA

1322. (1) The ordinary administration of the acquests and the right to sue or to be sued in respect of such ordinary administration**, shall vest in either spouse.**

(2) The **right to exercise acts of extraordinary administration**, and the right to sue or be sued in respect of such acts or to enter into any compromise in respect of any act whatsoever, shall vest in **the two spouses jointly.**

(3) Acts of extraordinary administration are the following:

- (*a*) acts whereby real rights over immovable property are acquired, constituted or alienated;
- (*b*) acts constituting or affecting hypothecation of property;
- (*c*) acts whereby immovable property is partitioned;
- (*d*) acts granting rights of use and, or, enjoyment over immovable property;
- (*e*) donations other than those referred to in article 1753(2)(*a*);
- (*f*) borrowing or lending of money, other than the deposit of money in an account with a bank;
- (*g*) the acquisition of movable property or of any right of use or enjoyment over movable or immovable property the consideration for which is not paid on, or prior to, delivery:

Provided that this shall not apply to any debt incurred for the needs of the family in terms of article 1327(*c*), or to the hiring of movables or immovables when the consideration therefor is moderate in relation to the condition of the family and the duration of the lease is for a short period;

- (*h*) the contracting of any suretyship;
- (*i*) the giving of a pledge;
- (*j*) the entering with unlimited liability in a commercial partnership, or the subscribing to or acquisition of any shares in a limited liability company which are not fully paid up;
- (*k*) the transfer of a business concern as well as the transfer of any share in a commercial partnership other than a public company;
- (*l*) any act that may give rise to a special privilege in terms of paragraph (*b*) of article 2010;
- (*m*) any act of rescission of any act referred to in paragraphs (*a*) and (*c*), and any act of declaration made *inter vivos* whereby any real right over immovables is acknowledged or renounced; and
- (*n*) the settlement in trust of property forming part of the community of acquests and the variation or revocation of the terms of any trust in which any such property has been settled.

- NOWADAYS: What sort of administration is involved ? The law distinguishes between ordinary and extraordinary administration.

Elmo Insurance Services LTD nomine vs. Pace Edwin et (Court of Appeal (Civil, Superior) (2003).

This was a case dealing with an insurance claim following damages in a traffic accident whereby the plaintiffs were arguing that since the property which caused the damages in question belonged to the community of acquests, then the spouses of the defendants had to also be party to the suit.
The court made reference to ordinary acts and extraordinary acts. When referring to ordinary acts, the court said that any one of the spouses can carry out such acts. With regards to extraordinary acts, the presence or contribution of both spouses is required.

The Court said *"Il- precitat artikolu 1322 jipprovdi ghas-sitwazzjoni dipendenti minn natura tal-amiministrazzjoni tal- akkwisti f'kaz din li tkun wahda ordinarja li jekk wiehed jharrek jew jigi mharrek jispetta lil kull wahda lil mizzewgin. Invece fejn l-amminstrazzjoni tkun wahda straordinarja illi jekk tappena issemmi lil missu lis zewg mizzewwgin flimkien. Issubix tlieta imbghad jellenka dawk l-atti li huwa expressis dikjarati bhala ta imboli straorinarji, huma biss dawk l-atti ellenkati mis-sub paragraph minn (a) sa (n) li ghandhom jitqiesu ta' natura straordinarja u ghalhekk ghandhom jinnataw interpretezzani ristrettativa".*

- Only those acts which are listed in article 1322(3) are acts of extraordinary administration. The court in this case, insists that the interpretation must be one that is restrictive.

ORDINARY Acts of ADMINISTRATION (1 spouse is enough - sub 1)

Maltacom plc vs Anthony Aquilina - Civil Court, First Hall, decided on 28th MaY 2003

D was debtor of P of a sum (Lm1720.21c) for telephone usage services. The duty to pay is an ordinary act of administration, requiring only one spouse.

"Ghalhekk meta f'kawza intentata minn kreditur sabiex jithallas dejn tal-amministrazzjoni ordinarja"

"(-akkwisti huwa bizzejjed wiehed biss mill-mizzewgin.)"

QUOTES

"**L-obbligazzjoni giet assunta mill-konvenut innifsu** bl- imsemmi kuntratt u **allura kull hlas ghas-servizz derivanti minnu, jew konness ma' jew emergenti mis-servizz moghti,** ghandu jitqies oggettivament u effettivament **bhala obbligu dwar spiza ordinarja** u rikorrenti mwielda minn att ta' **amministrazzjoni ordinarja**.

"Prima facie ghalhekk din il-Qorti ma tarax li kien necessarju li s- socjeta` attrici tharrek ukoll lil mart il-konvenut meta din ma kienetx parti fil-kuntratt ta' ftehim;

"Il-kontrattazzjoni ghalhekk u kull haga konnessa maghha, kompriz allura il-hlas reklamat ghas-servizz provvdut, ghandha tigi regolata **bl-Artikolu 1322(1) tal-Kodici Civili**"

Ma jidherx, minn ezami tal-ligi, illi l-materja de quo tista' tigi kwalifikata bhala att ta' amministrazzjoni straordinarja jew kazellata taht xi wahda mill-ipotesijiet elenkati fis- subinciz (3) ghall-Artikolu 1322;

Fil-fehma tal-Qorti ghalhekk l-att ghandu jitqies li jaqa' fl- amministrazzjoni ordinarja ta' l-akkwisti. Li jfisser, ope legis, u b'konsegwenza illi "l-jedd li wiehed iharrek jew jigi mharrek dwar dik l-amministrazzjoni ordinarja imissu lil kull wahda mill-partijiet mizzewga".

- Hence if one spouse entered into a liability in the COA and it is an ordinary act, that company could sue just the account holder of that service but it doesn't mean that the other spouse is free, but still respsosnble. there is a procedure whereby the other spouse not a party, did not give the necessary consent, even in an ordinary admin, can either request that that object - could either request the spouse to bring it back to the COA -n or it could the other spouse could seek to be refunded, the value of that item which was lost, bevciase of the transaction the other spouse entered into. the three remedies that a spouse that has not given consent had and the procedure to follow a transaction.

Alfred & Alice konjugi Brown v John Mifsud - Court of Appeal (superior) – 2nd December 2005

What happened was that they did not pay regularly the rent and the landlord brought an action before the Rent Regulation Board to evict the tenants and regain possession of the flat. The case before the RRB was brought only against Alfred Brown; one of the spouses.

"Wara li saret din iz-zieda jidher li bdew jinqalghu xi problemi dwar il-hlas tal-kera u l-atturi ma jidhirx li kienu jkunu puntwali u konsistenti fil-hlas tal-kera."

The Board found that the landlord was right. His rights had been breached and the board ordered the eviction of Alfred Brown from the flat. It happened that an eviction order was issued by the court following the decision of the RRB, because Alfred Brown didn't file an appeal.

The spouses brought another case against the landlord to counter the issue of eviction. In this case, it was stated that the judgment before the RRB was only brought against the husband and not against the wife. Since this apartment was being used as the matrimonial home, they claimed that they cannot be evicted because the first case was brought only against the husband. It was found that although the first case was brought against the husband, in actual fact it was an ordinary act of administration. The obligation of lessee was to pay the rent to the landlord, and they failed to pay the rent.

The FHCC, and later confirmed by the Court of Appeal decided that the payment/non- payment of rent was an act of ordinary administration and referred to Article 1322(1) and since it was an ordinary act, the landlord could sue any/either of the spouses successfully.

Il-ligi, però, dah[h]let distinzjoni **bejn l-amministrazzjoni ordinarja u l-amministrazzjoni straordinarja ta' l-istess akwwisti. L-Artikolu 1322(1) tal-Kodici Civili jiddisponi li l-amministrazzjoni ordinarja ta' l-akkwisti u l-jedd li wiehed iharrek jew jigi mharrek dwar dik l-amministrazzjoni ordinarja imissu lil kull wahda mill-partijiet mizzewga**. Min-naha l-

ohra, l-Artikolu 1332(2) jipprovdi li l-jedd li jitwettqu l-atti ta' amministrazzjoni straordinarja, u l-jedd li wiehed iharrek jew jigi mharrek dwar dawk l-atti imissu liz- zewg mizzewgin flimkien.

"L-atti ta' amministrazzjoni straordinarja huma elenkati tassittivament u esklussivament fis-subArtikolu (3) ta' l- Artikolu 1322. Kif qalet din il-Qorti fil-kawza Elmo Insurance Services Ltd vs Pace, deciza fit-3 ta' Ottubru, 2003, huma biss dawk l-atti elenkati fl-Artikolu 1322(3)(a) sa (m) li ghandhom jitqiesu ta' natura straordinarja u, ghalhekk, ghandhom jinghataw interpretazzjoni restrittiva. Issa, fost l-atti elenkati fl-indikati subparagrafi ma insibux il-hlas tal-kera ta' fond li jappartjeni lill-kommunjoni ta' l- akkwisti, jew azzjonijiet ta' zgumbrament minn tali fond. Skond is-subparagrafu (g) huwa att ta' amministrazzjoni straordinarja l-akkwist ta' xi jedd ta' tgawdija ta' proprietà immobbli meta l-prezz tieghu ma jkunx moderat meta tqabblu mal-kondizzjoni tal-familja u meta l-kirja ma tkunx ghal zmien qasir. Darba, però, sar l-akkwist, l-atti relattati mat-tgawdija ta' l-immobbli ma jitqiesux atti ta' amministrazzjoni straordinarja. Darba sar l-akkwist, l- effetti tieghu bhal, per ezempju, **il-hlas tal-kera, i**t-tiswija tal-fond, l-ameljoramenti li jsiru fil-fond, u affarijiet ohra marbuta **mat-tgawdija tal-fond, ma gewx elenkati bhala atti ta' amministrazzjoni strordinarja,** u kwindi, **huma atti ta' amministrazzjoni ordinarja** li jmissu lil kull wahda mill-partijiet mizzewga.

"Il-hlas mensili jew annwali tal-kera hija zgur att ta' amministrazzjoni ordinarja, u l-hlas jista' jsir kemm mir- ragel kif ukoll mill-mara separatament. Darba hu hekk, l- jedd li wiehed iharrek jew li jigi mharrek in konnessjoni mal-kera tispetta [recte: jispetta] lill-mizzewgin separatament a tenur ta' l-Artikolu 1322(1) tal-Kodici Civili. Darba l-att huwa ta' amministrazzjoni ordinarja, kull wahda mill-partijiet mizzewwga setghet tigi mharrka dwaru - ara Maltacom plc vs Falzon, deciza minn din il-Qorti fid-9 ta' Jannar, 2004.

li l-hlas tieghu huwa att ta' amministrazzjoni ordinarja, u l-konsegwenza ta' dak li jsir jew ma jsirx in konnessjoni ma' att ta' amministrazzjoni ordinarja tmiss lil kull wahda mill-partijiet mizzewga skond l-Artikolu 1322(1) tal-Kodici Civili. Altrimenti, il-konkluzzjoni tkun li fil-waqt li dak kollu konness mal-hlas tal-kera ikun att ta' amministrazzjoni ordinarja, il-konsegwenzi li johrogu mill-hlas jew min-nuqqas tal-hlas, ikunu ta' indole straordinarja, haga li tisnatura l-ligi.

"Il-ligi titkellem b'mod car meta tghid fl-Artikolu 1322(1) li f'dak kollu li huwa 'dwar' l-amministrazzjoni ordinarja (u l- hlas tal-kera huwa att ta' amministrazzjoni ordinarja), jista' jitharrek parti wahda mill-partijiet mizzewga, u, ghalhekk, f'dan il-kaz, la darba il-motiv tal-kawza quddiem il-Bord li Jirregola l-Kera, kien in konnessjoni ma' jew 'dwar' att ta' amministrazzjoni ordinarja, il-proceduri li ittiehdu kontra r- ragel biss jorbtu l-kommunjoni ta' l-akwisti, u kwindi anke lill-mart l-intimat.

Carmela Cachia et v Mario Mifsud Bonnici – Court of Appeal – 15th March 2002

This case concerned a procedural claim whereby the plaintiff was the landlord of the defendant, whereby the defendant lived in the tenements with his family. The plaintiff opened a court case against administration under **Article 1322(3)(d), in which he calmed that** his wife should have also been party to the suit. He argued that due to this defect, the suit cannot continue.

However, the Court of Appeal stated otherwise. It made reference to the fact that due to the 1993 amendments, whereas before it was the husband alone who administered the property, today the spouses jointly are required to administer certain tasks. Despite this however, it does not mean that if the husband used to contract alone with regards to a particular matter before the amendments, he cannot continue to administer such thing alone after the amendments.

In this case, the husband had always contracted alone with regards to the contract of lease and the payment of the rent, both before and after the amendments and there was nothing which implied that the plaintiff has to proceed both against the husband and the wife. The court held if the defendant which to have his wife as party to the suit, there are various procedural alternatives.

The court held that since the defendant never included his wife before in his contractual relationship with the landlord, even when there was the community of acquests in place, then his argument is not valid at law.

"Madankollu, xorta wahda jezistu l-kazi fejn ir-ragel ikun deher biex ikkontratta wahdu kemm qabel u anke wara li dawn l-emendi kienu gew fis-sehh."

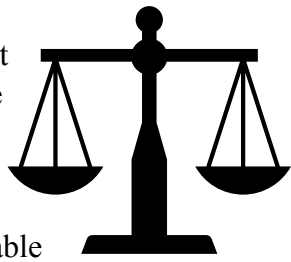
It made reference to Bianchi pro et nominee v Degiorgio – Court of Appeal – 29th September 2000, whereby the court held: "Illi bil-fatt li l-appellant kien joqghod fil-fond lokat lilu flimkien ma martu u mal-familja tieghu, ma jfissirx li l-procedura kellha ssir, ... kontra tieghu u martu f'daqqa. Il-provi kollha juru li l-inkwilin kien l-appellant u l-kera dejjem saret biss f'ismu u kwindi ma kienx il-kaz li tidhol jew tigi citata martu wkoll fil-proceduri gudizzjarji."

EXTRAORDINARY Acts of Administration (2 spouses - sub 2 + 3)

- *Signing on a bill of exchange* - act of extraordinary administration - not only must be signed by spouse but also his wife, as since there is community of acquests, it amounts to an extraordinary act of administration and hence **the other spouse has to participate in this contract.**

- EXAMPLE: If I purchase a Car on hire purchase - bill of exchange, a loan = as they are extraordinary art of administration - they are on the list as they have a huge consequence on the assets of the COA - that is the diff between them

Angela Demarco v David Demarco et – FHCC – 9th October 2003



Plaintiff wife sought to annul a guarantee that her defendant husband had given without her consent, arguing that this was to be considered null since it falls within one of the acts of extraordinary administration, as per Article 1322(3)(h).

She based her action on **Article 1326**, which gives one spouse the remedy to annul an action given without her consent if the action relates to real or personal rights on immovable property, or rights given gratuitously on movable property.

At first glance, the FHCC held that since this was a matter of extraordinary administration, then the plaintiff should succeed in her action if the act was done without her consent.

The Court agreed with the argument of the plaintiff that the guarantee is null in so far as the community of acquests, and the wife's consent is concerned. However, the court went on to say that it does not agree with the wife in saying that the act should be declared null in its entirety. The Court held that while this guarantee did not tie the community of acquests, it does not mean that it was null also with regards to the paraphernal property in the name of David Demarco.

The Court, once again, made reference to the fact that prior to 1993 amendments, the administration of the community of acquests was solely in that hands of the husband, in a way that he was even described as the *"kap u padrun tal-istess komunjoni tal-akkwisti."* In the eyes of third parties, there was no distinction between property held in the community of acquests and paraphernal property. The 1993 amendments removed this idea and today the administration if joint between the spouses, where required.

The Court, making reference to paraphernal property, held that both the husband and the wife keep control over their paraphernal property during the marriage and the administration with regards to that property remains independent of one another.

IMP - "Kemm mir-ragel ukoll il-mara, wara z-zwieg, jibqghu jzommu kontroll personali fuq il-proprjeta' parafernali taghhom, u jibqalhom il-jedd li jamministraw dik il-proprieta'indipendentement minn xulxin. X'jaghmel konsorti mill-assi personali tieghu ma jinteressax lill-konsorti ohra, u ghalkemm il-frutti ta' dawk il-beni parafernali jidhlu fil- komunjoni, x'isir minn dawk il-beni u kif u fejn jigu nvestiti jiddeciedi l-konsorti proprietarju wahdu."

Hence, albeit being in a community of acquests, a husband and a wife can still enter into negotiations and contracts and tie themselves personally, since their juridical personality is independent from their personality within the community of acquests.

Therefore, one cannot exclude the possibility that whoever binds himself personally is not allowed to do so, just because he finds himself in the community of acquests.

Reference to *Calleja v Calleja et – 2nd October 2002 – FHCC*, whereby the act was partially annulled due to the fact that consent was not obtained by the wife and therefore, it claimed that the act did not have all the legal requisites.

The lack of consent of one spouse can lead to the annullability of the act with regards to its effect on the community of acquests but **not to the annullability of the act in itself.**

"Ir-rekwizit legali, u cioe', il-kunsens tal-mara, hu mehtieg biex dak il-ftehim jorbot lill- komunjoni tal-akkwisti, izda mhux mehtieg ghall-validita' nnifsu tal-ftehim. In-nuqqas tal- kunsens tal-parti l-ohra jista' jwassal ghall-annullament tal-att in kwantu jolqit il-komunjoni tal-akkwisti, izda mhux tal-att innifsu."

As long as the spouse does not burden the community of acquests, he can ordinarily administer his paraphernal property, exclusively as he pleases.

The court explained, even by reference to Article **1327(b):**

- - debt belonging to the community of acquests includes expenses and obligations incurred by the administration of the acquests;
- - it does not however include expenses which require the joint administration of spouses but are performed solely by one spouse.
  Therefore, the court gave its interpretation on this article and held that such debts will still be considered to be valid, just, that they will not be debts belonging to the community of acquests, but rather, debts belonging to the personal responsibility of the spouse who administered them.

- *"Din id-distinzjoni tidher cara wkoll minn ezami tal-artikolu 1327(b) tal-Kodici Civili. Dan l- artikolu jghid li huma djun tal-komunjoni, l-ispejjez u l-obbligi li jkunu saru ghall-amministrazzjoni ta' l-akkwisti, hlief dawk l-ispejjez li jsiru b'atti li jehtiegu l-kunsens taz-zewg partijiet mizzewga izda li jsiru minn parti wahda minghajr il-kunsens tal-parti l-ohra. Dan l- artikolu jimplika li d-djun inkorsi minn parti wahda minghajr il-kunsens tal-parti l-ohra huma validi, biss ma jkunux djun li jimpingu fuq il-komunjoni tal-akkwisti."*
  Therefore, the court held that the act remains valid and the guarantee rests upon the paraphernal property of the husband because the wife's juridical interest is only present up until the debt or otherwise does not concern the community of acquests. Anything beyond that is not her concern and she could not nullify an act on that basis.

"Konsorti ma tistax tindahal u tagixxi biex thassar att li fiha hi ma kienetx parti u li sehh bejn zewgha u terz, sakemm dak l-att ma jolqotx l-interessi taghha qua kompartecipi fil-komunjoni tal-akkwisti. Hu s'hawn jasal l-interess guridiku taghha, izda sa fejn l-obbligi ta' zewgha ma jolqtux l-interessi taghha fil-komunjoni, hi ma tistax tindahal."

Anthony Frendo et v Anglu Zahra pro et noe – Court of Appeal – 31st January 2003

The court declared the obligation valid in the name of the husband and his company, but invalid with regards to the community of acquests since the wife did not give her consent.

"L-Onorabbli Qorti tal-Appell ma qalet li d-dejn li assuma fuqu r-ragel hu null ghax il-ftehim ma kienx bil-kunsens tal-mara, imma lliberat biss lill-mara u lill-komunjoni tal-akkwisti, u qieset obbligazzjoni ghall-bqija valida fil-konfront tar-ragel."

Aquilina v Falzon et – FHCC – 16th October 1998

It was once again confirmed that a married woman can enter into obligations without needing the consent of her husband and the obligation will only be valid to her and her paraphernal property.

"Mara miżżewġa għandha l-kapaċita' li tidħol f'obbligazzjonijiet mingħajr ilkunsens jew l-assistenza ta' żewġha, u dik l-iskruttura torbot lill-mara waħedha u għandha tagħmel tajjeb għall-istess obbligazzjonijiet bil-beni parafernali tagħha."

Catherine Vella Vs Albert Vella, 30th May 2013

P wants D husband to be declared as the debtor of the debt incurred with Michael Attard Limited, without her knowledge. She claimed that since he was buying cars with bills of exchange and she had no part in it, the debt was purely his.

The creditor started proceedings for the matrimonial home to be sold by auction. This house had been bought during the marriage. To this, the wife stated that as according to Article 1322, her husband was contracting extraordinary acts of administration, which he never had her consent to perform.

Inoltre ssostni li l-iffirmar tal-kambjali ma jikkwalifikax bhala att normali ta' gestjoni ta' kummec (Artikolu 1324 tal-Kodici Civili).

Spjegat ukoll li l-Artikolu 1327 jelenka x'dejn jaghmel tajjeb ghalih il-gid tal- komunjoni tal-akkwisti. Semmiet ukoll li l-kreditur kien hareg mandat ta' qbid 1615/11, mandat ta' sekwestru 1619/11 u mandat ta' inibizzjoni 1732/11 kontra zewgha biss. Irrizulta li minn sitta u ghoxrin (26) vettura li jissemmew fil-mandat, inqabdu sitta biss u ma tafx x'sar mill-kumplament.

Argumentat ukoll li m'ghandix taghmel tajjeb ghad-dejn li ghamel zewgha wara li ghamel negozju minghajr ma kienet infurmata,

"Illi jiena ma nistax nifhem kif zewgi dahhalni u lit-tfal taghna f'dan l-inkwiet kollu meta hu u hu biss ghamel in- negozju li ghamel, negozju li ghamlu minn wara dari u minghajr il-firma tieghi, u issa qed jippretendi illi jiena naghmel tajjeb ghad-dejn li ghamel mas-socjeta imsemmija, meta jien qatt ma kelli x'naqsam fiha."

The court said that since the community of acquests was still applicable and in force, the cars bought belong to the community of acquests as according to Article 1320. What also belongs to the COA is the liability and debt of such;

"L-akkwist ta' mobbli fejn il-prezz ma jithallasx mal-konsenja jew qabel, hu att ta' amministrazzjoni straordinarju li jmiss lill-konjugi flimkien (Artikolu 1322(3)(g) tal-Kodici Civili).

Reference made to A1324

Claudette Gauci vs Paolo Bonnici Ltd et deciza (Prim'Awla3) tad-9 ta' Ottubru 2003, il-qorti osservat:-
"Kieku att straordinarju li hu att normali ta' gestjoni ta' kummerc ma jorbotx il-komunjoni tal-akkwisti, ma jkunx hemm lok tar-regola introdotta bl-artikolu 1324, ghax bhala att straordinarju ezercitat minn konjugi wiehed biss ma jorbotx lill-komunjoni tal-akkwisti fih innifsu. L-iskop tal-Artikolu 1324 hu intiz biex, fil-konfront ta' terz, il- komunjoni tintrabat anke meta att straordinarju jsir minn konsorti wiehed biss, basta li jkun att "normali ta' gestjoni ta' kummerc"."4.

Issir ukoll riferenza ghall-Artikolu 1330 tal-Kodici Civili li jipprovdi li meta l-gid tal-komunjoni tal-akkwisti m'huwiex bizzejjed biex jaghmel tajjeb ghad-dejn, kreditur jista' jinforza t-talba tieghu in subsidum kontra l-beni parafernali tal-mizzewwgin. B'dan li fil-kaz ta' "..... (b) dejn li jinholoq mill-ezercizzju ta' sengha, negozju jew professjoni kif imsemmi fl-artikolu 1324", kreditur jista' jinfurza t-talba tieghu biss kontra l-beni parafernali ta' dik il-parti li minhabba fiha nholqot it-talba.

L-attrici ssostni li d- dejn li ghamel zewgha m'huwiex wiehed minn dawk li jissemmew fl-Artikolu 1327. *Il-qorti ma taqbilx. Hu veru li x-xiri tal-vetturi hu fih innifsu att ta' amministrazzjoni straordinarju gialadarba l-hlas ma sarx qabel jew mal- konsenja.*

Madankollu billi l-qorti hi tal-fehma li jikkwalifika bhala att normali ta' gestjoni ta' negozju (Artikolu 1324) u ghalhekk seta' jsir mir-ragel minghajr il-htiega tal-kunsens tal-mara, l-obbligu tal-hlas jaqa' taht l-Artikolu 1327(b) tal- Kodici Civili.

"Dawn iz-zewg Artikoli 1324 u 1330 ghandhom jinqraw flimkien, u ghalkemm kif jghid l-Artikolu 1324 l-att huwa maghmul minn parti wahda, xorta wahda dan il-att jorbot il-komunjoni ta' l-akkwisti tal-konjugi. Izda meta mbaghad wiehed jirreferi ghal Artikolu 1330, l-legislatur specifika illi fil-kaz ta' dejn rizultanti minn att normali ta' gestjoni ta' sengha, negozju jew professjoni, il-krediturijistghu jinfurzaw it-talba taghhom fuq il-beni parafernali tal- persuna li maghha jkunu ghamlu negozju u mhux fuq il- beni parafernali tal-parti l-ohra. Ghalhekk meta l-beni fil-komunjoni ta' l-akkwisti ma jservux sabiex jithallas id-dejn gravanti, bhalma jidher li jista' jkun il-kaz in dizamina, il- krediturijistghu biss jinfurzaw it-talba taghhom (ghal dik il- parti li ma tkunx tista' tithallas mill-beni tal-komunjoni) fuq il-beni parafernali tal-parti li maghhom huma ghamlu n-negozju – f'dan il-kaz Angelo Camilleri – u mhux l- appellanti.".

Il-qorti hi moralment konvinta li l-attrici kienet taf li zewgha kien beda negozju ta' kiri ta' vetturi. Hu minnu li m'hemmx prova li kienet taf li l-vetturi kien qieghed jixtrihom bid- dejn. Pero' jibqa' 'l fatt li sfortunatament ghaliha wara li bdiet il-proceduri gudizzjarji ghall-firda personali minn ma' zewgha ma jirrizultax li hadet passi sabiex zewgha jigi inibit milli jaghmel dejn li jkun ta' piz ghall-komunjoni tal- akkwisti5

Madankollu dan hu kaz iehor li jikkonferma li l- istat attwali tal-ligi mhu xejn felici in kwantu ma jatix protezzjoni adegwata lil min isib ruhu f'sitwazzjoni simili ghal dik li sabet ruhha fiha l-attrici.

Ghal dawn il-motivi l-qorti tiddeciedi l-kawza billi tichad it-talbiet tal-attrici b'dan li ticcara li l-attrici m'ghandhiex obbligu li taghmel tajjeb ghad-dejn bil- gid parafernali taghha. L-attrici ghandha taghmel tajjeb ghall-ispejjez taghha.

Simon Parnis v Benedetta Meilak et – FHCC – 12th February 2009

This case concerned an action whereby the plaintiff lent the husband of the defendant a sum of money which the latter had not yet paid prior to his death. According to Article 1322(3)(f), lending and borrowing money requires the joint administration of both spouses unless it is a normal act of business, trade or profession for one spouse, as per Article 1324.

sakemm Joseph Meilak kien għadu ħaj, bejnu u martu l-imħarrka Benedetta Meilak kienet teżisti l-komunjoni tal-akkwisti. Ma nġabitx prova mod ieħor, u għalhekk taħdem il-preżunzjoni stabilita mil-liġi li hekk kien il-każ. Dan ifisser ukoll li, mal-mewt ta' Joseph Meilak, dik il-komunjoni nħallet. Jirriżulta wkoll li s-self mill-attur lil Meilak sar meta dan kien diġa' miżżewweġ lill-imħarrka;

"Is-self ta' flus minn jew lil persuna li tkun mizzewga jitqies mil-ligi bhala att ta' amministrazzjoni straordinarja. Ghalhekk, il-ligi trid li ghamil bhal dak imiss liz-zewg mizzewgin flimkien, sakemm dak is-self ma jkunx att normali ta' gestjoni ta' kummerc, negozju jew professjoni ta' dik il-parti li tkun isselfet jew silfet.'

The question arose as to whether the debt that the defendant's husband had belonged to the community of acquests despite the wife not consenting to it, or whether it solely belonged to the paraphernal property of the deceased. In this case, taking into consideration the fact that the wife did not institute any proceedings against the debt and also that the act in question did not concern immovable property or movable property under a gratuitous title, the court decided in the affirmative in favour of the plaintiff whereby it held that the defendant is also tied to the borrowing of the money and should be made good for via the community of acquests.
"... dak is-self jiswa u jhalli effett tieghu fuq il-komunjoni tal-akkwisti li kienet tezisti bejn il-mizzewgin Meilak mhux biss fuq il-gid partikolari tal-imsemmi Joseph Meilak. Dan ifisser ukoll li l-imharrka Benedetta Meilak trid twiegeb bi hwejjigha (jigifieri bis-sehem taghha mill- kommunjoni tal-akkwisti u, jekk din ma tkunx bizzejjed, bil-gid partikolari taghha) ghall-hlas."

Illi fejn għamil ta' tmexxija straordinarja jsir minn waħda biss mill- miżżewġin u mingħajr l-għarfien – imqar taċitu – tal-parti miżżewġa l-oħra, dak l-għamil xorta waħda jkun jgħodd. Imma jekk l-għamil bħal dak kien jikkonsisti fi trasferiment jew f'ħolqien ta' jedd rejali jew personali fuq ġid immobbli, jew jekk kien jikkonsisti f'ħolqien b'titolu gratuwitu ta' jeddijiet rejali jew personali fuq ħwejjeġ mobbli, għamil bħal dak ikun jista' jitħassar fuq talba tal-miżżewweġ li mingħajr il-kunsens tiegħu ikun sar dak l-att. Kull għamil ieħor li jmissu jsir miż-żewġ miżżewġin flimkien imma li jsir minn miżżewweġ wieħed ma jistax jitħassar, iżda jingħata lill-parti li tħalliet barra milli tagħti l-kunsens tagħha l-jedd li ġġiegħel lill-parti li mexxiet waħedha li tirreintegra l-komunjoni tal-akkwisti jew, jekk dan ma jkunx jista' jsir, li tagħmel tajjeb għad-dannu mġarrab mill- parti miżżewġa li ma tkunx tat il-kunsens tagħha. Ukoll fejn huwa mogħti li parti miżżewġa tista' titlob it-tħassir ta' għamil straordinarju, dan irid isir fi żmien limitat, li jista' jitqassar għal tliet xhur jekk il-parti li ma tkunx tat il-kunsens tagħha jntbagħtilha att ġudizzjarju biex jgħarrafha bit-twettiq ta' l-għamil;

Illi dawn id-dispożizzjonijiet juru li l-imħarrka ma għandhiex raġun tgħid li xi self li ngħata lil żewġha mingħand l-attur mingħajr ma ħadet sehem fih hi għandu jitqies null u bla effett. Fejn hemm nullita' ta' dawn l-għemejjel, din m'hijiex nullita' assoluta, imma biss waħda relattiva: l-għamil jibqa' jiswa sakemm ma jiġix imħassar. Fil-każ li l-Qorti għandha quddiemha llum, ma jirriżultax li l- imħarrka qatt fetħet xi kawża biex twaqqa' s-self li żewġha seta' rċieva, jew biex jirreintegra l-komunjoni tal-akkwisti bid-dejn li seta' għabbiha bih bis-saħħa tas-self li seta' ngħata mingħand l-attur;

Illi l-Qorti ma tistax taqbel mas-sottomissjoni tal-għaref avukat tal- imħarrka li l-għamil straordinarju mwettaq minn wieħed biss mill- partijiet miżżewġin bla għarfien jew minn wara dahar il-parti miżżewġa l-oħra huwa għamil null ab initio u dan għaliex il-liġi ma tgħidx hekk.

F'dan ir-rigward ukoll għandu raġun l-għaref avukat tal-attur li jgħid li l-għamil ta' self huwa wieħed minn dawk li, lanqas jekk il-parti miżżewġa trid tattakkah u tagħmel dan bil-mod u fiż-żmien mogħti lilha mil-liġi, ma jwassal għat-tħassir tal-għamil, imma biss għar- rimedju sussidjarju tar-reintegrazzjoni jew tal-ħlas tad-danni;

Dan is-sehem kien jingħata sa minn żmien qabel ma żewġha miet, u għalhekk jikkostitwixxi l-kunsens mistenni mil-liġi fejn jidħlu atti ta' amministrazzjoni straordinarja. Għalhekk, fil-fehma tal-Qorti, dak is-self jiswa u jħalli l-effetti tiegħu fuq il-komunjoni tal-akkwisti li kienet teżisti bejn il-miżżewġin Meilak, u mhux biss fuq il-ġid partikolari tal-imsemmi Joseph Meilak. **Dan ifisser ukoll li l- imħarrka Benedetta Meilak trid twieġeb bi ħwejjiġha (jiġifieri bis- sehem tagħha mill-komunjoni tal-akkwisti u, jekk din ma tkunx biżżejjed, bil-ġid partikolari tagħha) għall-ħlas lura ta' dak id-dejn. Fi kliem ieħor, b'rieda espressa tal-liġi, il-kreditu li l-attur għandu favurih jiġi qabel krediti oħra (partikolari) li l-miżżewġin Meilak seta' kellhom ma' terzi;**

Illi, minħabba li l-attur fetaħ il-kawża wara li Joseph Meilak kien miet, u għalhekk wara li l-komunjoni tal-akkwisti kienet inħallet, l- imħarrka trid twieġeb biss għal nofs id-dejn dovut lill-attur u dan trid tagħmel tajjeb għalih bis-sehem tagħha tal-komunjoni u, jekk dan ma jkunx biżżejjed, bil-ġid partikolari tagħha, kif fuq ingħad;

Tikkundanna lill-imħarrka Benedetta Meilak tħallas lill-attur is- somma ta' ħamsa u erbgħin elf ħames mija u tlieta u tletin euro u ħamsin ċenteżmi (€ 45,533.50), flimkien mal-imgħax legali fuq l-imsemmija somma b'seħħ mill-5 ta' Awwissu, 2007, sal-jum tal- ħlas effettiv;

Article 1322 sub 4 of the Civil Code

(4) Any money deposited in a bank and any instrument, as defined in the Second Schedule of the Investment Services Act, to the credit of a married person may only be withdrawn by such married person and it shall not be enquired whether such money or instrument belongs to the community of acquests or not.

- The word 'only' was included by Act XXI of 1993, an important addition keeping in mind the role of the husband as the sole administrator of the community of acquests in the past meant that if the wife deposited money in a bank it was the husband and the husband only who could withdraw such money, putting the wife in a clearly disadvantaged position vis-à-vis her money if such money was to form part of her paraphernal property.

- Nowadays, it is the spouse who deposits the money and such spouse only who can withdraw this money – a provision which in my opinion is a very important safeguard especially in the instance when the marriage has broken down or the spouses are in the process of separation or even if one spouse simply intends on defrauding the other. On the other hand, although the spouse who has not deposited such money has no right to withdraw it, if such money forms part of the community, such other spouse is still entitled to his or her share of it according to the general principles of the community of acquests.

Article 1322 sub 5

(5) The provisions of sub-article (4) shall continue to apply even after the termination of the community of acquests for any reason whatsoever and are without prejudice to the right of each of the spouses to his or her full share of the community upon its partition.

- if they are separating or through a court case, the COA has to be liquidated - the bank does nt give any details to thee individual spouse who queries that account. if proceedings are still going, the rules of secrecy and confidentiality will not disclose

Article 1322 sub (6) and (7)

(6) Either spouse may, by means of a public deed or a private writing duly attested in terms of article 634 of the Code of Organization and Civil Procedure, appoint the other spouse or any other person, as his or her mandatory with regard to acts of extraordinary administration and compromise.

(7) The notary publishing a public deed as is referred to in sub- article (6), and the advocate or notary public attesting a private writing as referred to in the same sub-article, shall in each case warn the spouse so appointing a mandatory of the importance and consequence of such appointment and shall in the public deed or the private writing, as the case may be, declare that he has so warned the spouse.

- Article 6 and 7 POWER OF Attorney - MANDATE - keeping in mind that the spouses might need to be away from Malta - or one of the spouses may not be in good health but mental capacity is still there -

- Under the law of mandate, the mandator can appoint someone to act on his behalf , to be a mandatory// whatever the mandator can do, the power of attorney can do it for him.

- In order to have a valid mandate, you need some formalities declared in this power of attorney. Usually in a normal power attorney, the mandator signs this private writing, or a public deed and the mandatory usually signs under the words i accept and the lawyer and notary would sign that and declare that he is identifying thee party and has also witnessed their signatures. with regards to spouses we have something more, the spouse granting that mandate has to make a declaration and the declaration usually takes this form, it has been addressed ro me from the grant of such power of attorney

David James Sammut et v Advocate Tonio Azzopardi et noe – Court of Appeal – 5th December 2014

The court confirmed that a promise of sale is not found in Article 1322(3) and therefore is not considered to be an act of ordinary administration. Therefore, one spouse can enter into a promise of sale agreement, without the consent of the other spouse or with just an oral power of attorney. However, when the spouses need to then proceed to the publication of the final deed of sale, the spouse requires a written power of attorney since the transfer of real rights over immovable property is an extraordinary act of administration and there needs to be the joint administration of the spouses in order for the contract to be valid. If the spouse will fail to obtain such written mandate or the other spouse fails to appear on the final deed to transfer the property, then the buyers can either sue the spouses in court to appear on the final deed, or if this is not possible, sue them for contractual damages for failing to conclude their obligations

Administration of trade, business, et

1324. Normal acts of management of a trade, business or profession being exercised by one of the spouses, shall vest only in the spouse actually exercising such trade, business or profession even where those acts, had they not been made in relation to that trade, business or profession, would have constituted extraordinary administration.

- Article 1322 should be read in conjunction with Article 1324, because what one may try to annul due to the lack of consent of one spouse on the basis that it is an act of extraordinary administration, it might be justified under Article 1324.

- The rationale is to protect the interests of trade and not to hinder one spouse from his daily acts of trade, business or profession by requiring the consent of the other spouse.

Once you have established that there is COA and that the act is extraordinary as found in the list, **you will need to establish the nature of the transaction involved to see if the intervention of a spouse** was required as 1324, is an exception to the general rule - we shall see more points on this - so the nature of it, of this transaction is not simply just because it is an extraoridinary act of administration.

- For 1234, one of the criteria necessary are the spouse has to be either a trader, a business person or a professional - but then you have to look at the transaction itself as in my daily activities - selling goods as part of the normal trade but selling items found at home, that is distinct from the nature of my trade or profession - you have to see the link - Is it a normal act of management falling within a trade business or profession ? If yes, then one has to see that the spouse, person involved was actually exercising his trade or profession when that transaction took place as you might have a transaction falling in a normal act of management but ha traders might have been retired - hence no longer a trader

The courts have interpreted A1324 VERY RESTRICTIVELY !!

Kummissarju tat- Taxxa fuq il- Valur Miżjud vs Carmen Zahra u Charles Zahra – Court of Appeal – 28th November 2008

"biex jiġi evitat li r-raġel joqgħod "iġorr" lill-martu kull fejn jeżerċita n-negozju tiegħu."

The Court continues by stating that such acts which fall under article 1324 shall still form part of the community of acquests. In fact article 1330 provides that where the community of acquests cannot make good such debts it is only the paraphernal property of the spouse who has given rise to them by means of this normal act of business, trade or profession who is liable to make good the claim by means of his or her paraphernal property.

Patiniott Grazio et vs. Cini Anthony et – Court of Appeal – 5th October 2001

This case dealt with Article 1324, and the Court referred to the fact that:

Il-frazi "atti normali ta' gestjoni ta' kummerc", li s-sinifikat taghha mhux facli jigi afferrat minhabba dicitura pjuttost neboluza, hi llustrata u ccarata mill-ekwivalenti test Ingliz li tieghu hi ovvjament traduzzjoni.

"Kellu jirrizulta lil din il-Qorti mill-atti kif provati x'kien ix-xoghol tal-kummerc li kien involut fih il-konvenut jew innegozju jew professjoni li kien jezercita."

"L-artikolu 1324 ma japplikax ghal kull att tal-kummerc kif definit mill-Kodici tal- Kummerc. Kien japplika biss fil-kaz ta' persuna li tkun qed tezercita kummerc, negozju jew professjoni bhala attivita' ekonomika u li fiha l-kontrattazzjoni taht ezami setghet tinkwadra ruhha bhala att normali tal-gestjoni taghha."

Victor Bonavia vs. Richard Attard

First court in **Victor Bonavia vs. Richard Attard 2008**

P were owed money by the D's wife the sum of 2400LM, Patricia Attard, who was dead. P lenta sum of money.

D husband of the dead Attard claimed that this sum of money was given without his consent. Hence it does not affect the COA.

"kien xoghol tan- negozju peress li kienet fil-kummerc u ma kellhiex ghalfejn il-prezenza ta' zewgha. Peress li n-Nutar kienet tafha personalment u taf li kienet tiggestixxi negozju minn garage Santa Venera, allura qablet maghha f'din il- konkluzzjoni li ma kienx hemm ghalfejn il-prezenza ta' zewgha Richard. Fil-fatt kompliet tghid "....kont naf illi Patricia Attard qieghda fil-kummerc u ma kienetx xi extraordinary expenditure illi setghet taffetwa xi proprjeta'." U ghalhekk kienet ukoll waslet ghal konkluzzjoni li l-prezenza ta' zewgha Richard ma kienx necessarju ghal fini ta' dan is-self.

Patricia Attard kienet talbitu ghal flus qalet li riedet taghmel hekk biex tixtri minivan sabiex tkompli bin-negozju taghha u kien ghalhekk li ftiehmu li jmorru ghand in-Nutar Miriam Spiteri Debono biex tigi redatta skrittura. Sar hekk u meta l-attur staqsa ghall-prezenza tar-ragel ta' Patricia Attard, in-Nutar qalet li ma kienx hemm ghalfejn ghax Attard kienet fin-negozju u ghalhekk l-attur qaghad fuq il-kelma taghha.

Ikkunsidrat:
Illi din il-konkluzzjoni hija konformi ma' l-Artikolu 1324 tal- Kodici Civili.

Il-Qorti hi tal-fehma li self ta' elfejn u erba' mitt lira mhijiex xi haga kbira u huwa normali fil-kummerc li jsir self bhala nvestiment f'xi intrapriza li tista' tirrendi aktar qliegh. Dak huwa proprju li riedet taghmel Patricia Attard. Skond l- attur dina qaltlu li l-flus ridiethom biex tixtri minivan ghal fini ta' negozju. Naturalment l-attur mhuwiex fi grad li jghid x'verament sar minn flusu. Dana l-ghaliex Patricia Attard mietet ftit xhur wara li gie redatt is-self fuq imsemmi u cioe' fi Frar ta' l-2004. Ghalhekk il-Qorti tikkonkludi illi l-att inkwistjoni huwa regolat bl-Artikolu 1324 tal-Kap 16.

Claudette Gauci vs Paolo Bonnici Limited
"fejn fost affarijiet ohra l-Qorti kienet qalet "kieku att straordinarju li huwa att normali ta' gestjoni ta' kummerc ma jorbotx il- kommunjoni ta' l-akkwisti ma jkunx hemm lok tar-regola ntrodotta bl-artikolu 1324 ghax bhala att straordinarju ezercitat mill-konjugi wiehed biss ma jorbotx lill-kommunjoni ta' l-akkwisti fih innifsu.

L-iskop ta' l-Artikolu 1324 huwa intiz biex fil-konfront ta' terz il-kommunjoni tintrabat anke meta att straordinarju jsir minn konsorte wiehed biss, basta li jkun att normali ta' gestjoni ta' kummerc. **It-terz allura ma jkollux ghalfejn kull darba li jinnegozja ma' konsorti, jitlob li dan ta' l-ahhar igib il-parti l-ohra mieghu ghax jaf li bil-firma ta' parti wahda, xorta wahda jkun kopert."**

Minn dan jirrizulta kwindi li l-obbligazzjoni inkwistjoni hi allura mhux biss obbligazzjoni valida li holqot Patricia Attard ai termini tal-Artikolu 1324 tal-Kodici Civili, izda wkoll hi obbligazzjoni li torbot lill-kommunjoni ta' l-akkwisti gia ezistenti bejn il-konjugi Attard. Dan ir-regim ta' kommunjoni gie terminat bil-mewt ta' Patricia Attard fi Frar 2004 u quindi l-konvenut Richard Attard ghandu jbaghti nofs l-obbligazzjoni naxxenti permezz l-iskrittura ta' l-24 ta' Novembru 2003, bin-nofs l-iehor gravanti l-eredi ta' Patricia Attard u cioe' uliedha Brian, Sharon, Mandy, Natasha u Richard u l-istess Richard Attard (SN) bhala legittimu rapprezentant ta' bintu minuri Tricia Attard.

Ghal dawn il-motivi, Taqta' u tiddeciedi illi tilqa' t-talba ta' l-attur u tikkundanna lil Richard Attard wahdu li jhallas is-somma ta' €2795.25 (Lm1200) u lill-konvenuti l-ohra Brian, Sharon, Mandy, Natasha u Richard u l-istess Richard Attard (SN) bhala legittimu rapprezentant ta' bintu minuri Tricia Attard is- somma ta' €2795.25 (Lm1200) rapprezentanti ammont misluf lil Patricia Attard mart Richard u omm il-konvenuti l- ohra ai termini ta' skrittura privata datata 24 ta' Novembru 2003. Bl-ispejjez u l-interessi legali mid-data tan-notifika ta' l-avviz kontra l-konvenuti.

Appell 2009

Jinzel b'ragonament minn dan kollu konsidrat illi la d- debitu kkontrattat kien wiehed konness man-negozju u fl- interess ta' l-istess negozju, li fih Patricia Attard kienet ukoll kompartecipi, tali kien jaggrava b'piz fuq il-komunjoni ta' l-akkwisti. Kien ikun differenti l-kaz kieku l-provi wrew b'mod konvincenti u konkludenti li dak is-self kien wiehed personali ghall-istess Patricia Attard, ghax allura, kif ritenut, "bl-ebda mod ma seta' jinghad illi kien jifforma parti mill-passiv tal-komunjoni ta' l-akkwisti ezistenti bejnha u bejn zewgha" ("Joseph Grech -vs- Mary u Martin Debattista", Appell Superjuri, 6 ta' Ottubru, 2000. Fil-fattispeci, l-awtonomija kontrattwali li kellha l-mara fit-

termini ta' l-Artikolu 1324 Kodici Civili, kienet iggib guridikament u fl-ewwel lok l-kontribuzzjoni korrispondenti tal-beni komuni ghas-sodisfaciment tar-restituzzjoni tas- self. L-ewwel Qorti sewwa rragunat. Ghaldaqsant, il- konkluzjoni taghha ma tiddifettax, la fuq il-bazi tal-provi u lanqas fuq dik tal-principji tad-dritt applikabbli.

Ghal dawn il-motivi kollha u dawk l-ohra ta' l-ewwel Qorti, l-appell qed jigi michud u s-sentenza appellata, ikkonfermata, bl-ispejjez kontra l-appellanti.

Yvonne Maria Schiavone vs. HSBC Bank Malta Plc et – FHCC – 16th June 2005

The plaintiff's husband, acted as a surety in favour of HSBC Malta. The plaintiff wife was not aware that her husband has their matrimonial home as a guarantee. In this regard, she therefore instituted this action in order to annul the suretyship as the matter constituted an act of extraordinary administration and this should be considered null since it was done without her consent.

Illi l-attriċi saret taf dwar l-għotja tal-garanziji fuq imsemmija, biss meta żewġha ġie notifikat bil-Mandat tal- Inibizzjoni 5832/96, li permezz tiegħu is-soċjeta' HSBC Malta plc talbet lil din l-Onorabbli Qorti jogħġobha tinibixxi lil Charles Schiavone milli b'xi mod jittrasferixxi jew jiddisponi mid-dar konjugali tagħhom.

Illi l-attriċi qatt ma kienet b'ebda mod konsapevoli tal- imsemmija garanziji u għalhekk wisq iżjed ma tatx il- kunsens tagħha sabiex dan isir, ai termini tal-Kodiċi Ċivili tal-Liġijiet ta' Malta.

Illi mill-fatti li joħorġu mill-atti tal-kawża jirriżulta li l-attriċi hija mart l-imħarrek Carmel Schiavone. Huma żżewġu fl- 19833 u l-komunjoni tal-akkwisti tirregola l-ġid matrimonjali tagħhom. B'kuntratt magħmul fit-2 ta' Novembru, 19934, Carmel Schiavone daħal garanti solidali mal-kumpannija mħarrka Girgenti Company Limited5 għal faċilita' ta' overdraft li ngħata mill-bank imħarrek. Fost ir-rabtiet ġenerali flimkien mal-imsemmija kumpannija, l-imħarrek Schiavone ipoteka d-dar taż-żwieġ bl-isem "Charlyv", fi Triq Professur John Borġ, Msida6. Id-dar kienet inkisbet fl-1980 fuq isem Carmel Schiavone waħdu7. Fuq l- imsemmi att ta' garanzija u self, l-imħarrek l-ieħor Anthony Dingli deher f'isem il-kumpannija debitriċi. Carmel Schiavone kien azzjonist minoritarju u wieħed mid-diretturi tal-imsemmija kumpannija;

Illi fit-2 ta' Diċembru, 19969, il-bank imħarrek talab u ħareġ Mandat ta' Inibizzjoni kontra l-attriċi u żewġha l-imħarrek, iżommhom milli jbiegħu, ineħħu, jew jiddisponu mid-dar taż-żwieġ tagħhom. Dak inhar il-bank kien beda kawża kontra l-kumpannija debitriċi tiegħu. L-attriċi laqgħet notifika tal-Mandat dak inhar li nħareġ. Il-kawża nfetħet fit-28 ta' Frar, 1997;

In the evidence in front of the court, it appeared that the plaintiff's husband had purchased his home, in his own name, before the marriage. Once again, the court gave its interpretation of Article 1322(1) and Article 1322(2) and Article 1324. It held that any act under Article 1324 is still valid and still ties the community of acquests, albeit does not tie the paraphernal property of the spouse who did not consent. However, if the act under Article 1324 relates to real and personal rights over immovable or movable property (with a gratuitous title) then the spouse who did not consent can annul such an act. In any other case, the act could not be annulled but the spouse is given other remedies under Article 1326(5).
Although the guarantee concerns an immovable property, the property in question was paraphernal. And therefore, since the property was in the name of the defendant husband, the wife had no say

and could not institute the action under article 1326 because the transfer of the immovable property in question did not belong to the community of acquests.

Furthermore, since the suretyship took place before the 1993 amendments were implemented, the husband at the time could perform any act of extraordinary administration alone without the consent of his wife. Therefore, the court ascertained that even if the house belonged to the community of acquests, the wife could not annul the act since at the time the husband could legally enter into such a contract without her knowledge.

Illi fejn għamil ta' tmexxija straordinarja jsir minn waħda biss mill-miżżewġin u mingħajr l-għarfien – imqar taċitu – tal-parti miżżewġa l-oħra, dak l-għamil xorta waħda jkun jgħodd. Imma jekk l-għamil bħal dak kien jikkonsisti fi trasferiment jew f'ħolqien ta' jedd rejali jew personali fuq ġid immobbli, jew jekk kien jikkonsisti f'ħolqien b'titolu gratuwitu ta' jeddijiet rejali jew personali fuq ħwejjeġ mobbli, għamil bħal dak ikun jista' jitħassar fuq talba tal- miżżewweġ li mingħajr il-kunsens tiegħu ikun sar dak l- att16. Kull għamil ieħor li jmissu jsir miż-żewġ miżżewġin flimkien iżda li fil-fatt isir minn miżżewweġ wieħed ma jistax jitħassar, iżda jingħata lill-parti li tħalliet barra milli tagħti l-kunsens tagħha l-jedd li ġġiegħel lill-parti li mexxiet waħedha li tirreintegra l-komunjoni tal-akkwisti jew, jekk dan ma jkunx jista' jsir, li tagħmel tajjeb għad-dannu mġarrab mill-parti miżżewġa li ma tkunx tat il-kunsens tagħha17. Ukoll fejn huwa mogħti li parti miżżewġa tista' titlob it-tħassir ta' għamil straordinarju, dan irid isir fi żmien limitat18, li jista' jitqassar għal tliet xhur jekk il-parti li ma tkunx tat il-kunsens tagħha jntbagħtilha att ġudizzjarju biex jgħarrafha bit-twettiq ta' l-għamil19;

dak il-fond kien inkiseb mill-imħarrek meta hu u l-attriċi kienu għadhom għarajjes, u nkiseb fuq ismu biss. L-attriċi tisħaq ħafna li hija kienet ħarġet sehemha (x'aktarx nofs il-prezz) tal-post li nxtara ġebel u saqaf, iżda jibqa' l-fatt li t-titolu għal dak il-ġid jgħajjat lill-imħarrek waħdu u jikkostitwixxi ġid parafernali għalih fis-sens tal-artikolu 1334 tal-Kodiċi Ċivili. It- tmexxija ta' ġid partikolari jew parafernali hija mħollija b'mod esklussiv23 f'idejn dik il-parti fiż-żwieġ li tagħha jkunu l-beni;

Il-Qorti tifhem ukoll li, f'każ bħal dan, jistgħu japplikaw id-dispożizzjonijiet tal-artikolu 1324 tal-Kodiċi, b'mod li l-għoti ta' garanzija f'ċirkostanza bħal dik tista' tgħabbi wkoll lill-ġid tal-komunjoni jekk issir bħala parti mill-eżerċizzju tal-kummerċ, negozju, jew professjoni ta' dak li jkun25.

Jidher li, meta xtara l-post (fl-1980) kien "skrivan". Meta deher fuq il-kuntratt mal-bank imħarrek u ta l- garanzija, kien "operations manager". Minn dawn il-provi waħedhom, wieħed ma jistax jasal għall-fehma li l- garanzija li ta Carmel Schiavone kienet waħda fil-kors normali tal-kummerċ, negozju jew professjoni tiegħu;

The Court eliminated the possibility for this act to fall under Article 1324 because it was not considered to be an ordinary act for the defendant to perform in his daily business, trade or profession.

In conclusion, the court rejected the plaintiff's claims because the surety was entered into was in a time where the husband could have solely acted on behalf of the community of acquests and could tie the community of acquests without the consent of the wife. And also, because the immoveable in question belonged to the husband's paraphernalia assets and hence the wife did not have a say.

Illi, madankollu, jibqa' l-fatt li (a) meta żewġ l-attriċi daħal garanti għall-kumpannija mħarrka dan seta' jagħmel hekk u jorbot waħdu lill-komunjoni tal-akkwisti li dak iż-żmien kienet teżisti bejnu u bejn martu; (b) li jirriżulta li l-ġid li huwa l-oġġett tal-garanzija huwa ġid immobbli parafernali tal-imħarrek Carmel Schiavone, u għalhekk il-komunjoni tal-akkwisti ma tintmissx; u (ċ) l-għoti tal-garanzija fiċ- ċirkostanzi li saret kienet tiswa f'għajnejn il-liġi, u ma teżisti l-ebda raġuni li għaliha jew minħabba fiha l-istess garanzija għandha tiġi mħassra jew kanċellata;

<u>Nazzarenu Caruana vs. Massimo Zahra et (Court of Appeal) (2019),</u>

The spouse claimed that loan had been taken out without her consent, therefore, the debt did not burden community of acquests but only huband's paraphernal property.

"Din il-Qorti hi konvinta li self m**aghmul ghall-iskop tan-negozju ta' airconditioners gestit mill-intimat jaqa' fil-parametri ta' att normali ta' gestjoni ta' kummerc' kif trid il-ligi**. Izda ma kemm l- ebda prova li l-istess jista' jinghad ghall-ammont kollu misluf. Din il-prova kienet tinkombi fuq ir- rikorrent gjaladarba ittenta l-kawza anke fil-konfront tal-mara tad-debitur tieghu **fejn din ma ffirmatx l-iskrituttura de quo jew ma kienitx konsenzjenti ghas-self.**

Illi fejn għemil ta'tmexxija straordinarja jsir minn waħda biss mill-miżżewġin u mingħajr l-għarfien – imqar taċitu – tal-parti miżżewġa l-ohra, dak l-għemil xorta waħda jkun jgħodd.

Illi fid-dawl tal-kunsiderazzjonijiet li għadhom kemm saru tqum il-kwestjoni dwar jekk għemil **straordinarju li jsir minn jew bl-għarfien ta' waħda biss mill-partijiet miżżewġin u li dwaru ma ssirx kawża għat-tħassir tiegħu jgħabbix xorta waħda lill-komunjoni tal-akkwisti daqs li kieku kien għemil li sar mit-tnejn, jew jekk jgħabbix biss lill-ġid parafernali tal-parti miżżewġa li waħedha tkun għamlitu** ...

Illi, fid-dawl tal-kunsiderazzjonijiet li saru, din il-Qorti tasal għall-fehma li l-**ewwel Qorti qatgħet sewwa meta qalet li dik il-parti tad-dejn likwidat li ma kienx maħsub biex jiffinanzja t-tagħmir tal-arja kundizzjonata ma kienx jgħabbi lill-komunjoni tal-akkwisti eżistenti bejn l-appellati, imma kellu jitħallas lura mill-appellat Massimo Żahra, bil-mob li jibqgħu bla mittiefsa l- jeddijiet tal-appellant f'każ li l-ġid partikolari tal-appellat debitur ma jiswiex biżżejjed biex jissodisfa l-ħlas imsemmi."**

lli din il-kawża tirrigwarda r-radd lura ta' flus mislufa fuq l-idejn u li, dwar biċċa minnhom, kienet saret kitba privata ta' kostituzzjoni ta' debitu. Il-qofol tal-kwestjoni hija dwar kemm kien tassew l-ammont misluf *brevi manu* mill-appellant, kemm tħallas lura minnu u min għandu jħallas lura l-bilanċ dovut, ladarba l-imħarrka appellata ma kinitx intrabtet bil-kitba msemmija;

Illi ma hemmx dubju li l-għemil li bih parti fiż-żwieġ tislef jew tissellef il-flus (minbarra d-depożitu ta' flus f'kont f'bank)(Art. 1322(3)(f) tal-Kap 16) huwa magħdud mil-liġi bħala att ta' amministrazzjoni straordinarja. Dan inissel miegħu konsegwenzi fil-liġi wkoll għal min jidħol f'att bħalu. Kemm hu hekk, il-liġi trid li għemil bħal dak imiss liż-żewġ miżżewġin flimkien21, sakemm dak

is-self ma jkunx att normali ta' ġestjoni ta' kummerċ, negozju jew professjoni ta' dik il-parti li tkun isselfet jew silfet (Art. 1324 tal-Kap 16)

Claudette Gauċi vs Paolo Bonniċi Ltd et
Illi fejn għemil ta' tmexxija straordinarja jsir minn waħda biss mill- miżżewġin u mingħajr l-għarfien – imqar taċitu – tal-parti miżżewġa l-oħra, dak l-għemil xorta waħda jkun jgħodd

Art. 1326(1) tal-Kap 16

Imma jekk għemil bħal dak kien jikkonsisti fi trasferiment jew f'ħolqien ta' jedd rejali jew personali fuq ġid immobbli, jew jekk kien jikkonsisti f'ħolqien b'titolu gratuwitu ta' jeddijiet rejali jew personali fuq ħwejjeġ mobbli, għemil bħal dak ikun jista' jitħassar fuq talba tal-miżżewweġ li mingħajr il-kunsens tiegħu ikun sar dak l-att24

Art. 1326(5) tal-Kap 16.

Kull għemil ieħor li jmissu jsir miż-żewġ miżżewġin flimkien imma li jsir minn miżżewweġ wieħed ma jistax jitħassar, iżda jingħata lill- parti li tħalliet barra milli tagħti l-kunsens tagħha l-jedd li ġġiegħel lill-parti li mexxiet waħedha li tirreintegra l-komunjoni tal-akkwisti jew, jekk dan ma jkunx jista' jsir, li tagħmel tajjeb għad-dannu mġarrab mill-parti miżżewġa li ma tkunx tat il-kunsens tagħha

Art. 1326(2) tal-Kap 16

Ukoll fejn huwa mogħti li parti miżżewġa tista' titlob it-tħassir ta' għemil ta' amministrazzjoni straordinarja, dan irid isir fi żmien limitat

Art. 1326(3) tal-Kap 16
li jista' jitqassar għal tliet xhur jekk il-parti li ma tkunx tat il-kunsens tagħha jintbagħtilha att ġudizzjarju biex jgħarrafha bit-twettiq tal-għemil li jkun

Illi fid-dawl tal-kunsiderazzjonijiet li għadhom kemm saru tqum il- kwestjoni dwar jekk għemil straordinarju li jsir minn jew bl-għarfien ta' waħda biss mill-partijiet miżżewġin u li dwaru ma ssirx kawża għat-tħassir tiegħu jgħabbix xorta waħda lill-komunjoni tal-akkwisti daqslikieku kien għemil li sar mit-tnejn (***Anthony Buġeja vs Publius Micallef et***)

jew jekk jgħabbix biss lill-ġid parafernali tal-parti miżżewġa li waħedha tkun għamlitu (***John Cassar vs Francis Manġion et***)

Il-liġi tgħid liema huma d-djun magħmulin minn persuna miżżewġa li jgħabbu lill-komunjoni tal-akkwisti li tkun teżisti bejn dik il-persuna u s-sieħeb jew sieħba tagħha. Dawk iċ- ċirkostanzi huma tassattivi u l-liġi tagħmilha ċara li huma dawk id-djun "biss" (Art. 1327 tal-Kap 16)
li jgħabbu 'l-komunjoni;

xi waħda miċ-ċirkostanzi tassattivi msemmija fil-liġi (***J & E Griscti Ltd vs Jesmond Sant et***) jew li juri li dak id- dejn sar għall-ħtiġijiet tal-familja tal-appellati (***O p.l.c. vs Nadine Roxanne Pace Wismayer et)***

Illi, fid-dawl tal-kunsiderazzjonijiet li saru, din il-Qorti tasal għall- fehma li l-ewwel Qorti qatgħet sewwa meta qalet li dik il-parti tad-dejn likwidat li ma kienx maħsub biex jiffinanzja t-tagħmir tal-arja kundizzjonata ma kienx jgħabbi lill-komunjoni tal-akkwisti eżistenti bejn l- appellati, imma

kellu jitħallas lura mill-appellat Massimo Żahra, bil-mod li jibqgħu bla mittiefsa l-jeddijiet tal-appellant f'każ li l-ġid partikolari tal- appellat debitur ma jiswiex biżżejjed biex jissodisfa l-ħlas imsemmi(1329)

Acts performed without the necessary consent - Article 1326

1326.(1) *Acts* ***which require the consent of both spouses but which are performed by one spouse without the consent*** *of the other spouse may be* ***annulled at the request of the latter spouse*** *where such acts relate to the alienation or constitution of a real or personal right over immovable property; and where such acts relate to* ***movable property they may only be annulled where the rights over them have been conferred by gratuitous title.***

Annulled = Therefore valid until suc tiem that it is annulled - there is a discretion -In one case the judge distinguished between the actual annulment and relative nullity. So here, at the begginign, we have what is considered as active nullity - the action visa vi third parties took place and the other action is limited to acts which refer to the alienation or - Not all extraordinary acts can be annulled- only these mentioned here

(2) An action for annulment may only be instituted by the spouse whose consent was required and within the peremptory term of three years from -

- (a) the date when such spouse became aware of the act, or
- (b) the date of registration, where such act is registerable, or
- (c) the date of termination of the community of acquests,

whichever is the earliest.

(3) Notwithstanding the provisions of sub-article (2), the right given by sub-article (1) to a spouse to request the annulment of an act shall lapse at the expiration of three months from the day on which notice of the act shall have been given to such spouse by means of a judicial act, unless within such time of three months such spouse shall have instituted an action for such annulment.

(4) The spouse who has not instituted the action for annulment within the stipulated time and who has not expressly or tacitly ratified the act, shall nevertheless have an action to compel the other spouse to reintegrate the community of acquests or, where this is not possible, to make good the loss suffered.

(5) Saving the preceding provisions of this article, where in any act which requires the consent of the other spouse and which relates to movables, a spouse has acted unilaterally, there shall be no right competent to the other spouse to demand the annulment of the act; where however, the other spouse has not ratified such act, whether expressly or tacitly, such spouse shall have an action to compel the spouse who has acted unilaterally to reintegrate the community of acquests, or where this is not possible, to make good the loss suffered.

(6) The provisions of this article shall be without prejudice to any right competent to a spouse under this Code or any other law.

Example - If a moveable is sold, the law doesn't allow the other spouse to annul as in return the money was payed - the law only pinpoints a gratuitous transaction - without the consent or permission of the other spouse.

Angela Demarco vs. David Demarco et (First Hall (Civil Court)) (2003) shows which elements must be presented for an action of annulment. Here the spouse constituted himself as a personal surety for a company, of which he was the financial controller. Wife sought to annul the contract through which her husband had offered himself as a guarantor to the company.

"Fejn din il-Qorti ma taqbilx mal-attrici huwa sa fejn hi trid twassal dan l-argument taghha, u cioe', li thassar in toto l-garanzija li ffirma zewgha, anke, jigifieri, in kwantu dik il-garanzija giet assunta minn David Demarco f'ismu propju.

Din il-Qorti tasal biex tghid li din il-garanzija ma torbotx il- komunjoni tal-akkwisti ezistenti bejn il-mizzewgin Demarco, izda mhux li dik il-garanzija ma tolqotx il-proprieta' parafernali tal-firmatarju David Demarco ... Ir-**rekwizit legal**i, u cioe', il- **kunsens tal-mara**, hu mehtieg biex dak il-**ftehim jorbot lill-komunjoni tal-akkwisti, izda mhux mehtieg ghall-validita' nnfisu tal-ftehim.**

In-nuqqas tal-kunsens tal-parti l-ohra jista' jwassal ghall- annullament tal-att in kwantu jolqot il-**komunjoni tal-akkwisti, izda mhux tal-att innifsu** ... [L- artikolu 1327(b)] jimplika li d-djun inkorsi minn parti wahda minghajr il-kunsens tal-parti l-ohra huma validi, biss ma jkunux djun li jimpingu fuq il-komunjoni tal-akkwisti …

Il-konsorti li ma jkunx parti f'att straordinarju ghandu dritt jotlob dikjarazzjoni li dak l-att ma jolqotx il-komunjoni, izda darba ottenuta dik id-dikjarazzjoni tal-konsorti ma jibqalux aktar interess fil-materja. Sakemm l-obbligazzjoni assunta mill-konsorti wahdu ma tkunx marbuta espressament ma kundizzjoni li din trid torbot lill-komunjoni tal-akkwisti, l-konsorti l-ohra m'ghandha ebda interess thassar dik l- obligazzjoni, u l-interess taghha hu limitat biss li takkwista dikjarazzjoni li ghal dik l-obligazzjoni jaghmel tajjeb biss il-konsorti li ffirma …

Kreditur li jkun qed jinnegozja ma' konsorti wahdu, m'ghandux ghalfejn jirrikjedi aktar mill-firma tieghu biex b'hekk ikollu obbligazzjoni valida u bir-"rekwiziti kollha legali"; huwa biss biex jorbot lill-komunjoni tal-akkwisti, li jkun jirrikjedi l- firma tal-konsorti l-ohra.

Kuntratt li jinvolvi att ta' natura straordinarja ffirmat minn konsorti wahdu, mhux nieqes mir-"rekwiziti kollha legali", izda validu u jorbot lil min jiffirmah ... **Dan ifisser li qabel ma att jigi deskritt bhala ordinarju jew straordinarju, irid l-ewwel jintwera li hu marbut mal-amministrazzjoni tal-komunjoni tal-akkwisti; jekk le, il-provvedimenti ta' l-artikolu 1326 ma japplikawx ghal dak l-att. Ghalhekk, it-talba attrici, in kwantu mirata ghall-annullament tal-garanzija iffirmata minn zewgha, ma tistax tigi milqugha ... kwalunkwe obbligazzjoni naxxenti mill-iskrittura ta' Settembru, 1999, hija parafernali ghall-firmatarju David Demarco u mhux ta' piz fuq il-komunjoni tal-akkwisti ezistenti bejn David Demarco u martu l-attrici, salv il-provvediment tal-artikolu 1329 tal-Kodici Civili."**

"L-attrici appellanti tghid illi dak li ghamel zewgha l- konvenut David Demarco kien li ta garanzija ghal dak li jghid u jrid l-art. 1322(3)(h) tal-Kodici Civili u ghalhekk att ta' amministrazzjoni straordinarja li jehtieg il-kunsens ta' l- attrici martu wkoll. Billi dak il-kunsens ma nghatax, l-att ta' amministrazzjoni straordinarja.

l-attrici, mart il-Financial Controller David Demarco, resqet din il-kawza li fiha qed titlob li l-kuntratt ta' assunzjoni ta' garanti ta' zewgha jigi dikjarat null ghax sar ad insaputa taghha u minghajr il-kunsens taghha bi ksur tal-artikolu 1322 tal-Kodici Civili.

Irrizulta mhux kontestat li l-attrici u zewgha zzewgu hawn Malta minghajr kitba ta' zwieg u kwindi jopera bejniethom ir-regim tal-komunjoni tal-akkwisti ai termini tal-artikolu 1316 tal-Kodici Civili.

Skond l-artikolu 1322 (3) (h) tal-Kodici Civili, il-kuntratt ghal xi garanzija gie dikjarat li hu att ta' amministrazzjoni straordinarja, u skond l-artikolu 1322 (2) il-jedd li jitwettaq att simili "imissu liz-zewg mizzewgin flimkien". Peress li l- attrici ma tatx il-kunsens taghha ghat-twettiq ta' dak il-ftehim, hi qed titlob l-annullament tieghu a tenur tal- artikolu 1326 tal-istess Kodici Civili.

L-artikolu 1326 tal-Kodici Civili jaghti l-fakolta' lil dik il- konsorti li ma tkunx tat il-kunsens taghha ghall-att straordinarju li jannulla dak l-att kemm-il darba dak l-att ikun dwar it-trasferiment jew il-holqien ta' jedd reali jew personali fuq proprjeta' immobbli; meta dak l-att ikun dwar propjeta' mobbli, dan jista' jkun annullat biss meta l- jeddijiet fuqhom ikunu nghataw b'titolu gratuitu.

Il-garanzija li ffirma l-konvenut David Demarco tolqot kemm proprieta' immobiljara, kif ukoll proprieta' mobbli, u dan peress li garanzija personali tfisser li d-debitur ikun dahal responsabbli ghad-dejn bil-gid kollu tieghu, prezenti u futuri, kemm mobbili kif ukoll immobbli. In kwantu l-garanzija tista' taffettwa l-proprieta' mobbli, ma jidhirx li l- garanti ffirma dik il-garanzija versu korrispettiv, u anke fid- dawl ta' dak li se jinghad aktar 'l quddiem dwar il-mestjer tal-konvenut firmatarju, jidher li l-assunzjoni saret b'titolu gratuitu.

Darba li rrizulta li l-garanzija personali, li hi att straordinarju b'disposizzjoni espressa tal-ligi, giet assunta mir-ragel minghajr kunsens jew firma tal-mara, allura jidher li l-attrici ghandha tirnexxi fl-azzjoni taghha. Fil-fatt, din il-Qorti lanqas ma tqies li l-att iffirmat mill-konvenut David Demarco jista' jaqa' taht id-dispositttiv tal-artikolu 1324 tal-Kodici Civili, li jippermetti atti normali ta' gestjoni ta' kummerc jew negozju, u li jigu ffirmati u assunti biss mill-konsorti li jmexxi dak il-kummerc jew negozju li jitqiesu validi, avvolja dawk l-atti jkunu normalment jikkostitwixxu atti ta' amministrazzjoni straordinarja. Il- konvenut David Demarco ma kienx Direttur jew Manager tas-socjeta' Price Club, izda biss Financial Controller, u l- mestjer ta' Financial Controller ta' kumpanija ma jinvolvix, normalment, l-assunzjoni ta' garanti personali ghall-hlas tad-debiti tal-kumpanija. Financial Controller huwa responsabbli li jikkontrolla l-finanzi u l-kotba tal-kumpanija li maghha jkun impjegat, u ma jidholx fid-deskrizzjoni tax- xoghol tieghu li jkun personalment responsabbli mid-djun tal-kumpanija. Ghaliex il-konvenut David Demarco accetta dak l-obbligu f'dan il-kaz mhux meritu ta' din il-kawza, pero', zgur ma jistax jigi ammess li dik l-assunzjoni kienet att "normali" tan-negozju jew professjoni tal-firmatarju David Demarco.

Ma jirrizultax, lanqas, li l-attrici tat xi prokura lil zewgha biex dan jiffirma ghaliha. Hu veru li fuq il-kuntratt hemm klawsola li tghid li "married applicants declare to sign this application in their own name as well as on behalf of their wife/husband"; imma din il-klawsola ma tistax isservi bhala prokura ghal fini tal-amminstrazzjoni tal-komunjoni tal-akkwisti. Ghalkemm, bhala regola generali, prokura tista' tinghata anke verbalment, ghal dan il-kaz, il-ligi trid li tali prokura tinghata b'att pubbliku jew kitba privata li jkollha l-elementi rikjesti fl-artikolu 1322 (6) u (7) tal-Kodici Civili. F'dan il-kaz, ma giet prodotta ebda prokura fis-sens tal-ligi, u kwindi l-firmatarju David Demarco ma kellu ebda awtorita' jiffirma u jintrabat ghan-nom ta' martu.

Qabel ma dahlu fis-sehh l-emendi ghall-ligi tal-komunjoni tal-akkwisti bl-att XII tal-1993, l-amministrazzjoni tal- komunjoni kienet fdata esklussivament lir-ragel, tant li gie kemm-il darba deskritt bhala "kap u padrun" tal-istess komunjoni tal-akkwisti.

Il-mara kellha sehem fil-komunjoni, izda dan is-sehem kien wiehed potenzjali, tant li kien jinghad li "uxar non est socia sed speratur fare". Kien hemm, fis-sens legali, konfuzjoni bejn il-proprieta' parafernali tar-ragel u l-assi tal-komunjoni, b'mod li, ghall- terz, dawn kienu proprieta' wahda u ma kienet issir ebda distinzjoni bejn il-gid personali tar-ragel u l-proprieta' tal- komunjoni. Kien jinghad li "maritus vivit ut dominus, moritur ut socius", u r-ragel gie ordinarjament deskritt bhala l-proprjetarju tal-assi tal-komunjoni, b'mod li l-mara jew l-eredi taghha jkunu jistghu jirreklamaw is-sehem taghha biss meta jinhall iz-zwieg (ara, per ezempju, is- sentenza riportata fil-Vol. XXXIV.II.503).

L-emendi introdotti bl-Att XII tal-1993 kisru dan il-principju ta' unita' fil-persuna tar-ragel, u l-komunjoni tal-akkwisti ghandu, illum, sa mill-bidu tal-ghaqda fi zwieg taht dak ir- regim, ezistenza indipendenti u awtonoma mill-assi partikolari tal-konsorti. Kemm ir-ragel kif ukoll il-mara, wara z-zwieg, jibqghu jzommu kontroll personali fuq il- proprieta' parafernali taghhom, u jibqalghom il-jedd li jamministraw dik il-proprieta' indipendenti minn xulxin. X'jaghmel konsorti mill-assi personali tieghu ma jinteressax lill-konsorti l-ohra, u ghalkemm il-frutti ta' dawk il-beni parafernali jidhlu fil-komunjoni, x'isir minn dawk il- beni u kif u fejn jigu nvestiti jiddeciedi l-konsorti proprietarju wahdu.

Kwindi, ir-ragel u l-mara mhux eskluzi milli jidhlu f'negozju u jintrabtu personalment, ghax huma zammew il- personalita' guridika taghhom indipendenti minn dik il- komunjoni. Kwindi ma jistax jigi eskluz li kull konsorti li agixxa f'ismu jkun qed jorbot biss lilu nnifsu. Infatti, l- artikolu 1328 jiddistingwi bejn djun parafernali u dawk tal- komunjoni u jghid li ceteris paribus il-krediturl tal-ahhar jigu qabel dawk ta' l-ewwel, imma djun parafernali, mahluqa mill-konsorti li jagixxi wahdu, jistghu jinholqu anke wara z-zwieg (ara artikolu 1329) u huma validi.

L-artikolu 1321 (1) tal-Kodici Civili jghid li l-beni kollha tal- mizzewgin jitqiesu li jaghmlu parti mill-akkwisti sakemm ma jkunx pruvat xort'ohra; ma tghidx, u ma hemm ebda disposizzjoni li tghid, li d-djun li jassumi konsorti jkunu prezunti li jkunu tal-komunjoni tal-akkwisti.

"Calleja vs Calleja et" deciza fit-2 ta' Ottubru, 2002. Din il-Qorti f'dik il-kawza, qalet li ftehim null "minhabba l-assenza ta' xi rekwizit legali", ma jistax jigi solvut billi dak il-ftehim jibqa' vigenti kontra parti ohra. Is-socjeta' kreditrici, kompliet tghid din il-Qorti, kellha fin-negozjati tassikura li dak li kien qed jigi miftiehem kien jissodisfa r-rekwiziti kollha legali.

Bir-rispett kollu lejn din il-Qorti kif allura presjeduta, din il- Qorti, kif issa presjeduta, ma taqbilx li l-ftehim jista' jitqies null minhabba "l-assenza ta' xi rekwizit legali". Ir-rekwizit legali, u cioe', il-kunsens tal-mara, hu mehtieg biex dak il- ftehim jorbot lill-komunjoni tal-akkwisti, izda mhux mehtieg ghall-validita' nnfisu tal-ftehim. In-nuqqas tal-kunsens tal- parti l-ohra jista' jwassal ghall-annullament tal-att in kwantu jolqot il-komunjoni tal-akkwisti, izda mhux tal-att innifsu. Bl-argument ta' din il-Qorti fil-kawza kwotata, ir- rizultat ikun li kull att ta' konsorti minghajr il-kunsens tal- konsorti l-ohra, ikun null jekk l-att ikun wiehed minn dawk deskritt bhala wiehed straordinarju fl-artikolu 1322 (3) tal- Kodici Civili. Dan zgur mhux il-hsieb wara l-emendi introdotti bl-att XII tal-1993, li ma kellhom qatt l-iskop li jxekklu lill-konsorti milli jagixxi wahdu u kif irid f'relazzjoni mal-assi parafernali tieghu. Konsorti ghandha l- amministrazzjoni "b'mod eskluziv" (artikolu 1334 (2)) tal- beni parafernali taghha, u dan ifisser li dik il-konsorti tista', wahedha,

tagixxi bl-aktar mod straordinarju li trid, bosta' b'dan l-agir ma tkunx qed tobbliga lill-kommunjoni tal- akkwisti.

Din id-distinzjoni tidher cara wkoll minn ezami tal-artikolu 1327 (b) tal-Kodici Civili. Dan l-artikolu jghid li huma djun tal-komunjoni, l-ispejjez u l-obbligi li jkunu saru ghall-amministrazzjoni ta' l-akkwisti, hlief dawk l-ispejjez li jsiru b'atti li jehtiegu l-kunsens taz-zewg partijiet mizzewga izda li jsiru minn parti wahda minghajr il-kunsens tal-parti l- ohra". Dan l-artikolu jimplika li d-djun inkorsi minn parti wahda minghajr il-kunsens tal-parti l-ohra huma validi, biss ma jkunux djun li jimpingu fuq il-komunjoni tal- akkwisti.

Konsorti ma tistax tindahal u tagixxi biex thassar att li fiha hi ma kienetx parti u li sehh bejn zewgha u terz, sakemm dak l-att ma jolqotx l-interessi taghha qua kompartecipi fil- komunjoni tal-akkwisti. Hu s'hawn li jasal l-interess guridiku taghha, izda sa fejn l-obbligi ta' zewgha ma jolqtux l-interessi taghha fil-komunjoni, hi ma tistax tindahal. Il-liberta' ta' konsorti m'ghandhiex tigi mxekkla b'mod li, kull meta jagixxi wahdu, jista' jsib lill-parti l-ohra tigri warjah u thassarlu kull ma jaghmel. Il-konsorti l-ohra tista' tindahal sa fejn l-att jista' jolqot l-interessi taghha, izda spicca dak l-interess, jispicca d-dritt ta' azzjoni ulterjuri.

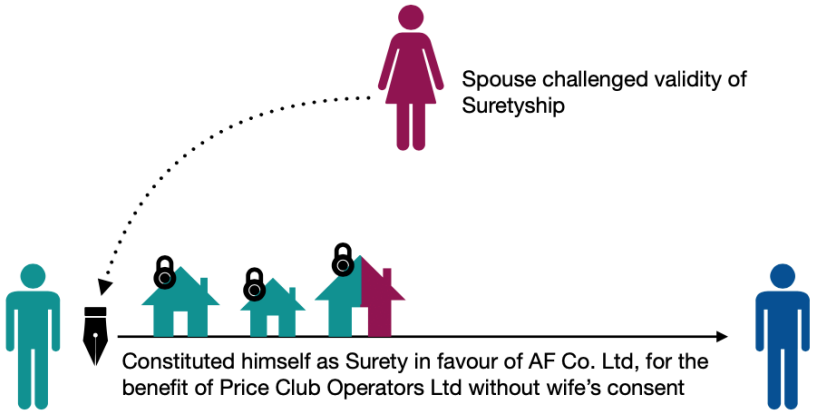
Il-konsorti li ma jkunx parti f'att straordinarju ghandu dritt jitlob dikjarazzjoni li dak l-att ma jolqotx il-komunjoni, izda darba ottenuta dik id-dikjarazzjoni dak il-konsorti ma jibqalux aktar interess fil-materja. Sakemm l-obbligazzjoni assunta mill-konsorti wahdu ma tkunx marbuta espressament ma kundizzjoni li din trid torbot lill- komunjoni tal-akkwisti, l-konsorti l-ohra m'ghandha ebda interess thassar dik l-obbligazzjoni, u l-interess taghha hu limitat biss li takkwista dikjarazzjoni li ghal dik l- obbligazzjoni jaghmel tajjeb biss il-konsorti li ffirma.

"Aquilina noe vs Falzon et", deciza minn din il-Qorti (per Onor.G. Caruana Demajo) fis-16 ta' Ottubru, 1998, gie affermat li mara mizzewga ghandha l- kapacita' li tidhol f'obbligazzjonijiet minghajr il-kunsens jew l-assistenza ta' zewgha, u dik l-iskrittura torbot lill- mara wahedha u ghandha taghmel tajjeb ghall-istess obbligazzjonijiet bil-beni parafernali taghha. Hemm ukoll kien gie allegat li l-att hu null ghax ma kienx gie ffirmat mir-ragel u l-mara, u din il-Qorti, ghalkemm qablet li dak il- kuntratt iffirmat mill-mara biss, ma kienx jorbot il- komunjoni tal-akkwisti, affermat li ma kienx null, izda validu fil-konfront tal-mara biss.

Kreditur li jkun qed jinnegozja ma' konsorti wahdu, m'ghandux ghalfejn jirrikjedi aktar mill-firma tieghu biex b'hekk ikollu obbligazzjoni valida u bir-"rekwiziti kollha legali"; huwa biss biex jorbot lill-komunjoni tal-akkwisti, li jkun jirrikjedi l-firma tal-konsorti l-ohra. Kuntratt li jinvolvi att ta' natura straordinarja ffirmat minn konsorti wahdu, mhux nieqes mir-"rekwiziti kollha legali", izda validu u jorbot lil min jiffirmah.

u ma jirrizultax li qatt kien fil-business jew mexxa xi negozju. Kwindi l-agir tieghu meta ffirma l-garanzija tmur lil hinn u mhux relatata mal-amministrazzjoni tal- komunjoni li tiddependi ghall-konsistenza taghha fuq il- professjoni tieghu bhala accountant. Dan ifisser li qabel ma att jigi deskritt bhala ordinarju jew straordinarju, irid l- ewwel jintwera li hu marbut mal-amministrazzjoni tal- komunjoni tal-akkwisti; jekk le, il-provvedimenti ta' l- artikolu 1326 ma japplikawx ghal dak l-att.

On the wife wanting to annul the suretyship on its entirety - what the court did is that she may annul it but only in respect nowhere this act touches the COA and there is the reasoning.



Did suretyship contracted by spouse affect property falling within the community of acquests? ✓

Was constitution of suretyship act of extraordinary administration? ✓

Had husband acted without the wife's consent? ✓

Did wife take action to annul the suretyship? ✓

Did Court accept to annul the suretyship? ✗ Suretyship still held valid, but debt could not burden community of acquests

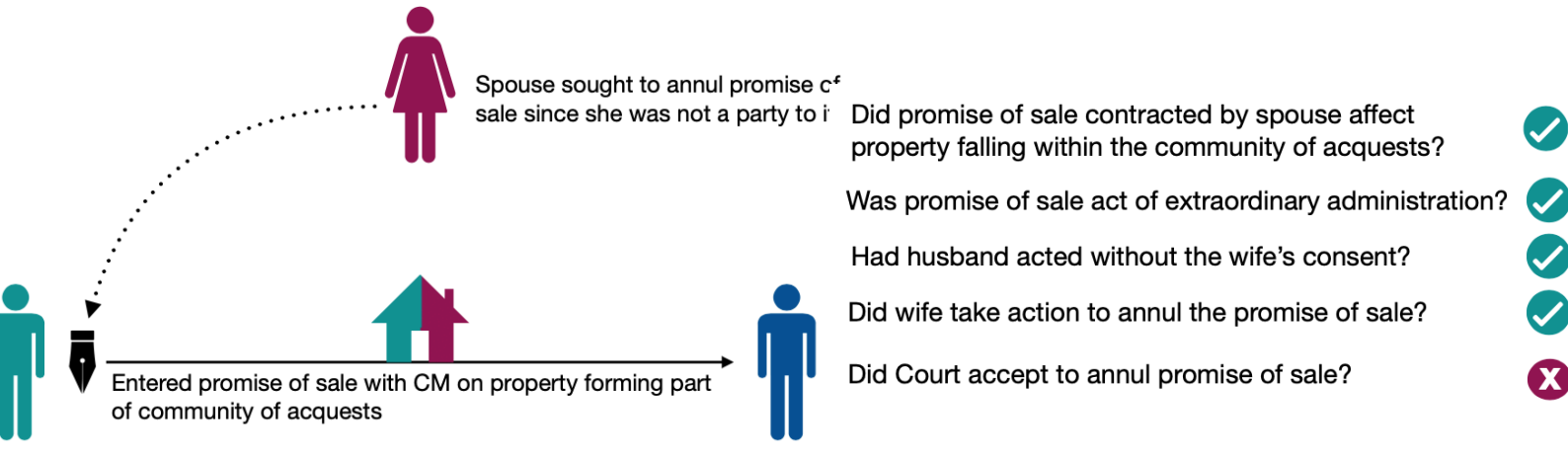
<u>Charles Muscat et vs. Roy Lancelor et (First Hall (Civil Court)) (2016),</u> the plaintiff sued spouses Lancelot for the enforcement for the enforcement of a promise of sale. Spouse objected to sale since had not consented to her husband entering a promise of sale relating to an immovable forming part of the community of acquests.

"F'dan il-kaz ir-rikorrenti ma rnexxielhomx jippruvaw l-ezistenza tal-mandat sal-grad mehtieg fil-ligi. Ghaldaqstant fin-nuqqas ta' prova ta' mandat car, ma jistax jigi prezunt li l-konvenuta **Giovanna Sharples tat kunsens espress bi xjenza u konsapevolezza lir-ragel taghha Roy Sharples sabiex jipprocedi bil-weghda ta' bejgh.** Ghalhekk jirrizulta li huwa minnu li l-konvenuta Giovanna Shrples la ffirmat u lanqas ma tat il-kunsens taghha lil zewgha sabiex jersaq ghal weghda ta' bejgh.

Il-konvenuta Giovanna Sharples tipprevalixxi ruhha mill-proceduri odjerni sabiex tressaq il-**kontrotalba li permezz taghha titlob li l-weghda ta' bejgh tigi dikjarata nulla u bla effett ghaliex jonqos il-kunsens taghha fuq il-konvenju liema konvenju hu att ta' natura straordinarja ghax hu trasferiment ta'immobbli formanti parti mill-komunjoni tal-akkwisti .**.. il-Qorti hi tal-fehma illi l- konvenju tat-13 ta' Ottubru mhux null izda hu validu biss ghal sehem Roy Lancelot Sharples cioe nofs billi l-fond jappertjeni lil komunjoni tal-akkwisti .... l-**atturi ghandhom il-jedd jekk iridu li jitolbu li jsir il-kuntratt ta' bejgh izda ghal nofs indiviz tal-fond".**

Charles muscat vs Roy Lancelot - in this case, there was a property falling into COA, the husband entered into promise of sale agreement with muscat - Roy promised to transfer entirety of the house - at that point the spouse when summoned by Charles Muscat, she claimed that that promise of. Sale must be annulled because I was not a party to it and never gave my consent to my husband -

Facts of the case - the Plaintiff sued the spouse Lancelot for the enforcement of a promise of sale. Spouse objected to sale since she had not consented to her husband entering **a promise of sale relating to an immovable forming part of the community of acquests**.



Il-konvenuta Giovanna Sharples tipprevalixxi ruhha mill-proceduri odjerni sabiex tressaq il- kontrotalba Ii permezz taghha **titlob Ii I-weghda ta' bejgh tigi dikjarata nulla u bla effett ghaliex jonqos il-kunsens taghha fuq il-konvenju liema konvenju hu att ta' natura straordinarja ghax hu trasferiment ta' immobbli formanti parti mill-komunjoni tal-akkwisti**.

[*Court cited Demarco v. Demarco et judgment extensively*]

... il-Qorti hi tal-fehma illi l-konvenju tat-13 ta' Ottubru 2010 mhux null izda **hu validu biss ghal sehem Roy Lancelot Sharples** cioe nofs **billi l-fond jappartjeni lil komunjoni tal-akkwisti**.

... l-atturi ghandhom il-jedd jekk iridu li jitolbu li jsir il-kuntratt ta' bejgh izda biss ghal nofs indiviz tal-fond

What Debts are to be Paid from Community of Acquests and What Debts are to be Paid from Paraphernal Property

Debts chargeable to the Community

1327. Saving the provisions of article 1329, the assets forming part of the community of acquests shall be charged only with the following debts:

(a) the burdens and obligations which encumber the assets under the act of their acquisition;

(b) the expenses and obligations incurred in the administration of the acquests, except such expenses as are incurred by acts which require the consent of both spouses but which are performed by one spouse only without the consent of the other spouse;

(c) the expenses and obligations, even if incurred separately, for the needs of the family including those for the education and upbringing of the children;

(d) every obligation which is contracted by the spouses jointly;

(e) debts relating to the ordinary repairs of the property of either of the spouses, the fruits of which are included in the acquests; and

(f) any debt or indemnity due as a civil remedy by either spouse where such indemnity is not due as a civil remedy in respect of any offence wilfully committed.

- Sub article F - if I am driving my car, and I cause the death of someone, I run over someone - I will be liable to pay damages, it is a civil indemnity, owing to liquidation, owing to this unfortunate principle. There is charged to the COA - there is an exception

J&E Grixti Limited vs Jesmond Sant and Rita Sant Court of Appeal, 2007:

Plaintiff sold merchandise to Jesmond Sant who managed a mini market called Save & Smile in Mosta. The small claims tribunal was asked to recognise that the creditor owed money to the plaintiff as he had defaulted. The wife was also roped into the lawsuit. The husband was carrying out all the management and administration of the mini market but did not pay his creditor. In the pleas, the wife pleaded that she had nothing to do with the transaction as this was entered into by Jesmond thus he should bear responsibility and she should be exonerated.

The spouses were also undergoing separation proceedings at the time which was also mentioned during the case. There is a provision of the law which states that if the husband did not disclose much information about the dealings of his business as soon as the spouse becomes aware she may bring an action to challenge or annual the act. The spouse discovered this debt and the claim upon receiving the court papers. Rita Sant held that she challenged this provision as she filed a reply and referred to Article 1326. However this article refers to a transaction which must refer either to a real right over an immoveable property, an alienation of a immoveable property or a donation of a moveable property. The adjudicator held that there were two relevant articles to this case which were article 1327(d) which requires the signature of both spouses for an extraordinary act of administration as well as article 1326 which contained the relevant timeframes. Thus it was concluded that the husband is liable but the wife is not according to the Small Claims Tribunal.

The plaintiff company filed an appeal because whereas the plaintiff company sued both spouses, it only got a remedy against the husband and the wife was released from any responsibility. The Court of Appeal referred to article 1324 by which Jesmond could enter into transactions on his own since he was a trader and the sale of merchandise was related to management of his business thus he could enter into the transaction on his own regardless of his wife's knowledge of the actions. This means that the two articles on which the prior judgments was based were considered irrelevant by the Court of Appeal and that decision was disregarded.

- *"Ghal kjarezza, qed jigi rilevat illi hemm atti li jirrikjedu l- intervent taz-zewg konjugi [Artikolu 1322 (2)] u hemm ukoll atti li wiehed mill-konjugi jista' jgib fis-sehh uti singuli [Artikolu 1324 jew l-Artikolu 1327 (c)]. F' dawn l-istanzi t- terz kreditur huwa legittimat li jissodisfa l-kreditu tieghu fuq il-beni tal-komunjoni. Dan ghar-raguni illi dawk l-atti jinciedu fuq ic-cespiti li jifformaw parti mill-patrimonju tal- komunjoni. Naturalment, u skond il-ligi, l-istess terz kreditur huwa ulterjorment tutelat billi in subordine idur fuq il-beni personali ta' dak biss fost il-konjugi li ghamel in- negozju u ndahal ghar-responsabilita` kontrattwali diretta. Jigi allura illi r-ragel jirrispondi ghad-dejn de quo mhux biss bis-sehem tieghu mill-komunjoni imma anke bil-beni tieghu proprji, mentri l-mara hija biss responsabbli sal- konkorrenza ta' sehemha mill-komunjoni ta' l-akkwisti. Dan hu bil-wisq car mill-kontenut tan-norma fl-Artikolu 1330 tal-Kodici Civili;"*

Consequences of this judgment:
The small claims tribunal released the wife from any liability and the Court of Appeal decided that Article 1324 applies and it is a debt which burdens the community of acquests and held that it was wrong for the first tribunal to acquit the wife from liability.
The portfolio of each spouse is made up of assets which might have originated before marriage, during marriage through succession, inheritance or donation which are considered to be paraphernal property and then there are the undivided share in the assets which are created from the day of the marriage (community of acquests).

Firstly the Court said that the wife is also liable towards the creditor and also said that Jesmond had to pay the debts to the plaintiff from his share of the community of acquests and if that is not enough he must liquidate any assets owned by him as paraphernal property. Therefore the spouse

that benefited from the autonomy given to him (as a trader) by Article 1324 was burdened by having to pay from his share in the community of acquests and if that is not enough from his paraphernal property. The Court held that Rita Sant was only liable to pay from her share in the community of acquests but her paraphernal property was hers and could not be touched by creditors.

s-socjeta` attrici talbet li l- konvenuti jigu kkundannati jhallsu s-somma ta` elf, mitejn u erbgha u tletin lira Maltin u tlieta u tmenin centezmu (Lm1,234.83c) rapprezentanti prezz ta` merci lilhom mibjugha u kkonsenjati mill-istess socjeta` attrici liema prezz il-konvenuti naqsu milli jhallsu.

Rita Sant li biha eccepiet li hija qatt ma trattat mal-kumpanija attrici stante l-fatt li n-negozju ta` Save & Smile kien dejjem gestit mill-konvenut Jesmond Sant.

Jesmond Sant, li kien qed jiggestixxi l-hanut Save & Smile il-Mosta xtara l- merkanzija in kwistjoni u ma hallasx ghaliha.

Rita Sant kienet tahdem fis-supermarket in kwistjoni sa Lulju 2003 izda minn Mejju 2003 inqalghu kwistjonijiet matrimonjali bejnha u bejn zewgha l-konvenut l-iehor, imbaghad f' Lulju 2003 bdew proceduri ta` separazzjoni personali u jirrizulta wkoll illi minflok ma baqghet il-konvenuta fil-hanut, dahlet mara ohra minflokha li maghha huwa allegat li l-konvenut ghandu relazzjoni.

Fil-kontestazzjoni ta' din is-sentenza s-socjeta` attrici tavvanza dawn l-ilmenti:-
(1) Kuntrarjament ghal dak ritenut mit-Tribunal, hi presunzjoni legali dettata mill-Artikolu 1316 (1), Kodici Civili illi bejn il-konvenuti jvigi r-regim tal-komunjoni ta' l- akkwisti;

(2) Ghall-fattispeci tal-kaz in ezami huwa applikabbli d-dispost ta' l-Artikolu 1324 tal-Kapitolu 16 u mhux l-Artikoli 1326 u 1327 (d) kif hekk erronjament ikkonkluda t-Tribunal. F' kull kaz, it-Tribunal lanqas seta' in bazi biss ghar-risposta tal-konvenuta Rita Sant jikkunsidra l-materja mill-ottika ta' l-Artikolu 1326;

Il-fatt ta' din is-separazzjoni jippresupponi l- ezistenza ta' zwieg u li allura l-koppja kienet tinsab f' regim ta' komunjoni. Il-prova ta' dan taghmilha d- disposizzjoni ta' l-Artikolu 1316 (1) Kodici Civili li jipprovdi illi "iz-zwieg li jsir f' Malta igib ipso jure bejn il-mizzewgin, il-komunjoni ta' l-akkwisti, meta ma jkunx hemm ftehim xort' ohra b' att pubbliku". Minn dan jitnissel illi d-drittijiet tar-ragel u tal-mara mizzewga ghall-komunjoni jibdew minn dakinhar taz-zwieg u jispiccaw malli jinhall iz-zwieg (Artikolu 1319, Kodici Civili);

Ordinarjament, a norma ta' l-Artikolu 1322 (2) (g), il-Kodici Civili taghna iqis "l-akkwist ta' proprjeta` mobbli ... li l- prezz tieghu ma jithallasx mal-konsenja jew qabel", kif hekk apparentement jidher li huma l-akkwisti tal-merce f' dan il-kaz, bhala att ta' amministrazzjoni straordinarju u, konsegwentement, tali att, kif ukoll il-jedd li wiehed iharrek jew jigi mharrek dwaru, imiss liz-zewg mizzewgin flimkien. Dan jibqa' hekk il-kaz sakemm dak l-att ma jkunx ukoll wiehed li jitqies ri-entranti fl-"atti normali ta' gestjoni ta' kummerc, negozju jew professjoni" ghal liema jirreferi l- Artikolu 1324 tal-Kodici Civili. Artikolu dan li, kif drabi ohra mfisser, "ma japplikax ghal kull att tal-kummerc kif definit mill-Kodici tal-Kummerc izda kien japplika biss fil-kaz ta' persuna li tkun qed tizercita kummerc, negozju jew professjoni bhala attivita` ekonomika u li fiha l- kuntrattazzjoni taht ezami setghet tinkwadra ruhha bhala att normali tal-gestjoni taghha" ("Grazio Patiniott et -vs- Anthony Cini et", Appell, 5 ta' Ottubru 2001). Minn dak trapelat mill-

provi huwa indubitat illi l-atti mwettqa mill- konvenut Jesmond Sant kienu "atti normali" tal-gestjoni minnu tas-supermarket u tal-ko-gestjoni flimkien ma' martu tan-negozju minn dan l-istess supermarket, ghallanqas sa l-ahhar ta' Lulju 2003. Ghal fattispeci allura jircievi applikabilita` d-dispost ta' l-Artikolu 1324;

It-tezi propunjata mis-socjeta` attrici appellanti dwar l- applikabilita` ta' l-Artikolu 1324 hi ghalhekk dik korretta. Din it-tezi, kondiviza minn din il-Qorti, ghandha tikkonduci biex jigi ritenut illi fil-kaz ta' l-obbligazzjoni assunta mill- konvenut Jesmond Sant u li ghandha karattru negozjali, u mhux personali, tiddetermina di fronte ghat-terza socjeta` li maghha kkuntratta is-sodisfaciment ta' interess komuni, f' liema kaz ghandha twiegeb il-komunjoni ta' l-akkwisti. Din il-Qorti gja kellha okkazjoni taghmel accenn ghal ragonament simili fid-decizjoni taghha ta' l-4 ta' Ottubru 2006 in re: "Poultry Products Ltd -vs- Gesmond Sant et", fejn l-odjerni konvenuti kienu wkoll ko-involti, anke jekk imbaghad dik id-decizjoni kellha ghal dak li ntqal fiha ssegwi binarju iehor u konkluzjoni diversa minn dik prezenti;
Dejjem rigwardata l-materja mill-perspettiva tat-terz li mieghu r-ragel debitur ikkuntratta, intqal sewwa mill-Prim' Awla tal-Qorti Civili illi "l-iskop ta' l-Artikolu 1324 hu ntiz biex, fil-konfront tat-terz, il-komunjoni tintrabat anke meta att straordinarju jsir minn konsort wiehed biss, basta li jkun att 'normali' ta' gestjoni ta' kummerc". ("Claudette Gauci -vs- Paolo Bonnici Limited et", 9 ta' Ottubru 2003, per Imhallef Tonio Mallia);

Ghal kjarezza, qed jigi rilevat illi hemm atti li jirrikjedu l- intervent taz-zewg konjugi [Artikolu 1322 (2)] u hemm ukoll atti li wiehed mill-konjugi jista' jgib fis-sehh uti singuli [Artikolu 1324 jew l-Artikolu 1327 (c)]. F' dawn l-istanzi t- terz kreditur huwa legittimat li jissodisfa l-kreditu tieghu fuq il-beni tal-komunjoni. Dan ghar-raguni illi dawk l-atti jinciedu fuq ic-cespiti li jifformaw parti mill-patrimonju tal- komunjoni. Naturalment, u skond il-ligi, l-istess terz kreditur huwa ulterjorment tutelat billi in subordine idur fuq il-beni personali ta' dak biss fost il-konjugi li ghamel in- negozju u ndahal ghar-responsabilita` kontrattwali diretta. Jigi allura illi r-ragel jirrispondi ghad-dejn de quo mhux biss bis-sehem tieghu mill-komunjoni imma anke bil-beni tieghu proprji, mentri l-mara hija biss responsabbli sal- konkorrenza ta' sehemha mill-komunjoni ta' l-akkwisti. Dan hu bil-wisq car mill-kontenut tan-norma fl-Artikolu 1330 tal-Kodici Civili;

Ibda biex ir-risposta tal-konvenuta Rita Sant ma setghet qatt isservi ta' pretest biex it-Tribunal jikkontempla l- materja quddiemu fil-parametri ta' l-Artikolu 1326 Kodici Civili, u li, del resto, kif manifest, ma jiccentrax fil-kaz in ispecje. L-azzjoni de quo ma kienetx qeghda ssir mill- mara fil-kontestazzjoni ta' l-atti maghmula minn zewgha izda mit-terz kreditur ghall-hlas tal-kreditu tieghu. Ankorke kellu jitqies l-Artikolu 1326 dan kjarament jikkontempla l- ezercizzju ta' azzjoni u dan huwa bil-wisq ovvju. Biex att jigi mhassar u mwaqqa' ghal xi raguni li ssemmi l-ligi dik l-annullabilita` trid per forza tkun dedotta b' azzjoni u mhux permezz tar-risposta jew ta' eccezzjoni. Ara Kollez. Vol. XXVI PIII p642uVol.XXIX PI p452;

Ghal dawn il-motivi din il-Qorti qed tilqa' l-appell lilha devolut u b' hekk tirriforma s-sentenza appellata fis-sens illi tirrevoka dik il-parti taghha fejn cahdet it-talba attrici di fronte ghall-konvenuta appellata Rita Sant u b' hekk tghaddi biex tikkundanna lil din, flimkien mal-konvenut Jesmond Sant, taghmel tajjeb ghall-pretensjoni kreditorja tas-socjeta` attrici, limitatament pero` sal-konkorrenza ta' sehemha mill-komunjoni ta' l-akkwisti. L-ispejjez gudizzjarji taz-zewg istanzi jitbatew miz-zewg konvenuti flimkien.

Article 1330 - Where paraphernal property is subject to the debts of the community.

1330. When **the assets of the community of acquests** are insufficient to satisfy the debts which burthen it, the creditors of such community may enforce their claim *in subsidium* against the paraphernal property of the spouses:

Provided that where -

(*a*) the debt is due as a civil remedy in respect of a wilful offence committed by either spouse; or

(*b*) the debt is one arising out of the exercise of a trade, business or profession as is referred to in article 1324;

the creditors may not enforce their claim against the paraphernal property of the spouse who has not given rise to the claim, but may in such cases enforce their claim to the extent of any part remaining unsatisfied by the assets of the community of acquests, against the paraphernal property of the spouse giving right to such claim.

- The rule is that when the assets of the community are insufficient, the creditors may enforce their claim against the paraphernal property of the spouses if both are responsible for the debts. This property would be ceased by the court and liquidated to pay the dues.

- The proviso refers to the debt which is due as a civil remedy for a wilful offence caused by one of the spouses as well as to debts arising from the exercise of trade, business or profession.

- Therefore the Court based itself on the second scenario contemplated in this proviso with regards to the aforementioned case.

Article 1328 - creditors of a particular spouse

Article 1328: "Creditors of a particular spouse shall, unless they enjoy a lawful cause of preference, rank after the creditors of the community of acquests."

- This article provides that the creditor of a particular spouse (this is paraphernal) shall rank after the creditors of the community of acquests. Therefore if there are two normal creditors, it is the creditor of the community of acquests who will be paid first (such as loan taken after marriage) prior to the paraphernal creditor (car purchased or hire purchase by one spouse) if both have not been paid.

- This article also mentions an exception through the rule or or phrase, "unless they enjoy a lawful cause of preference". There may be a paraphernal debt which requires a security of a general hypothec over all property which is moveable or immovable as well as a special hypothec over immovable property constituted in favour of the creditor by the debtor. If this loan was obtained prior marriage, this is paraphernal but because of this security, this article allows for that debt to be ranked prior to an unsecured debt even if this is a debt of the community of acquests thus arose during the marriage.

Article 1329 - Obligations separately contracted by either spouses

Article 1329: "(1) Subject to the following provisions of this article, the creditors of a spouse for debts which are not chargeable to the community of acquests whether such debt has arisen before or after the marriage, may, when such creditors cannot satisfy their claim against the paraphernal property of such spouse, enforce their claim in subsidium against the assets forming part of the community of acquests but only to the extent of the value of the share which such spouse has in the community of acquests.

(2) Saving the right of the debtor's spouse to seek the judicial separation of property, the debtor's spouse shall not have a right to oppose an act enforcing the credit against any property of the debtor or of the community of acquests except where the property upon which execution is being attempted is the paraphernal property of such debtor's spouse."

- The creditors of paraphernal property can sue the particular debtor and if he does not have enough money to pay what is due, said creditors will try to seize his assets within the community of acquests. The assets are generally moveables and immovables rather than liquid thus those assets would be ceased by the court and sold in a judicial auction. The other spouse to whom the debt does not belong has his or her claims but cannot challenge the liquidation of the community of acquests. Said spouse can only challenge if the creditors are trying to cease or liquidate his or her paraphernal property.

An example of paraphernal debt acquired after marriage: one inherited an asset and wants to acquire it but thus not have the funds to pay his co-heirs therefore he would owe them funds.

- First, such creditors shall attack the debtors paraphernal property and if this is not sufficient they will move forward to attack his share within the community of property. The other spouse cannot protest this. If proceedings are instituted in court to liquidate, then the other spouse cannot object, so the community of acquests will have to be terminated and liquidated judicially. The other spouse can only object if in that lawsuit the paraphernal property of the spouse to whom the debt does not belong is being seized and an attempt is being made to liquidate it. That spouse has a remedy to object to that seizure because it belongs to him/her personally and he/she is not required to compensate the other spouse who owns the paraphernal debt.

Refusal to give consent

1323. (1) If one of the spouses refuses his or her consent to an act of extraordinary administration, the other spouse may apply to the competent court for authorisation when the act of extraordinary administration is necessary in the interests of the family:

Provided that the parties may, in such cases, choose to adopt the procedures contemplated in article **6A** to arrive at an agreement or to have an arbitration between them.

(2) If one of the spouses is away from Malta or if there exists any other impediment in respect of one of the spouses and in either case there exists no authorisation by public deed or by private instrument duly attested in terms of article 634 of the Code of Organization and Civil Procedure, the other spouse may perform such necessary acts of extraordinary administration of the acquests which in terms of law require the consent of both spouses, and which the court of voluntary jurisdiction may specifically authorise; sohowever that the court may not in such cases authorise the performance of all necessary acts of extraordinary administration generally.

(3) The registration required by article 996 or 2033 as the case may be, in respect of any act alienating the ownership or any real right over immovable property, and any hypothecation whether general or special shall contain also the name of the other spouse as if such other spouse were a party to the deed of alienation or hypothecation, and where such registration is made in the name of one spouse only it shall in respect of third parties be operative only in relation to the spouse in whose name it is registered.

Article 6A - Disagreement between the spouses

6A. In case of any disagreement either spouse may apply to the competent court for its assistance and the presiding judge, after hearing the spouses and if deemed opportune any of the children above the age of fourteen years residing with the spouses, shall seek to bring about an amicable settlement of such disagreement.

(2) Where such amicable settlement is not attained and the disagreement relates to the establishment or change of the matrimonial home or to other matters of fundamental importance, the presiding judge, if so requested expressly by the spouses jointly, shall determine the matter himself by providing the solution which he deems most suitable in the interest of the family and family life.

(3) No appeal shall in this case lie from the pronouncement of the presiding judge.

- So what strikes us is the refusal - act of extraordinary administration - the remedy for the other spouse is to ask the court to authorise that transaction - now a reference is made to A6A of the civil code. Relate to family law

- The operative points of this article are - a spouse refusing consent - the remedy - is the other spouse asking the court to intervene - this is limited however - asks the court for assistance where the act of extraordinary admin concerns the interest of the family, hence not any act of administration - it needs to be beneficial, needs to be of interest to the family - an application is made to the family court

- **Article 6A** has never been used. If you have a disagreement, you do not usually go to court to ask the judge to help you solve the disagreement as court is a matter of last resort. The reason by this provision exists, is because mediation did not exist when the law was drafted.

- For example: imagine the case of a spouse who has one form of religion which does not allow blood transfusion and the other spouse has a different religion which allows it. The minor child has a problem and needs urgent blood transfusion. Here, we are talking about the interest of the family. The other spouse has the discretion to apply to the Family Court for authorisation. Article 6A stipulates the procedure.

Article 1323 sub 2

(2) If one of the spouses is away from Malta or if there exists any other impediment in respect of one of the spouses and in either case there exists no authorisation by public deed or by private instrument duly attested in terms of article 634 of the Code of Organization and Civil Procedure, the other spouse may perform such necessary acts of extraordinary administration of the acquests which in terms of law require the consent of both spouses, and which the court of voluntary jurisdiction **may specifically authorise;** sohowever that the court may not in such cases authorise the performance of all necessary acts of extraordinary administration generally.

- If one of the spouses is away from Malta or if there exists any other impediment in respect of one of the spouses and in either case there exists no authorisation by public deed or by private

- Instrument duly attested in terms of article 634 of the Code of Organization and Civil Procedure, The other spouse may perform such necessary acts of extraordinary administration of the acquests which in terms of law require the consent of both spouses, and which the court of voluntary jurisdiction may specifically authorise; so however that the court may not in such cases authorise the performance of all necessary acts of extraordinary administration generally.
(3) The registration required by article 996 or 2033 as the case may be, in respect of any act alienating the ownership or any real right over immovable property, and any hypothecation whether general or special shall contain also the name of the other spouse as if such other spouse were a party to the deed of alienation or hypothecation, and where such registration is made in the name of one spouse only it shall in respect of third parties be operative only in relation to the spouse in whose name it is registered.

Article 1325 - Exclusion of a spouse from the administration of the community.

1325. (1) The competent court may at the request of a spouse order the exclusion of the other spouse either generally or limitedly for particular purposes or acts, from the administration of the community of acquests, where the latter spouse -

(a) is not competent to administer; or
(b) has mismanaged the community;

and in any such case the administration of the community of acquests shall to the extent to which such spouse has been excluded, vest exclusively in the spouse not so excluded.

(2) The spouse who has been so excluded from administering the acquests may, if the grounds upon which he or she has been excluded no longer subsist, request the court to reinstate such spouse in the administration.

(3) Any order made in terms of this article shall be notified within twenty-four hours by the registrar to the Director of the Public Registry who shall keep the same in a special register and keep a special index thereof. Such orders shall contain all particulars of both spouses as are required for notes of enrolment under the Public Registry Act and shall become operative with regard to third parties upon such registration.

- Where a spouse is prejudicing the COA through negligence, mismanagement and the other spouse has the remedy of seeking a remedy by referring the matter to a court of law an the situation would be that, if the court finds that following a hearing and submission of proof, that there is maladministration or negligence, the judge would interdict that spouse from continuing to administer the community of acquits - A1325

- The court can decide either to issue an interdiction which is general or limitedly, where it concerns the management of a shop, you will be prohibited from exercising that rights and administration is left entirely to the other spouse hence sub 1 - there is a request made by a spouse to exclude the other spouse, a request for a general exclusion or limited for certain - and

proof before this exclusion is granted, the spouse brining the application in court ha to prove incompetence of the other spouse or mismanagement of the COA

Grech Mary pro et noe vs. Grech Nazzareno sive Reno – 27th April 2001 - FHCC

In a nutshell, the wife alleged that due to such circumstances, the husband was not fit to manage the COA. Plaintiff asked the court to order that the husband be excluded form administering the family business. Furthermore, she also requested that she could manage the business herself instead of the husband. The applicant declared that such claim was being made on the basis of **Art 1325.**

The Husband did reply to such application, and he submitted evidence about his circumstances. However, the reached a point where the husband lost interest in the case, however, since the case was still in front of the court, the court proceeded to give its judgement:

"Illi n-nuqqas ta' interess li wera l-konvenut f'dawn il-proceduri huwa ssorpassat biss bin- nuqqas ta' interess li jidher li wera fit-tmexxija tan-negozju tieghu stess. Dan in-nuqqas ta' interess johrog bl-aktar mod lampanti mix-xhieda li ta l-istess konvenut minkejja illi huwa kkorroborat ukoll mix-xhieda moghtija mill-attrici. Apparti milli x-xhieda tal-konvenut hija inkonsistenti fiha nnifisha minnha jirrizulta li dak iddikjarat mill-konvenut fir-risposta tieghu mhux minnu. Il-Qorti ma ghandhiex ghalfejn tiddubita li forsi dan in-nuqqas ta' interess seta' kien ikkagunat minn mard u/ jew depressjoni qawwija li kellu l-konvenut. ***Bhala fatt pero' jirrizulta illi n-negozju li minnu kienet tghix din il-familja gie totalment ittraskurat u li l- istess konvenut ma wera ebda hajra partikolari biex jindika li kien sejjer jipprova jirravvivah."***

The court applied the principle of credibility and found out that the husband was not credible in his deposition. The husband lost interest in the management of the business on which the family dependent entirely:

"Normalment negozjant biezel aktar jistinka meta s-suq ikun hazin biex ikun jista' jzomm listess livell ta' ghixien u negozju li kellu meta s-suq kien tajjeb."

Termination of Community of Acquests

1332. (1) The judicial separation of property may be pronounced -

(*a*) upon the interdiction or incapacitation of one of the spouses; or

(*b*) where the disordered state of affairs of one spouse or his or her conduct in relation to the administration of the acquests jeopardises the interest of the community of acquests, or of the family or of the spouse requesting the judicial separation of property; or

(*c*) where one of the spouses fails substantially in his or her duty to contribute to the needs of the family in accordance with article 3 of this Code; or

(*d*) where one of the spouses has been excluded from the administration in terms of article 1325, either generally or to a great extent; or

(*e*) upon the legal separation of the spouses

(2) The judicial separation of property may only be demanded by either spouse or by his or her lawful representatives; sohowever that such separation may not be demanded by the spouse or the representatives of the spouse who has given rise to the causes for judicial separation referred to in paragraphs (*b*) or (*c*) of sub-article (1) of this article.

(3) Where the judicial separation has been demanded by the spouse excluded from the administration of the community of acquests in terms of paragraph (*d*) of sub-article (1) of this article, the court shall, where the judicial separation causes financial damage to the other spouse, order the spouse demanding judicial separation to pay compensation to the other party for the loss that such party may have suffered because of the separation.

(4) In the judgment pronouncing the judicial separation of property, the court shall direct that the community of acquests between the spouses shall cease as from the day on which the judgment becomes *res judicata*:

Provided that the court may however, without prejudice to any right legally acquired by any third party, direct that the judgment shall operate retrospectively to the date of the filing of the judicial act introducing the cause upon which judgment is given.

(5) The creditors of either spouse or of the community of acquests may impeach the separation pronounced by the court, even though it may have been given effect to, if such separation has been obtained in fraud of their rights.

(6) The court may where in its opinion circumstances so warrant direct that the property comprised in the community of acquests be not partitioned before the lapse of such period after the cessation of the community of acquests as it may determine.

(7) Any direction given by the court in virtue of sub-article (6) of this article, may, on good cause being shown, be changed or revoked by the court.

(8) The demand for the judicial separation of property shall not stay any action enforcing any debt of the community of acquests.

(9) Where a demand for the judicial separation of property has been filed, a creditor of a particular spouse may proceed or continue proceedings enforcing his claim against property of the community of acquests and in any such case the spouse of the debtor may demand that half the proceeds of the sale of any object belonging to the community of acquests shall remain deposited in court on account of the share in the community of acquests of the spouse of the debtor; sohowever that if such deposits exceed the share of such spouse in the community of acquests any sum so deposited in excess shall remain to the credit of the debtor spouse and be attachable by his creditors.

(10) Any judgment ordering the judicial separation of property shall not be operative against third parties except from the day on which such judgment shall have been registered in the Public Registry.

Distinguish between consensual separation and judicial separation. Both situations require the authorisation of the Courts.

In a **consensual separation**, the registrar appoints a mediator to meet the party who is obliged to ask them to see whether they can reconcile and once he establishes that this is not possible, he will read to them the contract prepared by the lawyer and published by the Notary. The notary publishing that contract is the only person to withdraw the draft from Court.

In the case of a consensual separation, you must firstly identify what is in the portfolio. Unless there is a pre or post nuptial agreement, then you have the presumption that unless proof is brought about, a community of acquests is in effect. This means that from the date of marriage, whatever the spouses acquire, a list is made with movable and immovable property. The problem arises when there is paraphernal property which was sold in order to improve the spouse's situation.

Judicial separation is the actual litigation. If the parties do not agree to something, such as the matrimonial home, visitation rights, expenses, or not able to liquidate the community of acquests. The Court will examine everything and in the judgement the Court will pronounce the parties separate and detail the obligations of both parents.

Other causes which may bring personal or judicial separation are **incapacitation** (a degree less than interdiction i.e., would need someone to help him who is usually the curator) and interdiction (full incapacity of the person i.e., the individual cannot appear alone in contracts and thus the curator will carry out all civil acts which have to be authorised by the Court). A psychiatrist is appointed and presents a report to the Court.

In a consensual separation what happens is that the registrar, by court decree, appoints a mediator who meets the parties. According to our law, the mediator is obliged to ask them to see whether they can reconcile. Once it is established it is not possible to reconcile the parties, then he will read to them the contract done by the lawyers and vetted by the notary who had published that contract. The mediator would then draw up a report to the judge and would recommend that draft contract. The judge would have a look at the terms and conditions of the parties and if the judge has no objection to any clause he will authorise the publication of the contract. The notary who published the contract of consensual separation has to personally withdraw the draft from the court registry. The parties would appear on the contract and the notary would publish that contract and enrol it on the pubic registry. In the contract there is the termination and liquidation of the community of acquests, if there is of course community of acquests.

Judicial separation is the actual separation. If the parties do not agree on the matters related to the matters on their home or their kids or if the couple does not agree to the matters related to visitation rights, the matrimonial home, is not able to liquidate the community of acquests. In a judicial separation, the court will examine everything and in the judgment the court will pronounce the couple separated and pronounce himself with regards to maintenance, the separation, and expenses relating to the minor children. And then, in the second part of the judgment, the court will terminate the community of acquests and based on the evidence submitted would distribute the net assets, after the paraphernal property is acknowledged and declared and so the party who is the owner of that paraphernal property will be acknowledged as the rightful owner of those assets and liabilities. What would remain is the loss to the community of acquests, because of the presumption that whatever is not excluded by contract belongs to the community of acquests. This is judicial separation as it involves litigation since the parties did not agree on how to terminate the community of acquests when proceedings with personal separation.

How do you terminate and liquidate a community of acquests?

Let us say there is a consensual separation, so they are negotiating with the help of the lawyers, how to terminate their affairs. Once they have agreed to the duties regarding their minor children, they now proceed to terminate their affairs.

Firstly, you would identify what is in the portfolio. The presumption at law is that unless there is a prenuptial or postnuptial agreement excluding a community of acquests, then there is a presumption that unless proof is brought about, a community of acquests is in effect. That means, from the date of marriage, whatever the spouses acquired and whatever liabilities they create, belonged to both of them. The date is a factor, so you have to check when the investment was made to see if it is before or after marriage. The problem arises when you have paraphernal property which was sold in order to improve the position of the spouses.

For example - Spouse A acquired an apartment before marriage. It was a comfortable apartment but was small to fit the spouses and their children, so they decided that they would purchase another apartment to accommodate the family that has now grown. To do so, they decide to have spouse A to sell his very own property, the matrimonial home which had belonged to him before the marriage, and with the sale price, they would pay the price of the new house. Suppose it was not enough, and they had to also obtain a home loan. So there was the selling of the paraphernal property, which belonged to spouse A, and spouses A and B, in order to have the full price available at hand to finance the new asset, they took a loan. The loan definitely belongs to the community of acquests, since it was acquired during the marriage.

One must ask, is the home that was bought is it paraphernal or community property, since it was bought with the sale of the paraphernal property? Does it belong to the community of acquests?
Take note that it is acquired during the marriage, so if there is the presumption that the community of acquests applies, whatever is acquired during the marriage belongs to the community of acuqests.

So the new house falls within the portfolio of the community of acquests. Unless there is friction between the spouses no problem arises. The trouble arises when the parties are in a breakup and they decide to proceed to separate. Separation brings about the liquidation of the regime.
In such a case one starts asking, that they have this property which is community property because it was bought during the marriage, but does spouse A, who had the paraphernal property have any

rights to that property now that they are terminating and liquidating the property? If he has, what rights and to what extent?

We dealt with recovering what a spouse has lost. Note that there was a paraphernal property that was sold to purchase a new property during the marriage. So in a sense spouse A has sacrificed his own personal property to buy a matrimonial home. This gives rise to a refund. During liquidation, whilst establishing what the parties are going to take with them if the parties decide to sell the second property they must establish a price and assume they manage to sell it. Let us assume that they manage to sell it, according to article 1333, whatever is being liquidated in terms of the community of assets, the shares of the parties are 50/50. Suppose the only asset they had was this house, and they decide to sell it, the rule is that if they sold a house, the price must be divided half and half minus the expenses, only if there was no paraphernal property involved. In this case, rather than splitting up the price half and half, spouse B would need to refund the other spouse with the value of the immovable property that belonged to him and was paraphernal property. When you exercise the liquidation and distribute the assets and liabilities of the community of acquests the rule is half and half, whether it is a loan or an asset, however from the portion that the half that one receives, it might be that one spouse might have to compensate to another spouse the value of paraphrnal property that had been lost or property which belonged to the community of acquests and was transferred or alienated without the consent of the other spouse. Refunds and compensation have to be kept in mind.

Article 1333 - *The partition of the community of acquests shall be made by assigning one-half of the assets and liabilities comprised in the community to each of the spouses.*

1333 - Whatever is being liquidated from the community of acquests, the share of the parties is 50% each.

Article 55 - Cessation of community of acquests and community of residue under separate administration

55. (1) The court may, at any time during the cause for separation, upon the demand of any of the spouses, order the cessation of the community of acquests or of the community of residue under separate administration existing between the spouses.

(2) The order for the cessation of the community as provided in sub-article (1) shall be given by means of a judgement from which every party shall have a right of appeal, without requiring permission from the court for this purpose.

(3) The order of cessation shall have effect between the spouses from the date of the judgement on appeal or, if no appeal is entered, from the date when the time allowed for the appeal lapses, and it shall remain valid even if the cause for separation is discontinued.

(4) Prior to ordering the cessation of the community as provided in this article, the court shall consider whether any of the parties shall suffer a disproportionate prejudice by reason of the cessation of the community before the judgement of separation.

(5) The order of cessation under this article shall, at the expense of the party who demanded such cessation, be notified to the Director of Public Registry and it shall have effect as if the cessation of

the community of acquests or of the community of residue under separate administration were made by public deed.

(6) Unless the court, in its discretion, upon the demand of one of the parties, shall have ordered the cessation of the community of acquests or of the community of residue under separate administration existing between the parties at the time of commencement of the cause for separation, on separation being pronounced, the court shall direct that the community of acquests or the community of residue under separate administration shall cease as from the day on which the judgement becomes *res judicata.*

(7) The court may however where in its opinion circumstances so warrant direct that an asset or assets comprised in the community be not partitioned before the lapse of such period after the cessation of the community as it may in its direction determine.

(8) Any direction given by the court in virtue of sub-article (7), may on good cause being shown, be changed or revoked by the court.

- This article may only be involved in a judicial separation. *It cannot be requested by the spouse during the first phase.*

- During the lawsuit, an application is filed and a request is made whereby the spouse asks to terminate the community of acquests in spite of the fact that the case is still ongoing. By so doing, the other spouse is not prejudiced.

- When you have the application of this article, it would mean that it would operate from the date of the judgement of this article's request is pronounced. It is an independent judgement from the lawsuit that is still ongoing. This does not mean that the community of acquests is liquidated, it will mean that the community is no longer in effect thus giving rise to the spouses having a separate estate from each other.

- **Judgements:** Evlyn Spiteri vs Anthony Spiteri - 27/05/1963 - the court noted "min jitlob is-separazzjoni personali, ghandu d-dritt jitlob ix-xoljiment tal-akkwisti, ezistenti b'azzjoni separat, purke dik timxi kongunta mal-azzjoni tas-separazzjoni personali"

Although there was no article 55 at the time, the court already reasoned that there must be a separate claim to stop the community of acquests and to terminate it.

- From the date that community of acquests is terminated, each party will be acting on his own thus, rights and obligations are separated on this day. This is important for creditors and that is why the termination of the community is published

- It is a relatively new article, which provides that if the spouses did not achieve a consensual separation and proceeded with judicial separation, which would normally take 2-3 years if there is a community of acquests it could mean that unless a spouse does something, the other spouse might prejudice the whole community of acquests.

For example - That spouse might enter into a new law and not pay it, or continues to conduct a business and not pay the suppliers. So when the spouses in this judicial action to acquire personal separation, one spouse might feel prejudiced, because although there is the case there is nothing to stop them from prejudicing the administration of the community of acquests.

- Article 55 was introduced and can only be exercised if the spouses are going about a judicial lawsuit. It cannot be requested by a spouse during the first phase, a mediation because the lawsuit would not have commenced, as the parties would be attempting to negotiate an amicable consensus separation. In that stage, they have other remedies, but in order to avail themselves of article 55, there must be a lawsuit. During that lawsuit, an application (rikorss) is filed and a request is made whereby a spouse asks to terminate the community of acquests, in spite of the fact that the case is still ongoing, and as long as by so doing, the other spouse is not prejudiced.

- Whatever claim you do you have to support it with evidence since that is the plea/defence that is made. When you have the application of this article, the other spouse would put in a plea challenging this request and telling the court that by such a request the spouse would be prejudiced and such prejudice must be proved.

- From the date of the judgment, the parties would acquire the separation of estates, even though they are still not separated and are still considered married. This will be effective from the date of the judgment, based on article 55. The assets and liabilities would not be liquidated, but would simply be declared by the judge that from the date of the judgment community of acquests does not apply anymore to those spouses. Then, in the principal suit, the court will liquidate the community of acquests.

OF COMMUNITY OF RESIDUE UNDER SEPARATE ADMINISTRATION - (CORSA)

- **This regime is not popular and not known to the general public, and is underestimated by the practitioners.**

- **This regime was introduced with the amendments of 1993.**

For example, in Germany, even though they have the other two regimes, the default regime is corsa. Firstly, it could be that the practitioners when clients come over for advice, constantly recommend a community of acquests, because there are no formalities and no contract is needed and because the community of acquests is intended to recognise the spouse who doesn't go to work but takes care of the children.

- This regime has the features of both the community of acquests regime and the separation of property regime. In order to have the community of residue under separation administration, you need a prenuptial contract (before marriage). The spouses must go to the notary and declare that once they get married the default regime shall not apply and they would like to have the community of residue under separate administration to regulate their marriage. Therefore, the parties either before marriage or during the marriage, have to appear on a deed, eliminating the other regimes and opting for this regime. The contract is also enrolled in the public registry for third parties to consider.

- If when the spouses got married the default regime came in automatically, and they are not happy with the community of acquests, then can ask a notary to draw up a contract to eliminate the community of acquests and to opt for the community of residue under separate administration. However, before signing that contract they need the authorisation of the court.
- The notary usually, by means of application will file the draft contract in courts and the judge will examine the contract and authorise it. This formality of needing the authorisation of the court only happens after marriage. So the court only comes in when the spouses decide to opt for corsa after marriage. Before marriage, the spouses can enter into a deed voluntarily and opt for any of the three regimes.

- They acquire and manage their assets and liabilities on their own and they are responsible for it as if they have the separation of estates in place. Any acquisition made by one spouse shall be deemed to be his only and he is considered as the exclusive owner. Selling or transferring that object can be made without the consent of the other spouse.

-> When any property is acquired jointly, according to the provisions of CORSA, it is to be administered jointly and can only be alienated during the course of the regime by the consent of both spouses, or where this consent is withheld unreasonably, by the authority of the Court. The need for this limitation with regard to joint property is understandable when one takes into consideration the mechanisms of CORSA since without such a limitation a spouse would be free to alienate any property in order to reduce the residue such spouse is left with on the termination of the regime.

- Upon the termination of the marriage, two inventories are drawn up and this is when similarity to the Community of Acquests kicks in. The two inventories include:

- From here onwards, community settles in. For instance, we have spouse A having an account amounting to €100,000 and spouse B with an account of €200,000. Spouse B needs to forfeit an amount and put it in account of A, in order to balance the accounts. This is where ***equality*** comes in. For many, this may seem unfair. The spouses will continuously have a direct interest in the financial situation of the other spouse. Yet, one cannot stop the other from administering his property in any manner he wants to because the separate administration remains the essential element of CORSA.

Corsa is regulated by Article 1338 - Community of residue under separate administration.

1338. *(1) Where the future spouses in a marriage contract stipulate that the property acquired by them during marriage shall be governed by the system of community of residue under separate administration the following provisions of this Sub-title shall apply.*

(2) The assets which shall be governed by the system of community of residue under separate administration shall be all the assets falling under paragraphs (a) to (f) of article 1320.

AM vs. Johann (J) M (High Court of South Africa, 8954/10)

How acquisitions are registered.

1339. (1) Under the system of community of residue under separate administration the acquisitions made by each of the spouses during the marriage shall be held and administered by the spouse by whom such acquisitions are made, and subject to any limitations contained in this Sub-title shall, in relation to third parties, be dealt with by such spouse as if such spouse were the exclusive owner thereof.

(2) Where under the system of community of residue under separate administration property is acquired by the spouses jointly, it shall be administered jointly. The share of each spouse in such property may only be alienated *inter vivos*, with the consent of the other spouse, or where such consent is unreasonably withheld, with the authority of the court of voluntary jurisdiction, or in a judicial sale by auction at the instance of any creditor of such spouse.

Termination of community of residue under separate administration.

1340. (1) The community of residue under separate administration shall, unless terminated earlier by mutual consent by public deed with the authority of the court, terminate upon the dissolution of the marriage; under the same circumstances, *mutatis mutandis*, as apply for the community of acquests under paragraphs (*b*) and (*c*) of sub-article (1) of article 1332; and upon the legal separation of the spouses.

(2) Sub-articles (2), (4), (5), (9) and (10) of article 1332 shall apply *mutatis mutandis* where the dissolution of community of residue under separate administration is declared by judgment of the court.

Calculation of residue

1341. (1) At the termination of the community of residue under separate administration, howsoever happening, the residue to be accounted for by each spouse shall include any expense made by that spouse solely in his or her interest out of assets governed by the community and held by that spouse, and shall be subject to the deduction of any amount paid out with paraphernal property of that spouse for debts of that spouse relating to assets held by that spouse and governed by the system of community of residue with separate administration, as well as liabilities still outstanding by that spouse incurred in respect of such assets.

(2) From the residue as determined in sub-article (1) there shall be deducted any paraphernal debts of the spouse which are in excess of that spouse's paraphernal assets.

(3) The result as determined in sub-article (2) shall if it is not a debit constitute the final residue of that spouse. If the result is in debit there shall be considered to be no final residue for that spouse.

(4) Where the final residue of one spouse is greater than the final residue of the other spouse or where only one spouse has a final residue, there shall be assigned to the spouse with the lesser final residue or with no final residue, as the case may be, as much of the final residue of the spouse with the greater final residue or with the only final residue as is necessary so that each spouse may have an equal share of assets forming the final residue of both spouses.

Where debt is not paraphernal.

1342. (1) For the purpose of article 1341(2) any debt which is not one mentioned hereunder is a paraphernal debt:

(a) the burthens and obligations which encumber the assets under the act of their acquisition;

(b) the expenses and obligations incurred in the administration of the acquests;

(c) the expenses and obligations even if incurred separately for the needs of the family including those for the education and upbringing of the children;

(d) debts relating to the ordinary repairs of paraphernal property of the spouse the fruits of which are included in the assets governed by the community of residue under separate administration;

(e) any debt or indemnity due as a civil remedy by a spouse where such indemnity is not due as a civil remedy in respect of any offence wilfully committed.

Rights of third parties.

1343. (1) Third parties may only exercise their rights against the spouse who has contracted with, or incurred the debt towards, them.

(2) At the termination of the community of the residue under separate administration and after the assignment of any final residue, the creditors of one spouse may however in relation to any debt due to them arising before the termination of the community of residue under separate administration, claim *in subsidium* against the other spouse up to the amount if any of the assets of the final residue of the debtor spouse assigned to the other.

Gratuitous alienations.

1344. (1) Where the system of community of residue under separate administration operates between the spouses, a spouse may not transfer *inter vivos* any of his assets under gratuitous title except with the consent of the other spouse.

(2) Sub-article (1) of this article shall not apply to donations of moderate value regard being had to the condition of the parties and all other circumstances.

(3) An action for annulment of an act of alienation under gratuitous title may only be instituted by the spouse whose consent was required and within the peremptory term of three years from -

- (*a*) the date when such spouse became aware of the act, or
- (*b*) the date of registration, when such act is registerable, or
- (*c*) the date of termination of the community of residue under separate administration,

whichever is the earliest.

Acts performed with intention to defraud

1345. (1) Where a spouse performs an act with the intention to defraud the other spouse of the potential rights competent on the termination of the community of residue under separate administration such other spouse may exercise the action contemplated in article 1144 as if he or she were a creditor.

Such right shall be personal to the latter spouse or his or her heirs and is not exercisable by the creditors of the spouse.

(2) An action under this article shall be prescribed by the lapse of five years from -

- (*a*) the date when such spouse became aware of the act, or
- (*b*) the date of registration, where such act is registerable, or
- (*c*) the date of termination of the community of residue under separate administration, whichever is the earliest.

Here we are making applicable the list that falls under the community of acquests. Whatever is acquired under these paragraphs shall also form part of the assets that fall under the community of residue under separate administration.

To describe this regime very simply, we can say that from the moment corsa takes effect and regulates the assets and liabilities of this particular marriage, you have a hybrid. The spouses start off as if they are under the regime of separation of property. Whatever one spouse acquires and whatever liability that spouse incurs will belong to that spouse entirely. The same happens with regard to the other spouse. Even in corsa, each spouse, apart from those assets that are acquired separately and administered separately during marriage, also has paraphernal property assets or

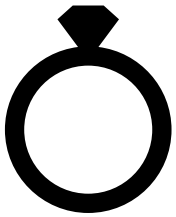
liabilities. So throughout the marriage, unless there is friction and the parties seek to terminate this regime, each spouse acts on his/her own.

Therefore, initially, until termination, the spouses are on a separation of estates regime. Hence, whatever is acquired belongs to one spouse and whatever liability is acquired belongs to that spouse who makes it, even with regard to creditors. In fact, the law states that if one of the spouses has incurred a debt, that spouse is responsible for that debt and the creditors cannot sue the other spouse. They can only sue the spouse who contracted with them for the liability. So each spouse will be responsible for their affairs.

Where does the residue come in?
When one of the spouses passes away or when the spouses decide to separate, they would need to terminate and liquidate this regime.

Imagine you want to create an inventory. How would this work in the case of corsa?
You have a sheet with two columns, one column belongs to spouse A and column B belongs to spouse B. In the different cells, you would put in the assets and liabilities of each spouse and their value accordingly. This inventory shows the portfolio of spouses A and B, at the point that they are terminating corsa. Once the debts are finalised and the values are created, a total is calculated.

There is a provision dealing with a remedy if one of the spouses tried to hide assets to defraud the other, known as the *actio pauliana* provisions, found under Article 1144 of the Civil code (covered in Law of Obligations).



MARRIAGE AND ITS VALIDITY

Marriage Act - Chapter 225 of the Laws of Malta is the main act with regards to marriage.

However one should still make reference to Chapter 12, Chapter 5, Legal Notice 20 of Chapter 12 (deals with proceedings), Act XXVII of 2020 (Chapter 614 of the Laws of Malta). Section 33 is important and it deals with the recognition of divorces, separation, annulment and marriages which were carried out abroad.

Definition of Marriage - Article 2, Chapter 255

Article 2 provides us will a list of definitions, including the definition of 'act of marriage'

Article 2: *"act of marriage" means the act of marriage drawn up and completed in accordance with article 293 of the Civil Code.*

Restrictions of Marriage

Before you marry we would like to know if there's any *impediment on the marriage* - word still used from canon law - *restrictions on marriage* used now.

Age for marriage

3. (1) A marriage contracted between persons either of whom is under the age of sixteen shall be void.

(2) Without prejudice to the provisions of sub-article (1), a person who is subject to parental authority or to tutorship may not validly contract marriage without the consent of the person exercising such authority, or of the tutor, as the case may be.

(3) Notwithstanding the provisions of sub-article (2) the court of voluntary jurisdiction within whose jurisdiction the minor habitually resides, may upon good cause being shown, authorise the celebration of a marriage referred to in that sub-article, where the consent of the person exercising paternal authority or of the tutor, as the case may be, is not forthcoming; and for the purposes of proceedings in connection with this sub-article, article 781(*a*) of the Code of Organization and Civil Procedure shall not apply.

Infirmity of mind.

According to Article 4, if you marry and are infirm of mind, a marriage will be void. If a person is incapacitated then he cannot marry, but if he is interdicted the ability to marry is in the hands of the Registrar.

4. A marriage contracted between persons either of whom is incapable of contracting by reason of infirmity of mind, whether interdicted or not, shall be void.

Marriages within prohibited degrees.

Article 5 deals with marriages between family members. These are not allowed. Direct line happens when for example a wife has a daughter and her husband dies and she marries a second man. The second man cannot marry the daughter. There are some dispensations, such as when one marries his or her cousin.

5. (1) A marriage contracted between -

(*a*) an ascendant and a descendant in the direct line;

(*b*) siblings, whether of the full or half blood;

(*c*) persons related by affinity in the direct line; or

(*d*) the adopter and the adopted person or a descendant, or the spouse, of the adopted person,

shall, whether the relationship aforesaid derives from legitimate or illegitimate descent, be void.

(2) For the purposes of sub-article (1), the relationship of an adopted person shall be deemed to subsist both with reference to his natural and to his adoptive family.

(3) The court of voluntary jurisdiction within whose jurisdiction either of the spouses resides may upon good cause being shown dispense from the provisions of sub-article (1)(*c*) and (*d*).

Persons bound by previous marriage.

6. A marriage contracted between persons either of whom is bound by a previous marriage , by a registered or unilaterally declared cohabitation under the Cohabitation Act or by a cohabitation enrolled by means of a public deed under the Cohabitation Act, 2020 shall be void.

- Now it is possible for 2 persons who are not married to go to a Notary and have their cohabitation registered

Procedure Before Marriage: Formalities to precede marriage

- The banns are regulated in Article 7 - Banns of matrimony

7. (1) The celebration of marriage must be preceded by the publication of banns of matrimony.

- These banns are necessary for both civil marriages and those done by the church (any type of religion).
- Without such nobody can officiate the marriages the registrar would not have published a certificate that these have been done.
- The banns are also used by cannon law. They show the public who is getting married, this is as to know who is married and who is not. This is done especially to prevent bigamy.
- In the banns even the names of the parents are included. They have to be posted at the marriage registry and also in a place where official acts are posted.
- Furthermore it should be posted in the parish of the future husband and wife. This would mean that the banns are posted in both the nationalities of the partners.
- They must be available to all as one can call the marriage registrar and report anyone who is going to get married and is already married.
- If one marries before the 8th day of the period of the banns the marriage will be void. If one marries after a period which supersedes 3 months from the last day of the publication of such banns the banns will have to be redone as otherwise the marriage will be void. The marriage registrar can shorten the period in exceptional circumstances such as one of the persons is on his death bed.

(2) **Banns of matrimony** shall state the **name, surname, place of birth and residence** of each of the persons to be married**, the place where they intend to contract marriage** and, unless the Registrar in the case of natural filiation or other circumstances deems proper to act otherwise, the **name and surname of the parents of each of the persons to be married.**

(3) The publication of the banns consists in the **posting up of the banns in a place at the Marriage Registry accessible** to the public and reserved for that purpose and in keeping the banns so posted up **for a period of not less than eight consecutive days excluding Saturdays, Sundays and other public holidays.** The banns shall also be posted up at the place where official acts are usually posted up in the **town, village or parish in Malta** in which **each of the persons to be married resides.**

(4) **Banns of matrimony** shall be **published by or by order of the Registrar** on a request in writing signed by **both persons** to **be married** or, where the marriage is to take place by proxy, by the proxy and the other person.

(5) A **request for the publication of banns** shall not be entertained unless it is delivered to the Registrar **earlier than six weeks before the date of the intended marriage**, or than such shorter period as the Registrar may in his discretion accept in special circumstances, and unless and until, in addition to all other relevant information, there are delivered to the Registrar-

- (*a*) the certificate of birth of each of the persons to be married;
- (*b*) a declaration on oath made and signed by each of the persons to be married stating that to the best of his or her knowledge and belief there is no legal impediment to the marriage or other lawful cause why it should not take place:

Provided that if it is shown to the satisfaction of the Registrar that it is impracticable to obtain a certificate of birth required to be delivered by this sub-article, the Registrar may accept instead such other document or evidence as he may deem adequate for the purpose of this article.

(6) The Registrar may administer oaths for the purposes of this Act.

(7) Where banns have been published in accordance with the provisions of this Act and it appears to the Registrar that there is no legal impediment or other lawful cause why the marriage should not take place, the Registrar shall, at the request of either of the parties to be married, issue a certificate that the banns have been so published and indicate therein, in addition to other relevant information, the date of the completion of such publication.

(8) Subject to the provisions of article 10, no person shall officiate at a marriage unless a certificate issued in accordance with sub-article (7) in respect of the persons to be married has been produced to him; and that certificate or a certificate issued in terms of article 10 shall be final and conclusive proof of its contents.

Refusal by Registrar to publish banns or issue certificates.

8. (1) If the Registrar is of the opinion that he cannot proceed to the publication of the banns or that he cannot issue a certificate of such publication he shall notify the persons requesting the publication of his inability to do so, giving the reasons therefor.

(2) In any such case, either of the persons to be married may apply to the competent court of voluntary jurisdiction for an order directing the Registrar to publish the banns or to issue a certificate of their publication, as the case may require, and the court may, after hearing the applicant and the Registrar, give such directions as it may deem appropriate in the circumstances, and the Registrar shall act in accordance with any such directions.

- **Article 8** - Registrar must give reasons for not proceed to the publication of the banns or that he cannot issue a certificate of such publication. The reason must be given with a notification of the inability to publish.

Marriage to be contracted within certain period from banns.

9. (1) A marriage contracted before the sixth day after the completion of the period during which the banns are to remain posted up in accordance with the provisions of this Act, and a marriage contracted after the expiration of three months from the day on which the banns are first posted up as aforesaid, shall be void.

(2) Where the period of three months referred to in sub-article (1) has expired, the banns shall be published again and the procedure for their publication shall be started afresh.

Sub 1 - marriage contracted to be void: before the sixth day after the completion of the period during which the banns are to remain posted up in accordance with the provisions of this Act, and a marriage contracted after the expiration of three months from the day on which the banns are first posted up as aforesaid, shall be void.

Sub 2 - if the period of 3 months referred to in sub1 has expired, the banns shall be published again and the procedure for publication shall be started afresh

Formalities of Marriage

11. (1) A marriage may be contracted either in a civil form between two consenting individuals, that is to say in the form established by this Act for civil marriage, or in a religious form, that is to say in a religious form in accordance with the provisions of this Act.

(2) A marriage, whether contracted in a civil or in a religious form, shall be valid only if all the provisions of this Act applicable thereto or to marriage generally are satisfied or observed.

(3) In the case of the non-observance of any formality or other similar requirement relating to the celebration of the marriage or preparatory thereto, a marriage may not be annulled and shall be held to have always been valid, if the demand for annulment is not made within two years after the celebration of the marriage.

Registration of Marriage

12. (1) Registration is not essential to the validity of marriage.

(2) Registration shall not operate as to validate a marriage which, independently of such registration, is null.

(3) A marriage shall not have effect for any purpose of law unless and until the appropriate act of marriage is completed and delivered for registration in accordance with the provisions of articles 293 and 294 of the Civil Code.

- Why is registration important ? 293 and 294 of the civil code - for the effects of marriage - registration is important - there were times were no registration was needed but at that time it was not compulsory - this registration is very important - you must also have 2 witnesses A11-17

The form of a civil marriage and the form of a religious marriage

Form of a civil ceremony - A15 - the Form of a religious marriage - A17

FORM OF CIVIL MARRIAGE

15. (1) A civil marriage shall be contracted in the presence of the Registrar, or of an officer of the Marriage Registry authorised by the Registrar to officiate at marriages, and of the witnesses required by this Act.

(2) During the ceremony, the Registrar or other officiating officer in front of whom the marriage takes place shall ask each of the persons to be married, first to one of them and then to the other, whether that person will take the other as such person's spouse, and upon the declaration of each of such persons that they so will, made without any condition or qualification, the Registrar or other officiating officer shall declare them to be spouses.

(3) The act of marriage shall be completed and delivered for registration immediately after the marriage.

(4) Without prejudice to the provisions of sub-article (2) the persons to be married may indicate to the Registrar or other officiating officer in front of whom the marriage takes place the form of words which will be used during the ceremony, including any readings, songs or music:

Provided that the persons to be married must make such request by not later than seven days prior to the date set for the marriage.

16. (1) A civil marriage shall be contracted in the Marriage Registry or on board a Maltese registered ship while this is not in the internal waters of any country other than Malta or in such other place open to the public as the persons to be married may designate and which the Registrar accepts as appropriate.

(2) If one of the persons to be married cannot, by reason of infirmity of body or other lawful cause, attend any of the places referred to in sub-article (1), the marriage may be contracted in such other place as the Registrar may deem appropriate in the circumstances.

FORM OF RELIGIOUS MARRIAGE

17. (1) Saving the provisions of article 21, a religious marriage shall be contracted according to the rites or usages of a church or religion which is recognised for the purposes of this Act and which either of the persons to be married belongs to or professes; but the consent of the persons to be married must, in order that the marriage may be valid, conform in substance to the consent required by article 15(2).

(2) A church or religion shall be recognised for the purposes of this Act if it is generally accepted as a church or religion or if it is recognised for the purposes of this article by the Minister; and if any question arises as to the application of this sub-article, the decision of the Minister aforesaid shall be final and conclusive.

(3) The act of marriage shall be completed and delivered for registration immediately after the marriage.

Validity and Annulment of Marriages

18. A marriage, whether celebrated in Malta or abroad, shall be valid for all purposes of law in Malta if -

- *(a) as regards the **formalities** thereof, **the formalities required for its validity by the law of the country where the marriage is celebrated** are observed; and*

- *(b) as regards the **capacity of the parties**, each of the persons to be married is, **by the law of the country of his or her respective domicile,** capable of contracting marriage.*

- There is a criteria for such. This section also speaks about form and capacity. The notion of domicile is important for this section. Article 18 has two limbs; it is the law of the domicile which determines whether I can marry or not and the capacity to marry under Article 3, 4, 5 and 6. Section b deals with the form of marriage according to where the marriage is celebrated.

- Does everyone in Malta know I'm getting married ? Yes ! We have to know whether you are married or not, whether that son is yours or not. Not either legitimate or not. Because now legitimate and illegitimate children share the same rights.

- Marcx vs. Belgium - the ECHR established that there should be no discrimination between legitimate and illegitimate children

- Section 18 - applies also to same sex marriages - civil unions act - enacted in 2014 - it is so Short because it takes many of the provisions which we have in chapter 255 and says that they apply *mutates mutantis*. If they apply in the equality act, it also applies to employment and industrial relations act.

Article 19 - Nullity of marriage.

19. (1) In addition to the cases in which a marriage is void in accordance with any other provision of this Act, a marriage shall be void:

(*a*) if the **consent** of either of the parties is extorted by violence, whether physical or moral, or fear;

(*b*) if the **consent** of either of the parties is excluded by error on the identity of the other party;

(*c*) if the **consent** of either of the parties is extorted by fraud about some quality of the other party which could of its nature seriously disrupt matrimonial life;

(*d*) if the **consent** of either of the parties is vitiated by a serious defect of discretion of judgment on the matrimonial life, or on its essential rights and duties, or by a serious psychological anomaly which makes it impossible for that party to fulfil the essential obligations of marriage;

(*e*) if either of the parties is **impotent**, whether such impotence is absolute or relative, but only if such impotence is antecedent to the marriage;

(*f*) if the consent of either of the parties is vitiated by the positive exclusion of marriage itself, or of any one or more of the essential elements of matrimonial life, or of the right to the conjugal act;

(*g*) if either of the parties subjects his or her consent to a condition referring to the future;

(*h*) if either of the parties, although not interdicted or infirm of mind, did not have at the time of contracting marriage, even on account of a transient cause, sufficient powers of intellect or volition to elicit matrimonial consent.

(2) Subject to the provisions of this Act, an ***action for the annulment*** *of a marriage* ***may only be commenced by one of the parties*** *to that marriage, and this provision shall apply even where such party is, under any provision of law, incapable of suing or being sued, and in any such case the action may be commenced by such party notwithstanding such incapacity, saving any assistance or other condition the court may deem appropriate to order. Where an action has been commenced by a party to a marriage, the action may be continued by any of the heirs.*

- Usually lawyers may apply more than one ground, so if one of the ground is not applied the couple may null the marriage on another. The 'pertrine privilege' is particular to cannon law. This is not available under Article 19. However it has been shown by judgments that we are not bound by the interpretation provided by cannon law.

- Annulment refers to a situation where a marriage is dissolved as if it never existed, and the law regards the couple as never having been husband and wife. However, the court needs to be convinced from the very being, before the marriage was contracted, that it was null. The court delves into the question of whether there was a marriage in the first place.

- Consent is an essential requisite in each of these grounds of annulment. Once consent is validly given and the marriage is contracted, then it cannot be annulled.

Ground 1 - *(a) if the **consent** of either of the parties is extorted by violence, whether physical or moral, or fear;*

Reference to Article 977 of the Civil Code

977. (1) The use of violence against the obligor is a cause of nullity, even if such violence is practised by a person other than the obligee.

(2) Nevertheless, an obligation entered into in favour of a person not being an accessory to the use of violence, in consideration of services rendered for freeing the obligor from violence practised by a third party, may not be avoided on the ground of such violence; saving the reduction of the sum or thing promised, where such sum or thing is excessive.

This ground of annulment regards when consent has been vitiated by violence or fear. The fear that the law speaks of must be:

- Grave
- Related to the marriage
- Enough to compel the spouse to contract the marriage, because had there not been such fear , the spouses would not have contracted

Important

Therefore, the fear has to emanate from a threat and not just a mere concern or bad thought (intrinsic fear). Simply being afraid of marriage is not a good enough excuse. Even reverential fear is not enough. If for example a parent or a guardian makes one of the potential spouses feel afraid prior to the marriage, it still cannot be said that the marriage has been vitiated by fear

For example: contracting a marriage because of fear of telling your parents that you are

JG v AG – 13th June 1995

The parties had married nine days before the wife gave birth. She later sought annulment citing that she had been forced to marry out of fear from her parents reaction. However, the court was not convinced by this as no sufficient evidence was brought. Moreover, the court noted that had she been so afraid of her parents she would have married earlier!

Buckland v Buckland – English Case, 1967

An Englishman was having intimate relationship with an underage maltese girl. Her family threatened him that unless he married her, they would report him to the police for defilement of minors. Due to the impending threat, the man decided the marry the girl, but later proceeded to file an action abroad for annulment. This judgement by the British Courts accepted his pleas as this was a clear case of moral violence. Threating one with imprisonment is a moral violence, and thus the consent of the marriage was not free and **Article 19(1)(a)** applies.

R. Brown and **L. Wrenn** by saying that fear can be absolute or relative.

"fear is absolutely grave when it arises from an evil which could compel a well-balanced man to enter marriage against his initial will... other lesser evil inflicted on more timid persons could result in fear which is relatively grave, but there must always be some objective gravity which is at least prudently feared..."

Marianna Calleja vs Francis Calleja, October 2002

In this case the P got pregnant and she was pressured by her family to get married. The court annulled the marriage on A19(1)(a) as there were sufficient reasons for this.

Illi l-kunsens fil-mument taz-zwieg kien ivvizzjat stante li l- kontendenti zzewgu taht koerzjoni morali qawwija u zzewgu ta' bilfors peress li l-attrici kellha erba' (4) xhur tqala u dan fil-fatt jirrendi z-zwieg null.

Illi din hija kawza fejn l-attrici qed tallega li z-zwieg celebrat fil-11 ta' Frar 1979 huwa null u bla effett stante li l-kunsens tal-partijiet kien vizzjat peress li huma zzewgu taht koerzjoni qawwija ghaliex huma zzewgu ta' bilfors ghaliex l-attrici kienet tqila.

Carmelo sive Charles Saliba vs Mary Saliba" (P.A. (VDG) deciza fl-14 ta' Awissu, 1995:
"... ... biex pressjoni ndipendentement minn konsiderazzjonijiet ohra, tista` tinvalida l-kunsens matrimonjali, din il-pressjoni trid tammonta ghal vjolenza morali jew biza' esterna ta' natura irrezistibbli, cjoe` trid tkun pressjoni li ddeterminat kompletament l-ghoti ta' dak il-kunsens."

"Anna Magro vs Victor Rizzo" (P.A. (SBC) deciza fit-13 ta' Marzu 1984:
saret espozizzjoni tal-kuncett ta' vjolenza u biza' f'din il-materja. L-espert f'dik il-kawza jsostni li sabiex vjolenza morali twassal ghal effett li jinvalida:-
"trid tkun (i) ingusta, (ii) gravi, u (iii) determinanti."

"Joseph d'Ugo vs Rita D'Ugo" (P.A. (F.D.) 20 ta' Gunju 1994 inghad illi:-
"Fl-ewwel lok il-biza' trid tkun gravi; fit-tieni lok, il-persuna li qed jesercitaha jrid ikun kapaci, presumevolment li jesegwixxi dak li jhedded li jaghmel; u fit-tielet lok il-biza' trid tkun motiv principali ghaliex il-persuna tasal li tizzewweg, biex tevita l-konsegwenzi tat-theddid".

Anthony Gatt vs Doreen Gatt , 25 ta' Gunju, 1993), l-espert tal-Qorti fisser li:
"... il-vjolenza morali trid tkun ta' natura tali li tkun invincibbli u ma taghti ebda possibilta` lil min ikun li jisfuggi minnha."

Illi l-biza` tista` tkun ukoll "reverenzjali" bhal per ezempju l-biza` lejn genitur jew superjur. Fil-kaz "Shirley Anne mart Abdul Fatah xebba Perry vs Dr. A. Mifsud et" (P.A. - 22 ta' Novembru,1982,) il-Qorti spjegat:-

"Il-biza` ta' nies li huma superjuri jew il-genituri tista' f'certi kazi tkun tali li taffetwa l-kunsens. B'dan mhux qed jigi ntiz, biza` fis-sens ta' suggizzjoni esagerata, imma trid tkun gravissima u ta' certa entita`. L-indinjazzjoni tal- genituri kbira kemm tkun kbira ma ghandhiex tigi konsiderata bhala gravi. Il-biza` li wiehed jitkecca mid-dar jew li jitlef xi wirt, jew li jsofri xi danni finanzjarji

mhux bizzejjed. Izda jekk ikun hemm theddid, glied spiss, u minacci serji u gravi, dawn jistghu jaffetwaw il-persuni b'biza` li taqa' taht l-artikolu 19 (a)."

Illi l-kunsens moghti taht l-effetti ta' vjolenza fizika jew morali, jew b'biza', mhuwiex kunsens hieles u ghalhekk ma jistax jitqies li hu validu biex jorbot il-parti konsensjenti.

Illi bl-emendi tal-1981, il-biza' giet introdotta bhala vizzju ta' kunsens ghall-fini tan-nullita' taz-zwieg donnu b'zieda ghall-kuncett ta' vjolenza morali. Fil-fatt, ezami tal- gurisprudenza rotali turi li l-"is animo illata" jew "moral coercion" hu relattat mal-biza f'relazzjoni ta' kawza u effett. Il-biza' hija l-effett tal-vjolenza. Izda id-dicitura tal- artikolu 19 (1) (a) thalli possibilta' li l-biza' tigi kkunsidrata bhala kap ta' nullita' apparti dak ta' vjolenza morali.

"Lorenza sive Laura Muscat vs Dr. Paul Micallef nomine" (P.A. 17 ta' Frar 1988).

G. Lesage jghid hekk:-
"physical or moral violence is pressure exerted by an outside agent on a future spouse, in order to influence his or her actions. Fear is the effect which force, whether physical or moral, induces in the mind of the future spouse"

-Kodici Civili ta' Malta huwa wkoll relevanti, tant li l-artikolu 978 tal-Kap 16 jipprovdi li:-
"(1) Il-kunsens jitqies mehud bil-vjolenza meta l-vjolenza hija tali li tahkem fuq persuna ragonevoli u ggieghlha tibza' li hija nfisha jew hwejjigha jistghu jigu mqieghda ghal xejn b'xejn f'perikolu ta' hsara kbira"
"(2) F'dawn il-kazijiet, ghandhom jitqiesu l-eta', is-sess, u l-kondizzjoni tal-persuna"
Illi skond dan l-artikolu, il-vjolenza trid tkun daqshekk serja mhux biss li timpressjona 'persuna ragonevoli' imma li l- hsara li ser tigi rekata tkun ingusta u gravi.
Illi l-artikolu 980 tal-Kap 16 jiddistingwi bejn biza' u "reverential fear" li ma tkunx bizzejjed biex igib in-nullita' tal-att kontratwali. Ta' min josserva li, izda, l-Kap 255 ma jaghmilx din id-distinzjoni u ma hemm xejn li jeskludi li 'biza reverenzjali' jekk tkun gravi bizzejjed, milli tikkwalifika wkoll bhala vizzju tal-kunsens matrimonjali.

"Mary Bilocca vs Gaetano Bilocca" (P.A. (F.D.) 16 ta' Mejju 1990) vjolenza giet imfissra bhala "a pressure exerted by an outside agent on a future spouse in order to influence his or her actions" u 'biza' bhala "the effect which force, whether physical or moral, induces in the mind of the future spouse".

"Anna Aquilina vs Constantino Aquilina" – P.A. (F.D.) 30 ta' Jannar 1991). Fatturi li gew ikkonsiderati mill-Qrati taghna fl- apprezzament tal-validita' taz-zwieg huma s-segwenti:

- ? L-eta' tas-suggett
- ? L-avverzjoni ghaz-zwieg
- ? Il-karattru tal-genituri
- ? Il-perjodu qasir tal-gherusija
- ? In-nuqqas ta' ppjanar jew diskussjoni dwar il-hajja mizzewga mill-partijiet

- ? Il-fatt li d-decizjoni li jizzewgu ttiehdet ta' malajr.

- ? Il-biza' mill-genituri

- ? Biza' ta' proceduri kriminali f'dawk il-kazi kriminali f'dawk il-kazi fejn il-persuna li harget tqila tkun ghadha minorenni
- Nuqqas ta' maturita' tal-partijiet qabel iz-zwieg li rrendiethom aktar suxxettibbli ghall-ordnijiet u ghad- decizjonijiet tal-genituri.

l-attrici kienet tqila b'tarbija meta zzewget. Mill-provi mhux kontradetti, jirrizulta wkoll li qabel ma saru jafu li harget tqila, il-partijiet ma kienux qeghdin jahsbu fiz-zwieg. Jirrizulta wkoll li t- tqala kien fattur determinant li wassal lill-attrici biex tidhol ghaz-zwieg, ghalkemm kellha d-dubji fir-rigward tal- konvenut. Kieku ma hargitx tqila, ma kienitx tizzewgu.

Illi jirrizulta wkoll li hi kellha biza' reverenzjali minhabba l- effett tat-tqala fuq il-genituri taghha, li fi kliemha, kienu ser jitilfu l-unur tal-familja. Hi rreagixxiet b'paniku u, kif xehdet "minn banda wahda ma kontx lesta biex naqbad u nizzewweg ghaliex tali avveniment ma kienx ghadu programmat u ma konx certa minn Francis, u min-naha l- ohra ma kontx kuntenta li naqbad u nrabbi t-tarbija wahdi".

Illi biex izzid ma' din il-konfuzjoni nterna li bilfors kienet qed tghaddi minn l-attrici, il-konvenut u ommu rieduha taghmel abort. Oht l-attrici kkorroborat dan l-istat ta' animu tal-attrici meta xehdet li kienet rat li l-attrici kellha d- dwejjaq minhabba t-tqala. Hi kkonfermat ukoll li l-attrici kienet taht pressjoni mill-genituri taghhom biex tizzewweg lill-konvenut. Dan il-fatt, del resto, gie ammess ukoll minn omm l-attrici.

Illi tant kienet ikkonfondiet l-attrici, li sahansitra waslet biex xorbot flixkun Gin fuq suggeriment tal-konvenut li dan jista' jwassal ghall-korriment. Dan ma rnexxiex u hi mbaghad irrifjutat li tmur oltre kif qalilha l-konvenut u tiehu xi pilloli.

Illi fid-dawl ta' dawn ir-rizultanzi l-istess Perit Legali kkonkludiet b'dan il-mod:-
"Is-segwenti fatturi jwasslu lill-perit sottoskritt biex tissottometti, in konkluzjoni, li jezistu c-cirkostanzi rikjesti
mill-Ligi sabiex iz-zwieg bejn il-kontendenti jigi dikjarat null minhabba vizzju ta' kunsens a tenur tal-artikolu 19 (1) (a) tal-Kap 255 tal-Ligijiet ta' Malta u cjoe':-
? Ir-rabja tal-genituri taghha meta saru jafu bit-tqala li f'ghajnejhom kien ser iwassal ghad-dizunur taghhom.
? Il-biza' tal-attrici li kienet taf li ma setghetx tirrinfaccja li trabbi lit-tarbija wahedha.
? Ic-cirkostanzi kulturali li hasset dak iz-zmein li kienu ser joholqu stigma jekk it-tarbija tibqa' illegittima.
? Li ghaliha z-zwieg kien l-uniku triq biex tohrog mid- dilemma li sabet ruhha fiha.
"li z-zwieg iccelebrat bejn il-kontendenti fil-11 ta' Frar 1979 ghandu jigi ddikjarat null u bla effett a tenur tal-artikolu 19 (1) (a) tal-Kap 255 tal-Ligijiet ta' Malta u tghaddi biex tordna r-registrazzjoni tas-sentenza fl-att taz-zwieg opportun".

Illi fil-kaz odjern din l-Qorti thoss li dawn l-elementi gew ppruvati fil-konfront tal-attrici, ghaliex kienet din il-biza' li taffronta lill-genituri taghha dwar it-tqala taghha, il- pressjoni li ghamlu l-genituri taghha, l-biza' tal-istess attrici dwar l-istess tqala li wasslitha li tiehu d-decizjoni li

tizzewweg, tant li kienu biss dawn il-konsiderazzjonijiet li wasslu lill-attrici sabiex tizzewweg u ghalhekk jirrizulta li l- attrici kellha l-kunsens taghha vizzjat ghaliex kien effettwat b'biza`.
Illi ghalhekk it-talba attrici ghandha tigi milquha bif proposta.

(1) Tiddeciedi li z-zwieg kontrattat bejn il-kontendenti fil-11 ta' Frar 1979 huwa null u bla effett ghall-finijiet u effetti kollha tal-ligi u senjatament ai termini tal-artikolu 19 (1) (a) tal-Kap 255.

Ground 2 - *(b) if the **consent** of either of the parties is excluded by error on the identity of the other party;*

i.e. when you want to marry X and, unbeknownst to you, you marry Y. This may sound a little far fetched, but it may be possible in certain cultures.

A very practical example is **marriage by proxy** i.e. marriage taking place with the written authority of the Registrar where one of the persons to be married is not present in Malta, and there are, in the opinion of the Registrar, grave reasons for permitting the marriage to take place by proxy.

There was a New Zealand case, „C vs. C", where a woman married a man believing that he was a well-known boxer (when in fact he wasn"t). She tried to have the marriage annulled on that basis but the Court made it clear that this was not a valid ground for the annulment of a marriage as this was not equivalent to an error in personam.

There was a time where lawyers tried too expand the meaning of the provision, but they were unsuccessful - error on the identity of the other party - the stretching is no longer necessary - those 3 grounds in our law - here it Is being interpreted as you intend to marry a person called A - from town B - you married another person with the same name as A and from the same town as B - but a different person altogether - this may happen in marriage by proxy - a marriage with someone not in Malta and for some reason can not come to malta and hence a mistake about the identity of this person.

Evelin Aguis vs.John Borg (1995). In this case the judge went into the section of 19(1)(b), which is found in page .He stated that if the marriage was valid, then chapter 255 cannot impinge on the validity of such a marriage.

In this case the plaintiff invoked paragraph b about the error of the person. The judge on page 5 makes it clear that the error has to be about the quality of the person. He also goes on to quote from Vincento Del Judice saying that the error is in the person. This is a quality of the person. This could mean that one thought he was marring a lawyer and ended up marrying a taxi driver. The court stated that if the evidence does not show any error about the identity of the person this does not apply.

Ground 3 - *(c) if the **consent** of either of the parties is extorted by fraud about some quality of the other party which could of its nature seriously disrupt matrimonial life;*

- Therefore, there must be fraud about the quality of the life of one spouse and such quality must

- Concealing a terminal illness, or concealing your true sexuality are grave reasons for annulment

Eventually, the Courts have developed a list of 4 criteria emanating from later judgments and this list includes:

1. The fraud must be perpetrated with the intention that one obtains the consent of the other party.

2. The fraud must have had an effect on the consent of the other party.

3. The fraud must concern a quality of the other party and,

4. This quality must be serious enough to disturb matrimonial life.

Furthermore, in this case, the court also provided examples of what may give rise to such fraud so much so that they relate to the quality of the person:

- Sickness (as was the case of ***Alexandra sive Sandra Farrugia v Raymond Farrugia*)**.

- Infertility

- Drug, Alcohol and Gambling addictions

- Homosexuality (as was the case of ***David Buhagiar v Roseanne nee Maile***)

For instance, in „NN vs. NN" (22/02/1996) (First Hall Civil Court – Judge Vincent DeGaetano), the husband claimed that his wife had defrauded him because she had lied about being a virgin. The Court did not accept this- first of all, the husband had failed to bring sufficient proof to back his claim and moreover, even if he had proven this, the Court felt that this revelation would not be one which of its very nature would seriously disrupt matrimonial life.

Alexandra sive Sandra Farrugia v Raymond Farrugia – Court of Appeal

In this case, the appeal of the plaintiff was met, and the marriage was annulled under Article 19(1)(c) when her husband chose to conceal the fact that he had a physical condition which interrupted their normal and sexual matrimonial life.
The court of appeal reversed the decision and allowed the annulment of the marriage of plaintiff.

Hi tissottometti illi mill-provi kellu jirrizulta illi l-konvenut verament qarraq biha meta zzewweg. Dana tinsisti li sehh fuq zewg fronti, l-ewwel fuq il-mod kif wera l-karattru veru tieghu ta' bniedem difficli w impossibbli li tghix mieghu mmedjatament wara z-zwieg u waqt li fl-gherusija kien proprju l-oppost il-komportament tieghu; l-iehor l-ghaliex hu kien irnexxielu b'success jahbi difett fiziku gravi illi una volta martu skoprietu wara z-zwieg serjament affettwa r-relazzjonijiet konjugali bejniethom u ppregudika z-zwieg taghhom.

tilmenta illi dan il-habi ta' kwalita' fizika negattiva u mard ta' certu gravita' kienu fixklu serjament il-hajja mizzewga mhux biss ghaliex, bhala effett tal-marda, l-hajja konjugali giet disturbata serjament fl-intimita' taghha imma wkoll ghaliex il- fatt stess ta' habi fil-mument tal-ghoti tal-kunsens nissel inevitabbilment sens ta' sfiducja kbira bhala konsegwenza diretta tal-fatt illi s-sieheb taghha kien qarraq biha fuq cirkostanzi daqshekk rilevanti w importanti ghall-konvivenza konjugali.

2. Din il-kondizzjoni kienet tikkostitwixxi difett fiziku li kien jezisti qabel iz-zwieg. Jirrizulta ppruvat illi l-attrici ma kienitx taf bih hi ghaliex ma giex zvelat lilha minn zewgha qabel iz- zwieg. Meta kien gara l-ewwel darba hi kienet baqghet ixxokkjata w ipprotestat illi zewgha kien hbielha dik il-haga qabel ma zzewget.

4. Wiehed irid jinnota wkoll illi x-xorta ta' inkonvenjenza kienet taffettwa l-intimita' konjugali, l-konvivenza bejn il- konjugi anke fir-rigward ta' rapporti sesswali. Kien indubbjament allura difett li, una volta stabbilita l-kondizzjoni u mhux bhala xi incident izolat, illi kien jobbliga, almenu civilment, il-parti li tkun ser tikkontratta z-zwieg illi tizvelah lill- parti l-ohra, altrimenti tkun qed tonqos mil-bona fede fil- kuntratt. Infatti l-Psikjatra Espert ma setax jeskludi l- possibbilita' illi kieku l-appellanti kienet taf b'din il-kondizzjoni hi kienet tirrecedi mid-decizjoni illi tizzewweg lill-appellat

Din il-Qorti allura ma tarax illi mill-ottika ta' dritt civili ma kienux jokkorru dawk l-elementi biex jigi stabbilit: (1) illi una volta indubbjament l-appellat kien konsapevoli tal-kondizzjoni fizika tieghu u kien pozittivament heba din il-kondizzjoni mill- futura martu, kien hati ta' qerq fil-konfront taghha u li kien b'dan il-qerq li kiseb il-kunsens taghha; (2) li dan il-qerq kien dwar kwalita' tal-parti l-ohra fis-sens illi l-appellanti kellha l- konvinzjoni illi setghet tikkontratta z-zwieg ma' l-appellat bhala persuna li ma kellhiex difetti fizici serji li setghu jimpeduh milli jkollu konvivenza intima maghha certament minghajr sitwazzjoni fejn in-natura tal-marda stess kienet tallontanhom milli jorqdu flimkien; (3) illi konsegwentement dan in-nuqqas tal-parti l-ohra kienet tali li kienet tista' tfixkel serjament il-hajja mizzewga.

Din il-Qorti allura ma tarax illi mill-ottika ta' dritt civili ma kienux jokkorru dawk l-elementi biex jigi stabbilit: (1) illi una volta indubbjament l-appellat kien konsapevoli tal-kondizzjoni fizika tieghu u kien pozittivament heba din il-kondizzjoni mill- futura martu, kien hati ta' qerq fil-konfront taghha u li kien b'dan il-qerq li kiseb il-kunsens taghha; (2) li dan il-qerq kien dwar kwalita' tal-parti l-ohra fis-sens illi l-appellanti kellha l- konvinzjoni illi setghet tikkontratta z-zwieg ma' l-appellat bhala persuna li ma kellhiex difetti fizici serji li setghu jimpeduh milli jkollu konvivenza intima maghha certament minghajr sitwazzjoni fejn in-natura tal-marda stess kienet tallontanhom milli jorqdu flimkien; (3) illi konsegwentement dan in-nuqqas tal-parti l-ohra kienet tali li kienet tista' tfixkel serjament il-hajja mizzewga.

Denise Scuderi nee Vella v Giuseppe Scuderi – FHCC – 18th May 2001

In this judgment, the plaintiff based her argument on almost all the grounds of annulment under Article 19. However, it was the ground under Article 19(1)(c) which subsisted.

The plaintiff was not made aware of the drug addiction that her husband had at the time of contracting the marriage. The couple had lived together for the first time after they got married and therefore, there was not any way to know that her husband was addicted to drugs. With this in mind, the court was convinced that this had seriously disturbed the matrimonial life.

Ground 4 - *(d) if the **consent** of either of the parties is vitiated by* a serious defect of discretion of judgment on the matrimonial life, or on its essential rights and duties*, or* **by a serious psychological anomaly** *which makes it impossible for that party to fulfil the essential obligations of marriage;*

This article is split into 2:

- *Lack of discretion of judgment on the matrimonial life* and
- *A serious psychological anomaly*

In order for annulment to be successful on this article, only one of the two elements mentioned is needed to subsist.

The First Part: a serious defect of discretion of judgment on the matrimonial life, or on its essential rights and duties

In Maltese society, these are the obligations concerning the carnal union, the obligation of community of life and love as an expression of the union between the two, mutual well-being. The obligation to receive and bring up children within the context of a conjugal community. These must be mutual, permanent, continuous, exclusive and irrevocable so that there would be incapacity if one of the contracting parties, is incapable of assuming these obligations with these essential characteristics. – **Viladrich**.

It must be shown that one of the parties had failed to understand the essential qualities of matrimonial life, or its essential rights and duties. However, it must be shown that this defect of discretion was ***serious.***

Bersini holds that it is not enough to know what marriage is about in a superficial manner but rather that one must have a maturity in his judgment which is able to weigh the rights and duties of marriage concretely which one assumes for all one's life. The consent is necessary not in as much as the ceremony itself involves but rather as the obligations one is going to assume. It is assumed that one knows such obligations. However, such presumption is rebuttable.

He holds that discretion of judgment includes a **mature judgment** and **emotional maturity**

Monica Sammut v Raymond Sammut – 2nd December 1987,

- The husband showed that he had an illness to control all the money. He used to do all the shopping himself so that he could control all the money. In order to buy some stamps, the wife had to ask him for the money. The wife was also earning money as he was doing. It resulted that he had a compulsive personality disorder which causes social and cultural malfunctions.

- "dak iz-zwieg huwa null billi l-kunsens kien vizzjat minn difett serju ta' gudizzju fuq il-hajja matrimonjali/id-drittijiet u d-doveri taghha essenzjali jew b'anomalija psikologika serja li taghmilha impossibli li tadempixxi l-obbligi essenzjali taz-zwieg, bl-eskluzjoni ta' xi element essenzzjali tal-hajja konjugali."

- The Court held that there must be a lack of a serious degree in one of the following in order for this ground of annulment to succeed:

1. Conceptual knowledge of the concept of marriage at the time of giving the consent

This is basic knowledge of the nature and object of the marriage. What are its essential elements rights and duties. You do not need to have full knowledge of what marriage entails, bt at least have a clear idea.

2. Evaluative knowledge

This means that this person was capable of appreciating the essential implications and consequences of marriage. This goes beyond mere knowledge but implies that one was able to evaluate and understand the essential implications.

For example: being able to understand that one needs to remain faithful once married or that one needs to use his money to provide for the family.

If one is not able to understand these essential duties, then it will be possible for the other spouse to annul the marriage on this ground.

3. Psychological Freedom which must be present at the time of consent

This is the freedom of choice. One must not be shackled by the internal qualities that render him incapable of understanding and appreciating the essential rights and duties of married life.

ABCD v Avukat Dr Josette Sultana et noe – Civil Court (Family Section) – 31st January 2018

The wife wanted to annul the marriage based on the alcohol problem that her husband had. Making reference to Article 19(1)(d), the Court held that this article requires that the parties both have the maturity to reflect on their duties and obligations and all the responsibilities that married life brings along with it.

The plaintiff managed to prove successfully that the defendant lacked the necessary maturity which makes him capable of reflecting upon his duties and obligations that come along with the matrimonial life. Rather than focusing on his life with his wife, he focused on just his drinking all day long without any interest in finding a job. He depended financially solely on his wife.

"L-attriċi rnexxielha tipprova sal-grad rikjest mil-liġi illi fil-mument li ngħata l-kunsens, il-konvenut assenti kien afflitt minn difett serju ta' diskrezzjoni dwar il-ħajja miżżewġa u/jew l-elementi essenzjali tagħha, Huwa ma kellux konoxxenza ta' dak kollu li kien dieħel għalih u lanqas kellu mpenn għall-obbligi u d-drittijiet konjugali kemm fil-preżent kif ukoll fil-futur. Għalhekk ma kienx kapaċi jerfa' u jwettaq l-istess matul il-ħajja matrimonjali tagħhom."

The Second Part - *a serious psychological anomaly which makes it impossible for that party to fulfil the essential obligations of marriage.*

Part two of 19(1)(d) mentions the adjective of essential twice. In regards to the essential rights and duties, each spouse has a right to each others bodies. If one refuses to have sexual intercourse the marriage is null as one is excluding one of the most important elements. There is also the unity of marriage. Furthermore one has the indissolubility of marriage. Nowadays, there is the possibility of divorce but if one subject his or her consent the marriage is null. This is seen in 19(1)(g).

- Here the law is saying that one of the parties was suffering from a serious pscyhological anomaly which makes it impossible for that person to fulfil the essential obligations of marriage.

- This is a bit more serious than a defect of discretion, because here we are moving closer towards psychological conditions which can perhaps be medically certified, such as schizophrenia. Other examples may be latent homosexuality (**Buhagiar vs. Maile)** or lack of sexual drive or some form of sexual disorder.

- **Samuela Lee Pavia v John Pavia – 20th May 1996**

The wife was suffering from a sexual aversion disorder due to abuse by her family & previous husband. When she met her future husband, she saw him as the ideal opporunity to leave her parents' home. The court understood that this sexual aversion disorder was a pscyholgical anomaly, however, it was not conviced that this was serious enough to make it impossible for her to fulfil the essential obligations of a marriage.

However, despite the psychological anomaly, the court still chose not to annul the marriage on this ground because the wife still had performed the conjugal act (albeit with reluctance). Therefore, the element of impossibility to perform such an obligation was missing.

"Il-liġi ma tiħux in kunsiderazzjoni l-ammont ta' pjaċir li wieħed għandu jieħu mill-att sesswali, jekk dan l-att hux ġenerat minn sens ta' mħabba jew fatturi oħra, jew jekk hux diffiċli għal koppja li jkollhom l-att sesswali, jew l-ammont ta‟ drabi li koppja jrid ikollhom l-att sesswali. Il-liġi hi kategorika. L-anomalija trid tkun tali li tirrendi l-impossibbiltà li parti taqdi l-obbligazzjonijiet essenzjali taż- żwieġ."

Ground 5 - *(e) if either of the parties is **impotent**, whether such impotence is absolute or relative, but only if such impotence is antecedent to the marriage;*

- If one of the parties can not perform the sexual act, that has to do with sub para d and NOT e

- This paragraph envisages situations where the parties are unable to perform the sexual act, due to a physical or psychological defect. However, impotency is not the same as sterility.

A person is sterile when he is biologically inefficient, for example when a man's semen court is too law for the purpose of fertilizing the female ovum. On the other hand, a person is impotent when he is inefficient in sexual performance. Therefore, he is sterile and capable of the conjugal act. However, the latter may suffer from difficult to have an erection or difficulty to ejaculate.

The other condition which is found in this section is that it has to be **antecedent to the marriage**, i.e. before the marriage. Thus, if impotency arose after the marriage (and assuming that the marriage was consummated), it would not be a valid ground for annulment.

Melanie Borg Cachia v Joseph Borg – 29th May 2003

In this case the court evaluated the article and held that one of the essential obligations when contracting a marriage is to perform sexual relations with your spouse aimed at the procreation of children. If this element is missing, it might lead to the annulment of a marriage, but only if impotence is proven.

"Il-ligi nostrana ppreferiet taddotta l-kuncett ta' mpotenza bhala raguni ghal annullament taz-zwieg skond id-duttrina tradizzjonali taz-zwieg, u cjoe' li l-att sesswali huwa wiehed mill- elementi essenzjali fiz-zwieg u dan kuntrarjament ghal kuncett applikat fil-ligi Franciza u l-ligi Taljana li segwew id-duttrina li l-att sesswali mmirat ghal prokreazzjoni tat-tfal mhux element essenzjali, izda huwa wiehed mill-elementi socjali li jgib mieghu z-zwieg."

19(1)(e) has no cases available, however, it deals with inability to perform the sexual act. This is not a question of infertility. If it is different from non- consummation of the marriage. The performance of the sexual act is necessary for the marriage to survive. This must be prior to the marriage. It also a question of medical / biological performance. Impotence can be also absolute or relative. Therefore can be impotent with all the other females or all the other males in the world. However, there might be a circumstance where one cannot perform the sexual act with one person, however they might be able to perform it with others. Therefore impotence might be relative, but this is still a ground for annulment, even if this is a mental block not a physical one.

have there been any cases ? NO NEVER - what is it about ? Impotence NOT about infertility - not about not being fertile but about the impossibility, which was there before the marriage, not afterwards - before, and has nothing to do with generating and having children, but with can the wife or husband perform the sexual act? This might be absolute or relative; can not have a sexual relationship for some psychological reason - no cases about 19, 1e -

<u>Ground 6</u> - *(f) if the consent of either of the parties is vitiated by the positive exclusion of marriage itself, or of any one or more of the essential elements of matrimonial life, or of the right to the conjugal act;*

19(1)(f) is the second best ground of nullity after 19(1)(d). 19(1)(g) refers to a condition which refers to the future. Example I will marry a person if he obtains his degree in medicine or on the condition that one does not pester the other spouse for children. One of the essential rights and obligations of marriage is to have children, this is the bonum prolis. If one excludes that in the long run one can claim that since the marriage was made on such a condition the marriage should be declared as null. A community of life or living together is also an essential right. There was a case where the marriage was annulled as he wanted to spend evenings and weekends with his friends and there was a question as to his commitment to the marriage. If one has an affair with months to go for the marriage, this is a serious defect of discretion of judgment on the matrimonial life.

Here we are referring to those situaitons where a person is capable of understanding properly the essential rights & obligations of married life and what marriage really entails, but at the same time, he simulates his intention in the sense that ***he gives the impression that he is*** *accepting them when in fact he is positively and categorically excluding them. (Christabelle*

Buhagiar – A critical analysis of article 19(1)(f) of the Marriage Act as one of the grounds of annulment of marriage).

This ground provides for a juris tantum presumption that the external manifestation of consent is in harmony with the internal manifestation. If there is a discrepancy between the two, the consent is vitiated and the marriage is null. However, whoever claims this needs to prove it.

This article makes use of the word 'positive exclusion', which refers to a positive act of one or both parties in giving consent. In other words, no one can simulate without knowing that he is simulating because there must be an underlying intent to have the intention to intent something and do another.

Partial simulation on the other hand is when one or both parties exclude one or more of the elements that come with marriage. For example: knwoing that one does not want to procreate. In such instances, the party who simulates his consent desires a sort of marriage tailored to his own preference and is not often aware that this may lead to the invalidity of the marriage in its totality.

<u>Miriam Ramadan Mabrouk nee Psaila v Lovay Ramadan Wahba Mabrouk – 16th January 1998</u>

When the main intention of one of the parties to a marriage is to remain in Malta so that he can work here and eventually become a citizen of Malta, then the party is positively excluding marriage itself and this would be tantamount to total simulation. One need expect to find direct evidence of this simulation, that is an explicit declaration of the party's intention but such an intention can also be implicitly expressed.

<u>Anna Galea v John Walsh – FHCC – 30th March 1995</u>

The court defined total simulation as: "meta l-atti, ġesti jew kliem esterni ma jikkorrispondux għall-kunsens intern li jkun ingħata".

ZX v PQ – 30th March 2011 – Civil Court (Family Section)

This case annulled a marriage on the basis of partial simulation because the defendant excluded the element of procreation:

"Illi f'dan il-kaz il-Qorti tirravviza fil-konfront tal-konvenut il-caput nullitatis kontemplat fil-paragrafu (f) ta' l-artikolu precitat, stante li, ghalkemm esternament dana ghadda minn cerimonja ta' zwieg, izda nternament u b'att pozittiv tal-volonta' tieghu eskluda obbligu essenzjali tal-hajja konjugali, u cioe' dak tal-prokreazzjoni u trobbija ta' l-ulied."

Carmela sive Carmen Ciantar v Dr Jeffrey Pullicino Orlando – 2019

Illi permezz ta' din il-kawza, l-attrici qed tfittex dikjarazzjoni li z-zwieg li gie celebrat bejnha u bejn il-konvenut fil-11 ta' Awwissu 2012 huwa null u invalidu fil-ligi a tenur tad- dispozizzjonijiet ta' l-Artikolu 19(1)(d) u/jew (f) tal-Kap. 255 tal-Ligijiet ta' Malta, minhabba ragunijiet imputabbli lillkonvenut. Il-konvenut da parti tieghu, filwaqt li jaqbel illi z-zwieg bejn ilpartijiet jigi dikjarat null, isostni li ghal din in-nullita` tahti l-attrici almenu b'mod parzjali.

Nullita` taht l-Artikolu 19(1)(f) "jekk il-kunsens ta' xi wahda mill-partijiet ikun inkiseb bleskluzjoni pozittiva taz-zwieg innifsu, jew ta' xi wiehed jew aktar mill-elementi essenzjali tal- hajja mizzewga, jew tad-dritt ghall-att taz-zwieg"

"Illi l-gurisprudenza in materja hija konkordanti illi sabiex tigi milqugha talba ghal dikjarazzjoni ta' nullita' taz-zwieg taht l-Artikolu 19(1)(f), irid jigi necessarjament ippruvat li xi wiehed mill-partijiet huwa hati ta' simulazzjoni tal-kunsens tieghu jew taghha.

"Il-partijiet issottomettew illi z-zwieg taghhom ghandu jigi dikjarat null peress illi fil-mument tac-cerimonja taz-zwieg kienu qed jeskludu li jkollhom ulied matul iz-zwieg taghhom."

Ground 7 - *(g) if either of the parties subjects his or her consent to a condition referring to the future;*

Marriage consent can never be based on any form of condition, neither resolutive nor suspensive.

Resolutive Condition: I will marry you but if you become ill, then the marriage will no longer exist;
Suspensive Condition: I marry you when you become a doctor.

In the case of Elizabeth Ne Conclium vs. John Zammit (1986), the condition was to start a family on the condition that in the future the plaintiff changed her character. He had found her too dominating and did not want to raise children in such an environment. He admitted that he wanted to call of the wedding for that same reason but was persuaded by his family. He made this condition to his spouse. The court accepted this as a ground for annulment.

Ground 8 - *(h) if either of the parties, although not interdicted or infirm of mind, did not have at the time of contracting marriage, even on account of a transient cause, sufficient powers of intellect or volition to elicit matrimonial consent.*

- A person of unsound mind is not capable of contracting marriage, even if this mental infirmity is only temporary. "Even on account of a transient cause" also includes the influence of alcohol and drugs.

- They do not have the volition to marry. It is important that there is no interdiction and there is no infirmity of mind. But when contracting the marriage the person does not have sufficient powers of intellect or will to elicit matrimonial consent. There was a case where on of them used to take so many drugs that at the time of the marriage consent, the person did not know what they were doing at all.

- Determining the state of mind of the party at the time of giving consent is not an easy thing to prove, and for this reason, this ground of annulment is not often used.

Evelyn Agius v John Borg – FHCC – 4th October 1995

"Jistgħu jaqgħu taħt dan il-paragrafu wkoll dawk li fil-mument taż-żwieġ ikunu taħt l-effett ta' droga, alkolħol etc, anke jekk biss temporaneament."

Emmanuel Briffa v Veronica Briffa et – FHCC – 2nd April 2003

The court quoted JR Keating: "when giving the consent the person must have enjoyed the degree of psychological freedom which is necessary and sufficient to ensure his basic powers of choice."

Nathalina Mifsuid vs. Perit Joseph Pace (1996). In this case both parties gave their consent on a condition which had to happen in the future. Besides that, the defendant at the time of contracting marriage, did not have the intellectual or volitional powers so that the consent could be given. He was not mentally ill but he was not able at the time to contract marriage to fully understand the decision of eliciting matrimonial consent as he was receiving some psychiatric treatment at that same time. It is a transient cause. He was not permanently mentally disabled but at the time he was receiving psychiatric treatment, so the court annul the marriage on section 19(1)(h). Annulments can be done either before the civil court or before the church tribunal.

- While one does not know what he is doing, in f the party would know what they are doing. There is a positive exclusion under f of one of the essential elements in conjugal life. In 19(1)(f) one is aware.

- This can be seen in the case of **Anthony Galio vs. Anthony Cutajar nomine (2002).** "When one is considering the exclusion of marriage or its essential elements, one has to see whether any of the parties, although he is able to give a valid consent, but through his act before or after the ceremony excluded a priori marriage itself or during the ceremony either of the parties excluded one or more of its essential elements".

Mario Testa vs. Louise Testa Polster. "As far as section 19(1)(f) is involved, one has to distinguish between a marriage which fails because of events which happen after the

marriage ceremony and a marriage which fails because while giving his or her consent, one of the parties intents not the abide by one or more of the essential obligations of marriage".

Abdilla Ahmed vs. Dr. Micallef Safrace (1994), the court held that the essential elements communal life (consorzium vite), the indissolubility of marriage, loyalty and the propagation of children.

Perit Herbet Debone vs. Astrid Francione (Court of Appeal Superior) (2016), the architect married somebody who had no real interest in the marriage. The question was if the community of acquests should apply.

ABC Vs DBC, June 2021

P was a Maltese man who married a Russian woman.

P wanted to declare the marriage null based on A19(1)(c) and (f)

Article 19(1)(c)

Both were unfaithful and before the marriage, D had a daughter with someone else. Since P knew before the marriage that he was not the father, and accepted the child anyway he could not succeed on an action based onArticle 19(1)(c).

Dan il-qerq jista' jigi kemm minn naha ta' wahda mill-partijiet fiz-zwieg kif ukoll minn terza persuna

Plaintiff is contending that Defendant hid from him the paternity of the child and had he been aware that he was not the natural and biological father of the child he would not have gone ahead with the marriage. Defendant, on the other hand, insists that Plaintiff was totally knowledgeable of the fact that the child she was carrying was not his own.

Therefore, considering all the facts as above stated, the Court has no reason to believe Plaintiff's version as there was no error on the quality of the person because surely he did not marry Defendant because he wanted to assume the responsibilities, believing he had fathered a child.

Therefore, this ground of nullity does not subsist. (**Article 19 (1)(c)**)

Article 19(1)(f)

Anthony Gallo vs Dr. Anthony Cutajar et nomine3:-
"Meta wiehed jitkellem dwar l-eskluzjoni taz-zwieg jew wiehed mill- elementi essenzjali tieghu, wiehed irid jifli jekk il-kontendenti jew wiehed (jew wahda) minnhom, allavolja hu kapaci jaghti l-kunsens validu taz- zwieg, pero` bl-att tieghu hu qabel u fil-hajja mizzewga, jew bl-ommissjoni tieghu, eskluda a priori z-zwieg.....hu jew hi eskludew xi wahda jew aktar mill-elementi essenzjali tal-hajja mizzewga." [sottolinejar ta' din il-Qorti]

Al Chahid vs Mary Spiteri the Court there reiterated that:-
"... wiehed jinnota li taht l-artikolu 19 (1) (f) trid issir distinzjoni cara bejn zwieg li jfalli minhabba cirkostanzi li jirrizultaw waqt iz-zwieg, u zwieg li jfalli ghax wiehed mill-partijiet minn qabel ma' ta l-kunsens tieghu, kien gja mentalment dispost li ma jottemperax ruhu ma' xi wahda jew aktar mill-obbligi matrimonjali. Fl-ewwel ipotesi hemm ir-ragunijiet li jaghtu lok ghas-separazzjoni u fit-tieni ipotesi hemm l-estremi tal- annullament taz-zwieg".

Jurisprudence is consistent regarding this ground for nullity to be satisfied. It necessitates that one of the parties excluded the marriage itself or one of the essential elements necessary for marriage, as well as that one of the partoes simulated his consent to the marriage.

Simon Cusens vs. Romina Cusens, considered that "*sabiex zwieg jigi kkunsidrat null ai termini ta' dan is-subinciz, irid jirrizulta ppruvat li entrambi l-partijiet jew xi hadd mill-partijiet tkun hadet decizjoni li ghalkemm ser tippartecipa fic-cerimonja taz-zwieg, hija tkun qieghda teskludi xi wiehed mill-elementi essenzjali taz-zwieg. Fi kliem iehor, filwaqt li esternament tidher li qed taghti l-kunsens ghar- rabta matrimonjali, dik il-parti tkun fl-istess hin u minn qabel ma tat il- kunsens taghha, diga` mentalment eskludiet a priori d-dispozizzjoni taghha li tottempera ruhha ma' xi wahda jew aktar mill-obbligi matrimonjali."*

Alfred Tonna vs Maria Tonna explained that *"ikun hemm simulazzjoni meta fil-mument tal-ghoti tal-kunsens matrimonjali parti jew ohra (jew it-tnejn) esternament turi li qed taghti l-kunsens matrimonjali izda internament u b'att pozittiv tal-volonta' taghha tkun qed tichad il-kunsens ghal dak iz-zwieg (simulazzjoni totali jew dejjem b'dak l-att pozittiv tal-volonta', tkun qed teskludi xi element jew proprjeta' essenzjali ghaz-zwieg (simulazzjoni parzjali)."*

Charles Atkins vs Matilde Atkins:-
"Tezisti simulazzjoni parzjali meta persuna teskludi biss wahda jew aktar mill-elementi essenzjali rikjesti biex jigi stabbilit iz-zwieg bhal per ezempju, l-eskluzjoni tal-prokreazzjoni u trobbija ta' l-ulied, jew l- eskluzjoni ta' l-obbligu tal-fedelta` lejn il-parti l-ohra".

Abdel Wahed vs. Dr. Yana Micallef Stafrace et noe., held that the essential elements of marriage are the following -"*komunjoni tal-hajja konjugali, l-indissolubilita' tar-rabta taz-zwieg, id-dritt ghall-fedelta' u d-dritt ghall-prokreazzjoni ta' l-ulied*"9 L-istess elementi gew ikkonfermati wkoll fil-kawza **Aquilina vs. Aquilina** u fis-sentenza **Grech vs. Grech**.

Both parties contend however, that there was an exclusion of the essential elements of marriage, namely the exclusion of procreation, the exclusion of the indissolubility and permanence of marriage, as well as the exclusion of the obligation of fidelity, each one placing the blame on the other.

Exclusion of children - P did not want as was not financial in a good position and house was too small

Permanence/Indissolubility of marriage on P

Obligation of Fidelity - s Defendant brought forward evidence to show that two years into their marriage, Plaintiff had an affair with a colleague of his, ML. Her husband KL was brought to testify to confirm that there was this relationship, so much so that he blames Plaintiff for the breakdown of

their marriage and the whole affair led to the former beating up Plaintiff and with ensuing court proceedings.

This circumstantial evidence leads to one conclusion, that Plaintiff was not completely determined to retain his fidelity in the marriage and therefore satisfy another exclusion of the essential elements of marriage.

The Court decides and determines that the marriage be declared null because Plaintiff excluded one or more of the essential elements of marriage in terms of Article 19(1)(f) of the Marriage Act.
The costs are to be borne by Plaintiff.

Elaine Angela Delmar vs Domenico Madonia, May 2004

P maltese, met D husband who is from Sicily. She alleged that the marriage should be annulled, based on Article 19(1)(d).

jigi dikjarat null u bla effett a tenur tal-paragrafu (d) tas-sub-artikolu (1) ta' l- artikolu 19 tal-Kapitolu 255 tal-ligijiet ta' Malta.

Hija tallega wkoll illi l-kunsens taghha kien vizzjat minhabba simulazzjoni. Min-naha l-ohra, il-konvenut filwaqt li jaqbel li dan iz-zwieg ghandu jkun annullat a bazi tar-ragunijiet moghtija mill-attrici kellu jkun hemm modifika zghira u dan fis-sens illi fejn l-attrici talbet illi z-zwieg ghandu "jigi dikjarat null minhabba nkapacita' tal-konvenut li jassumi d- drittijiet u dmirijiet essenzjali taz-zwieg, l-esponent jirrileva illi tali nkapacita' kienet tezisti fiz-zewg kontendenti".

On Article 19(1)(d)

Illi fil-Code of Canon Law Annotated hemm is-segwenti spjegazzjoni:-
"... the expression discretion of judgement does not refer so much to cognitive resources or sufficient intellectual perception ... as to that degree of personal maturity which enables the contracting parties to discern in order to bind themselves to the essential rights and duties of marriage. ... The expression graVe lack refers to the discretion of judgement, which is a juridical concept. The cause of consensual incapacity and nullity of the act is not, therefore, the gravity of the psychic anomaly which is a medical concept and a case of fact, but the gravity of the lack of discretion of judgement. ... ... there is a grave lack when it is proven that a contracting party lacks intellectual and volitional maturity necessary to discern, in view of binding oneself in an irrevocable manner ... the essential rights and duties of marriage which are the object of mutual surrender and acceptance. The discretion of judgement refers to that degree of maturity of comprehension and of will of the contracting parties which enables them to give and receive each other, through a juridical bond, in a unique community of life and love. This community is indissolubly faithful, ordered to the good of the spouses as well as to the procreation and education of the offspring. ... ..." (Pagna 6

On Article 19(1)(f)

Marica Mizzi vs Mario Scicluna" (P.A. (RCP) 12 ta' Dicembru 2002) hawnhekk il-ligi qieghda titkellem fuq is-simulazzjoni kemm dik totali kif ukoll dik parzjali tal-kunsens matrimonjali. Il-kunsens huwa l-qofol ta' kwalunkwe ftehim jew kuntratt specjalment il-kuntratt taz-zwieg. Wiehed jista' jghid illi z- zwieg jibda jezisti hekk kif il-partijiet jimmanifestaw il- kunsens taghhom.

Illi ghalhekk jekk dak il-kunsens ikun b'xi mod simulat allura dak ma jibqax wiehed validu. Izda meta nistghu nghidu illi l-kunsens ikun gie simulat? Jekk il-kunsens intern ta' persuna ma jkunx jaqbel mas-sinjali jew gesti esterni ta' l-istess, jew jekk dak illi persuna tkun qed tfisser bil-kliem ma jkunx jaqbel ma' dak li qed tahseb jew trid internament allura huwa ovvju illi dik l-azzjoni umana hija wahda simulata.

Illi l-ligi fl-artikolu 19 (1) (f) taghmel distinzjoni bejn is- simulazzjoni totali u dik parzjali tal-kunsens matrimonjali. Tezisti simulazjoni totali meta persuna teskludi z-zwieg fit- totalita' tieghu bhala fethim bejn ragel u mara fejn jistabbilixxu unjoni ghal hajjithom kollha bl-elementi kollha li tistabbilixxi l-ligi ghal kuntratt matrimonjali. Tezisti simulazzjoni parzjali meta persuna teskludi biss wahda jew aktar mill-elementi essenzjali rikjesti biex jigi stabbilit iz-zwieg bhal per ezempju, l-eskluzjoni tal-prokreazzjoni u trobbija ta' l-ulied, jew l-eskluzjoni ta' l-obbligu tal-fedelta lejn il-parti l-ohra.

Illi ghalhekk biex wiehed jinvestiga l-validita' o meno tal- kunsens matrimonjali fil-kuntest tas-simulazzjoni, huwa necessarju illi l-volonta' tal-persuna li tkun tat dak il- kunsens tigi nvestigata. Il-ligi tistabbilixxi illi biex il- kunsens ikun gie simulat ma huwiex bizzejjed illi ikun hemm l-assenza tal-volonta' ghaz-zwieg, izda jrid bilfors ikun hemm l-eskluzjoni pozittiva. Dan ifisser illi l-persuna li tkun qed taghti l-kunsens tissimula dak il-kunsens meta jkollha l-volonta' u x-xewqa li teskludi z-zwieg. Ma huwiex necessarju illi tali eskluzjoni tigi manifestata esplicitament, izda jista' jkun illi mic-cirkostanzi kollha li jsegwu tal-hajja matrimonjali jkun car illi l-kunsens matrimonjali jkun gie simulat.

Court's conclusion

Illi mill-provi prodotti, hija l-fehma kunsidrata ta' din il-Qorti illi l-ebda wahda miz-zewg partijiet ma kienet lesta li tikkommetti ruhha ghal dan iz-zwieg, u sabiex dan l-istess zwieg jirnexxi. Illi fil-fatt jirrizulta li l-kunsens ta' l-attrici fl- ewwel lok kien simulat ghaliex eskludiet a priori l-element essenzjali tal-hajja mizzewga u cjoe' l-prokreazzjoni ta' l- ulied.

Qieghed jinghad hekk l-ghaliex mill-provi prodotti jirrizulta – fir-rigward ta' l-attrici – illi ghalkemm hija kienet thobb lill-konvenut, pero' hija ma riditx jkollha tfal minnu. Dan hija tghidu espressament fl-affidavit taghha meta tghid illi "meta zzewwigt, jien kont nghidlu li mhux ser ikollu tfal minni, ghax ma kontx narah ragel addattat ghall- familja" u "kont qed niehu l-contraceptive pill fuq opinjoni ta' tabiba biex nikkura lili nnifsi. Lil hija kont ghidtlu ukoll li ser nibqa niehu l-pill biex zgur ma ninqabadtx tqila ".

Illi jirrizulta bl-aktar mod car illi l-attrici eskludiet wiehed mill-elementi tal-bona matrimonii u cjoe' hija eskludiet il- bonum prolis minn mal-konvenut. Dan huwa kkonfermat ukoll mill-istess konvenut meta fix-xhieda tieghu huwa jghid illi "... wara li zzewwigna jien xtaqt li jkollna t-tfal, imma meta tkellimt fuq dan ma Elaine, hi kienet tghidli li ghal mument ma kenitx tixtieq li jkollha. Qatt ma tatni hjiel dwar meta kient lesta taccetta li jkollha t-tfal". Illi dan ifisser li l-kunsens tal-attrici kien vizzjat a bazi ta' l- artikolu 19 (1) (f) tal-Kap 255 tal-Ligijiet ta' Malta.

"waqt it-tieg, kemm kemm kellimha lil ohti, ghax hlief idur u jitkellem u jiccacra ma' shabu ma qaghadx. Kemm kemm kellem lilna l-familjari!". Dwar dan il-punt, dan ix-xhud jkompli jelabora u jghid illi "Minn wara t-tieg taghha jiena u ohti ma konniex niltaqghu regolari. Niftakar li darba kont stedinthom ghall-party u hu ma riedx jigi ghax ipprefera johrog ma' shabu bhas-soltu, imma ohti

kienet giet". Illi ghalhekk f'dan il-kaz jidher li l-kunsens tal- partijiet kien vizzjat a bazi ta' l-artikolu 19 (1) (d) tal-Kap 255 tal-Ligijiet ta'Malta.
Illi in vista tal-fatt li din il-Qorti qeghda ssib li z-zwieg iccelebrat bejn il-kontendenti fis-26 ta' Gunju 1999 huwa null u bla effett ai termini ta' l-artikolu 19(1) (d) tal- Kapitolu 255 tal-Ligijiet ta' Malta ghar-ragunijiet imputabbli liz-zewg partijiet, u wkoll a bazi ta' l-artikolu 19 (1) (f) ghar-ragunijiet imputabbli lill-attrici.

Tiddikjara li z-zwieg celebrat fis-26 ta' Gunju 1999 bejn il-kontendenti huwa null u minghajr ebda effett fil-ligi u dan skond l-artikolu 19 sub-artikolu (1) subincizi (d) ta' l-Att dwar iz-Zwieg, Kap 255 tal-Ligijiet ta' Malta ghar-ragunijiet imputabbli liz-zewg partijiet u skond artikolu 19 sub-artikolu (1) subincizi (f) ta' l-istess Kap ghar-ragunijet imputabbli lill-attrici, u konsegwentement

Noel Petroni vs Elena Monico, June 2003

P was maltese and his father had a friend, who's daughter, wo was Italian came to stay in their home. His son and her, defendant in this case, were married and now the P is instituting the case to annual the marriage.

Illi xi sentejn wara li zzewwigna Elena nqabdet tqila. Xi tlett xhur fit-tqala habib taghha mill-Italja gie jzurna u qaghad id-dar taghna. Allavolja jiena ndunajt li kien hemm xi haga hazina, kellhom jghaddu sitt xhur qabel Elena ammettiet mieghi Ii hi kellha relazzjoni ma' dan il-habib taghha waqt Ii kien btala d-dar taghna."

P's parents never approved of the fact that they were getting married as they knew that the D was very different from their son.

Illi huma zzewwgu gewwa l-Italja u dakinhar tat-tieg dak Noel kien qisu n-naghga l-mitlufa, lanqas tniffes. Mill- banda l-ohra hi ticcaccra mal-hbieb kollha taghha. Niftakar li jiena ghidt Iil mara kif din ser tizzewweg b'din il- kunfidenza ma' dawn il-guvintur. Wara z-zwieg ghamlu xi gimghatejn l-Italja u gew joqghodu Malta.

Illi fil-fatt jiena dejjem kont nghid li hawn Malta kienet tghix il-hajja artificjali u li lilna kienet turina stampa u kellha xi haga ohra gewwa mohha."

Wara sirt naf li ried jigi lura Malta ghax il-mara tieghu kienet qed tigri ma' l-irgiel allavolja kienet pregnant.

D said that she married P to run away from her problems at home as her father was having an affair with another woman.

Article 19 1 d
Illi dawn il-premessi huma kkontemplati fl-Artikolu 19 (1) (d) u (f) tal-Kap 255 tal-Ligijiet ta' Malta u cjoe` l-Att dwar iz-Zwieg.
Illi l-attur jissottometti illi z-zwieg bejnu u bejn il-konvenuta ghandu jigi dikjarat null inter alia a bazi ta' l-Artikolu 19 (1) (d) tal-Kap 255 li jghid:

Illi kwantu ghall-obbligazzjonijiet essenzjali taz-zwieg, din il-Qorti tifhem li, fin-nuqqas ta' definizzjoni jew indikazzjoni fil-Kap. 255, dawn l-obbligazzjonijiet essenzjali huma dawk li fis-

socjeta` Maltija dejjem u nvarjabbilment gew ritenuti bhala l-obbligazzjonijiet essenzjali taz-zwieg. Dawn huma "the obligation concerning the conjugal act or carnal union, as bodily union and basis of procreation; the obligation of the community of life and love as an expression of the union between man and woman, mutual well-being, which is inseparable from the provision of an environment conducive to the reception and education of children; and the obligation to receive and bring up children within the context of a conjugal community. It is important to remember that these essential obligations must be mutual, permanent, continuous, exclusive and irrevocable so that there would be incapacity if one of the contracting parties should be, due to a psychological cause, incapable of assuming these obligations with these essential characteristics" (Viladrich, P.J., op.cit., p. 687).

"Alexandra sive Sandra Farrugia vs Raymond Farrugia" (P.A. (VGD) 10 ta' Settembru 1997) inghad wkoll li:
"Kwantu ghad-difett serju ta' diskrizzjoni ta' gudizzju – Art. 19 (1) (d) – biex ikun hemm nuqqas serju ta' diskrezzjoni ta' gudizzju jrid ikun hemm inkapacita' psikika (mhux necessarjament anomalija psikologika fis-sens mediku psikjatriku) jew kostituzzjonali li wiehed jaghraf u jirrifletti, jew li jiddeciedi liberalment, fuq l-oggett tal-kunsens matrimonjali ("Isabelle Zarb vs Stephen Attard" – P.A. 21 ta' Novembru 1995). Mhix ghalhekk kwistjoni ta' inkompatibilita' ta' karattru, jew ta' decizjoni jew decizjonijiet zbaljati. Il-paragrafu (d) ikompli jitkellem dwar

"anomalija psikologika serja li taghmilha mpossibbli ghal dik il-parti li taqdi l-obbligazzjonijiet essenzjali taz-zwieg". Il-Qorti tosserva li l-ligi taghna tirrikjedi mhux biss anomalija psikologika tkun wahda serja, izda li tkun taghmilha mpossibbli mhux sempliciment difficli, li wiehed jaqdi l-obbligazzjonijiet essenzjali taz-zwieg ossia jassumihom".
Illi ghalhekk b'difett serju ta' diskrezzjoni ta' gudizzju l- legislatur ma riedx ifisser semplicement kwalsiasi stat ta' mmaturita` li parti jew ohra fiz-zwieg tista' tkun fiha fil- mument li jinghata l-kunsens reciproku ("Nicholas Agius vs Rita Agius gia Caruana" – P.A. (VDG) tal-25 ta' Mejju,1995

"Alessandra sive Sandra Mc Monagale qabel Mamo vs Mario Mamo" (P.A. (VDG) 26 ta' Ottubru 2000) ikun hemm id-difett serju ta' diskrezzjoni ta' gudizzju fis- sens ta' l-ewwel parti tal-paragrafu (d) imsemmi kemm-il darba jirrizulta li, "fil-mument ta' l-ghoti tal-kunsens matrimonjali, parti jew ohra tkun priva b'mod sostanzjali, ossia gravi, minn dik il-fakolta` kritiko-estimativa jew kritiko-valutativa dwar l-oggett tal-kunsens taz-zwieg, jew minn dik il-maturita` affettiva li hija presuppost ghal ghazla libera dwar l-imsemmi oggett. Id-difett serju ta' diskrezzjoni ta' gudizzju, ghalhekk, ma hux semplicement nuqqas ta' hsieb, nuqqas ta' riflessjoni; anqas ma jfisser li wiehed jaghmel ghazliet jew jiehu decizjonijiet zbaljati – in fatti decizjoni jew ghazla zbaljata hi perfettament kompatibbli ma' diskrezzjoni ta' gudizzju" (ara, "Emanuel Camilleri vs Carmen Camilleri", P.A., 10 ta' Novembru 1995).
Illi l-istess sentenza tkompli tghid "Li parti fiz-zwieg ma tkunx fehmet sufficjentement, fis-sens li ma tkunx hasbet bizzejjed jew ma tkunx irriflettiet bizzejjed fuq il-hajja mizzewga jew fuq id-drittijiet u d-dmirijiet essenzjali tal- hajja mizzewga, ma jammontax necessarjament ghal difett (serju) ta' diskrezzjoni ta' gudizzju ("Selina-Maria Vella Haber vs Joseph Gatt", P.A., 15 ta' April 1996)".
Illi ghalhekk biex ikun hemm in-nuqqas jew difett serju ta' diskrezzjoni ta' gudizzju kif ravvizat fl-artikolu 19(1)(d) irid ikun hemm l-inkapacita` psikika (mhux necessarjament anomalija psikologika fis-sens mediku / psikjatriku) jew kostituzzjonali li wiehed jaghraf u jirrifletti, u li jiddeciedi liberament, fuq l-oggett tal-kunsens matrimonjali (ara f'dan is-sens, fost ohrajn, "Jacqueline Cousin

vs Bernard Simler", P.A., 3 ta' Gunju 1998; "Roseanne Cassar vs Kenneth Cassar", P.A. 19 ta' Ottubru 1998; u "Carmelo

Article 1 f
"Fl-interpretazzjoni ta' dan is-sub-inciz gie ritenut mill-Qorti taghna illi l-eskluzjoni pozittiva ma kellhiex neccesarjament tirrizulta biss minn xi haga espressa direttament izda setghet tigi espressa bl-imgieba ta' xi
parti fil-perjodu mmedjatament qabel u wara li jkun inkiseb l-istess kunsens".

li mill-provi prodotti jirrizulta li l-kontendenti zzewgu ghar- ragunijiet differenti, li in verita` m'ghandhom x'jaqsmu xejn ma' l-elementi essenzjali tal-hajja mizzewga, tant li mill- provi prodotti unikament mill-attur, jirrizulta li huwa kien izzewweg lill-konvenuta assenti (li hija ta' nazzjonalita` Taljana) minhabba l-fatt li huwa kien litteralment hass ghaliha peress li hija kienet hafna drabi tibki u fi stat dippressiv minhabba avvenimenti li kienu qeghdin jigru fil- familja taghha, fosthom ir-relazzjoni li missierha kellu b'mod extra-maritali u wkoll fi problemi li kellu fin-negozju.
Illi jinghad ukoll li peress li anke li l-partijiet kienu ta' nazzjonalita` differenti u l-familji taghhom rispettivi kienu jghixu fil-pajjizi taghhom, il-kuntatt bejn xulxin ghaz-zmien kollu li huwa damu bhala koppja qabel ma zzewgu kien relattivament qasir, pero` nonostante dan m'hemmx dubju li fil-mohh ta' l-attur il-konvenuta halliet l-impressjoni li hija kienet imdejqa hafna mis-sitwazzjoni familjari taghha b'mod li din ikkawzat fl-attur, kwazi l-obbligu, li huwa jizzewwigha sabiex hija tkun tista' tehles minn dan l- inkwiet b'mod li jkollha refugu ma' l-attur.

jinsab ikkonfermat mix-xhieda minnu prodotti senjatament dik ta' missieru, Alfred Portelli, u ghalhekk abbazi tal- premess hija l-opinjoni ta' din il-Qorti li r-ragunijiet li ghalihom l-attur dahal f'dan iz-zwieg ma kellhom x'jaqsmu xejn ma dak li jikkostitwixxi bhala l-elementi essenzjali taz-zwieg u l-kunsens necessarju sabiex parti tidhol f'dan l- istat ta' hajja, u minhabba dan il-Qorti tikkonkludi li l- kunsens ta' l-attur f'dan il-kaz, kien vizzjat b'difett serju ta' diskrezzjoni ta' gudizzju fuq il-hajja mizzewga, u fuq id- drittijiet u d-dmirijiet essenzjali taghha abbazi ta' l-artikolu 19 (1) (d) tal-Kap 255.

Illi dan iwassal sabiex f'dan il-kaz jinghad li l-kunsens tal- konvenuta kien ukoll simulat abbazi tal-provvedimenti tal- artikolu 19 (1) (f) tal-Kap 255 u 'n verita` l-konvenuta qatt ma riedet li tghix hajja mizzewwga ma' l-attur, izda wzatu biss ghall-iskop uniku biex tahrab mill-hajja taghha fl-Italja u ghal xejn izjed.

Illi l-komportament ta' l-istess konvenuta wara z-zwieg, jikkonferma dan kollu stante li wriet bruda u nuqqas ta' sentimenti ghall-attur u dan ovvjament ghaliex ma setghatx tilghab il-parti konsistentement u ghal hajjitha kollha, u ma setghatx turi emozzjoni jew imhabba lejn l- attur fejn qatt ma kien hemm. Minn dak prodott quddiem din il-Qorti jirrizulta fil-fatt li ma' l-ewwel okkazzjoni, l- konvenuta harbet minn din ir-rabta u anke kellha relazzjonijiet ma' terzi persuni, b'dan li dan iz-zwieg fazull mill-bidu, sfaxxa wkoll fid-dehra tieghu, ghax in verita` sostanza qatt ma kien fih.
Illi abbazi tal-premess din il-Qorti thoss li t-talba attrici ghandha tigi milqugha abbazi ta' l-artikolu 19 (1) (d) u (f) tal-Kap 255 tal-Ligjiet ta' Malta.

Illi ghalhekk ghal dawn il-motivi, din il-Qorti, taqta' u tiddeciedi, billi filwaqt li tichad l-eccezzjonijiet tal-Kuraturi Deputati in kwantu l-istess huma nkompatibbli ma' dak hawn deciz, tilqa' t-talba attrici b'dan illi:

1. Tiddeciedi u tiddikjara li z-zwieg bejn il-partijiet tal- 11 t'April 1987, fuq imsemmi, huwa null u nvalidu ai termini ta' l-artikolu 19 (1) (d) u (f) tal-Kap 255.
Bl-ispejjez jinqasmu bin-nofs bejn il-partijiet.

Separation vs. Divorce vs. Annulment

Separation

When one separates, the partners go their separate ways but strictly speaking they are still bound by the marriage. This would mean that one is still expected to remain faithful to the ex partner. When one separates, it does not mean that one can marry again.

Divorce

When divorce is finalized then one is allowed to marry again and the one no longer has to remain faithful to the partner. In this case there was nothing wrong with the marriage however the partners choose not to continue with it and choose to remarry. Therefore they would like to dissolve the marriage as to be able to marry again.

Annulled

When the marriage is annulled, this would mean that the marriage is null 'ab initio' (from the very beginning). This is more difficult to prove than divorce. This will be noted at the back of the marriage certificate.

Annulment of marriage on the grounds of non- consummation.

19A. *(1) A valid marriage may be annulled at the request of one of the spouses on the grounds that the other party has refused to consummate the same.*

(2) The provisions of article 19(2) shall apply to an action for the annulment of a marriage referred to in sub-article (1) as it applies to an action for the annulment of a marriage therein referred to.

(3) An action for the annulment of a marriage under this article may not be instituted before the lapse of three months from the date of the celebration of the marriage.

Consumption of marriage - consummation means the actualization of marriage. It is the first act of sexual intercourse after marriage between a husband and wife. Consummation is particularly relevant under canon law, where failure to consummate a marriage is a ground for divorce or an annulment.

Punitive Measures

20. (1) If a marriage is declared to be void the effects of a valid marriage shall be deemed to have existed, in favour of the spouses until the judgment of nullity has become a *res judicata* when both spouses had contracted the marriage in good faith.

(2) The effects of a valid marriage shall be deemed to have always existed with reference to the children born or conceived during a marriage declared to be void as well as with reference to children born before such marriage and acknowledged before the judgment declaring the nullity.

(3) If only one of the spouses was in good faith such effects shall apply in his or her favour and in favour of the children.

(4) If both spouses were in bad faith the effects of a valid marriage shall apply only in favour of the children born or conceived during the marriage declared to be void.

(5) Notwithstanding any other provision, the spouse who was responsible for the nullity of the marriage, is bound to pay maintenance to the other spouse in good faith for a period of five years, which duty shall cease if the party in good faith marries during such period.

- A20 - putative marriage - has been annulled - what are the effects ? The effects of the marriage are deemed to have existed in favour of the spouse - when both if them were in bona fede - the *res judicata* is - you may go, the marriage is annulled and nobody bothers to appear, so after 20 days no one appears and the annulment by the first hall can not be reversed, a *res judicata*, but what happens during the marriage financially up to that time, still holds good.

- The fact that there is nullity of the marriage does not change the status of the children. They remain legitimate or legitimated. If only one spouse was in good faith then the effect apply to only that person and in favour of the children. The children are always protected.

- When there is annulment, the marriage is annulled from the very beginning. When there is divorce the marriage is stopped as they cannot live together anymore.

Sub-section 5 deals with the spouse who was in bad faith. If this is the case that person has to give maintenance to the other person for 5 years unless the other person marries before and the duty to give maintenance stops as well.

- Jirrizulta illi wara li l-partijiet kellhom l-ewwel tarbija, l- konvenuta bdiet relazzjoni extra-konjugali li minnha twieldet tarbija ohra li l-attur rabba u mantniha qisha tieghu. Fis-sena 1970, il-konvenuta bdiet relazzjoni extra-konjugali ohra ma' ragel Taljan li minnu wkoll kellha tarbija u li l-attur ukoll rabba bhala ibnu. Fis-sena 1981, il-konvenuta abbandunat id-dar matrimonjali u ftit wara telqet minn Malta sabiex tmur tghix l-Italja flimkien mas-sieheb il-gdid taghha, li minnu ghandha tarbija ohra.

Marriage was declared null

"Il-Mertu tal-Kaz Odjern
"Illi l-mertu tal-kaz odjern idur fuq Artikolu 20(1) tal-Kap255 tal-Ligijiet ta' Malta li jsegwi hekk:
"Jekk zwieg ikun dikjarat null l-effetti taz-zwieg validu ghandhom jitqiesu li kienu jezistu favur il-mizzewgin sakemm is-sentenza ta' nullita' tkun saret res judicata meta l-mizzewgin ikunu zzewgu in buona fede"
"filwaqt li sub-artikolu (3) jsegwi hekk: "Jekk wahda biss mill-partijiet kienet in buona fede dawk l-effetti japplikaw favur taghha u favur l-ulied".

"Permezz tan-nota ta' osservazzjonijiet tieghu, r-rikorrent jargumenta li l-effetti taz-zwieg li jigi dikjarat null jibqghu jezistu biss jekk il- mizzewgin ikunu zzewgu in buona fede.
"Il-qorti tirrileva li huwa minnu li gie dikjarat li z-zwieg tal-partijiet gie dikjarat null ghal ragunijiet li huma imputabbli lill-intimata, pero' l-fatt li inghatat tali 'tort' mhux necessarjament ifisser li l-istess intimata kienet in mala fede. Anke mill-qari tas-sentenza tat-Tribunal Ekklezjastiku, jirrizulta li minkejja li l-intimata kienet responsabbli ghad-dikjarazzjoni ta' nullita' abbazi tal-karattru taghha u n-nuqqas ta' commitment, dan ma jfissirx li l-istess intimata dahlet ghal dan iz-zwieg intenzjonalment b'mala fede. Tant hu hekk li ssir enfasi fuq in-nuqqas ta' maturita' da parti tal-istess intimata u nuqqas ta' diskrezzjoni tal-gudizzju li wasslu ghal dikjarazzjoni ta' nullita', imma mhux il-mala fede. Mix-xiehda tal- istess intimata li tat quddiem it-Tribunal Ekklezjastiku jkompli jirrizulta li ghalkemm l-intimata verament ma kienitx thobb lir-rikorrent, izzewgitu ghaliex kienet tithassru, kellha pressjoni mill-genituri taghha u fuq kollox ghaliex kienet immatura wisq biex tifhem x'pass importanti kienet ser taghmel. Dan kollu juri li l-intimata verament kellha nuqqas ta' diskrezzjoni ta' gudizzju fid-decizjoni taghha li tizzewweg (anke ghaliex ghaliha z-zwieg kien ifisser harba mir-restrizzjonijiet tad-dar) izda ma zzewgitx in mala fede.

Permezz tal-appell tieghu, ipprezentat fit-2 ta' Jannar 2015, l-attur qed jitlob lil din il-Qorti sabiex tirrevoka s-sentenza appellata, u tilqa' t- talba tieghu, b'dan illi tiddikjara li l-komunjoni tal-akkwisti bejn il-partijiet giet terminata, bl-ispejjez taz-zewg istanzi kontra l-appellata.

Isostni li l-konsegwenza logika u naturali tas-sentenza tal- annullament hija li tigi ddikjarata t-terminazzjoni tal-komunjoni tal-akkwisti, u dan minbarra l-fattur tat-trapass taz-zmien ta' kwazi tletin sena. Jghid li skont l-Artikolu 20(1), meta zwieg jigi dikjarat null, ir-regim tal-komunjoni tal-akkwisti jitqies li jibqa' jezisti sakemm is-sentenza ta' nullita` ssir res judicata.

Stellini v. Tabone9 deciza fil-31 ta' Jannar 2008, fejn il-Qorti ghamlet is-segwenti konsiderazzjonijiet li jghoddu wkoll ghall- kaz odjern:
"Illi in tema legali jigi osservat li l-kuncett ta' zwieg putattiv gie introdott fis-sistema guridiku nostrali bl-Att numru XXXIV tas-sena 1981 li ssostitwixxa l-artikolu 20 kif kien vigenti f'dak iz-zmien; u dana bhala eccezzjoni ghall-principju li "quod nullum est, nullum producit effectum" u

huwa primarjament intiz sabiex jikkawtela d-drittijiet tat-tfal li jkunu twieldu fi zwieg li sussegwentement jigi dikjarat null; izda mhux biss, ghax permezz ta' dan l-artikolu l-legislatur ried ukoll jikkawtela l-effetti civili tal-konjugi li jkunu, jew tal-konjugi li jkun, in buona fede. L-iskop tal-legislatur f'dan ir-rigward jirrizulta car minn qari tad-disposizzjoni tal- ligi, u jsib konfort qawwi fid-diskussjonijiet li saru meta din il-ligi kienet qeda tigi diskussa fil-Parliament.

".....jirrizulta car li, kuntrarjament ghal dak sottomess mill-konvenut, l- artikolu 20 ma jirrigwardax biss l-istatus tal-konjugi u ta' uliedhom wara l-annullament taz-zwieg, izda jirrigwarda wkoll l-effetti civili patrimonjali tal-konjugi. Dan jirrizulta car ukoll mill-kontenut tas-sub inciz [5] li jimponi fuq il-konjugi li jkun responsabbli ghall-annullament taz-zwieg, l- obbligu li jmantni ghal perijodu kwinkwennali, lill-konjugi l-iehor li jkun in buona fede. Inoltre quod lex voluit lex dixit; u l-ligi tghid biss "effetti civili" minghajr distinzjoni u ghalhekk tapplika l-massima legali li quod lex non distinguit nec nos distinguere debemus.

"Illi minn qari tad-disposizzjoni in dizamina, jirrizulta manifest li l-kriterju, jew ahjar l-ingredjent, principali sabiex jissussisti z-zwieg putattiv, bejn il-konjugi11, huwa l-ezistenza tal-buona fede da parti taz-zewg konjugi jew da parti ta' wiehed biss. Fl-ewwel kaz l-effetti patrimonjali ta' zwieg civili "jitqiesu li kienu jezistu favur il-mizzewwgin sakemm is-sentenza ta' nullita' tkun saret res judicata..", filwaqt li fit-tieni kaz, dawn l-effetti jissussistu biss favur il-konjugi in buona fede.
"Illi rigward l-fattur tal-buona fede tal-konjugi,

"Illi fil-kaz in disamina l-mala fede da parti ta' l-attrici tirrizulta cara u manifesta mill-kontenut tas-sentenza ta' l-annullament, u senjatament mill-parti dispositiva. F'dan il-kaz, il-Prim'Awla tal-Qorti Civili ddecidiet f'termini cari li z-zwieg kien null unikament minhabba l-fatt li l-attrici ssimulat il-kunsens bl-eskluzjoni posittiva ta' wiehed mill-element essenzjali taz-zwieg, cioe' l-att taz-zwieg, u konsegwentement addebitat l-ispejjez kollha fuq l-istess attrici.
"Illi, rigward is-sottomissjoni attrici li, gjaladarba ma hemmx dikjarazzjoni fis-sens li l-attrici kienet in mala fede, u gjaladarba ma ntalbitx tali dikjarazzjoni, allura mhux legalment permess li din il-Qorti tinvesti dan il-punt; din il-Qorti tosserva li dak li gie deciz fis-sentenza ta' l- annullament, jwassal b'mod esplicitu ghal mala fede ta' l-attrici. Dan jirrizulta manifest mir-raguni ta' l-annullament li hija unikament imputabbli lill-attrici, u li tikkonsisti fil-caput nullitatis kontemplat fil- paragrafu [f] li jikkontempla l-kaz ta' vizzju tal-kunsens da parti ta' minn b'att posittiv tal-volonta' tieghu jeskludi obbligazzjoni essenzjali ghaz- zwieg. Il-mala fede ta' l-attrici tohrog car, anke jekk mhux espressament dikjarat mill-Qorti, mill-fatt li dina ngannat lill-konvenut meta esternament ghaddiet minn cerimonja ta zwieg, izda internament eskludiet li jsir l-att taz-zwieg. Dik il-Qorti qalet obiter li "jidher li meta hija tat il-kunsens taghha ghaz-zwieg [hija] kellha l-intenzjoni illi ccahhad lill-konvenut mill-att matrimonjali." Minn naha tieghu l-konvenut ma giet addebitat b'ebda htija, tant li ma giex ordnat jippartecipa fil-hlas ta' l-ispejjez gudizzjarji."

14. Hu importanti ghalhekk li jigi determinat jekk fil-kawza tal- annullament taz-zwieg kienx jezisti qerq ta' parti fil-konfront tal-parti l- ohra, jew jekk it-tnejn kienux in buona fede jew jekk it-tnejn kienux in mala fede. Dan ghaliex skont l-Artikolu 20 tal-Kap 255, jekk iz-zewg partijiet ikunu in buona fede, il-komunjoni tal-akkwisti tal-akkwisti titqies illi kienet tezisti favur iz-zewg mizzewwgin sad-data li fiha s-sentenza ta' nullita` tkun saret res judicata; jekk ebda waħda mill-partijiet ma kienet in buona fede, l-effetti ta' żwieġ validu għandhom japplikaw biss favur l-ulied li jitwieldu jew li gew konċepiti matul iz-zwieg u dawk li jitwieldu qabel dak iż-żwieġ u li jkunu rikonoxxuti qabel ma tingħata s-sentenza ta' nullità, filwaqt illi jekk parti wahda biss kienet in buona fede, allura l-effetti taz- zwieg validu jissussistu biss favur dak il-konjugi.13

Fid-dawl tal-konsiderazzjonijiet premessi din il-Qorti hi tal-fehma li, ladarba gie defenittivament deciz li fil-mument tal-ghoti tal-kunsens matrimonjali l-konvenuta b'att pozittiv tal-volonta` taghha ssimulat dak il- kunsens, allura l-attur huwa gustifikat fis-sottomissjoni tieghu li, fil- konfront tal-attrici l-komunjoni tal-akkwisti kienet inezistenti ab initio, u ghalhekk it-talba tieghu kellha tigi milqugha.

Ghar-ragunijiet premessi tilqa' l-appell tal-attur u tirrevoka s-sentenza appellata u, minflok, tilqa' t-talba attrici u tiddikjara li ma tirrizulta l-ebda komunjoni tal-akkwisti bejn il-partijiet u dan stante li z-zwieg taghhom kien gie iddikjarat null u bla effett minhabba ragunijiet attribwibbli lill-konvenuta.
L-ispejjez kollha, kemm tal-ewwel istanza kif ukoll dawk relatati mal-appell odjern, ikunu a kariku tal-konvenuta.

Catholic Marriages

- Provisions Relating to Catholic Marriages -

Article 21 deals with the recognition of a catholic marriage. Article 22 states that the Parish Registry has to send the certificate within 5 working days.

Article 21 - Recognition of a catholic marriage

21. (1) A **marriage** celebrated i**n Malta** after the coming into force of this article, in accordance with the norms and formalities established by Canon Law shall as from the moment of its celebration, be recognised and have the same civil effects as a marriage celebrated in accordance with the norms and formalities of this Act.

(2) The provisions of sub-article (1) shall apply only where:

(*a*) the banns required by this Act have been either published or dispensed with in accordance with articles 7 to 10 and the Registrar has issued a certificate attesting such publication or dispensation;

- (*b*) the parish priest who in accordance with Canon Law has jurisdiction in the place where the marriage was celebrated transmits to the Director of the Public Registry an act of marriage in the form as may be prescribed duly signed by such authority as is provided for in the Agreement; and

- (*c*) no impediment to the marriage as is referred to in articles 3, 4, 5 and 6, subsists. So however that the competent organs of the Catholic Church may for the purpose of catholic marriages under this Act grant authorisations or dispense from the restrictions in article 3(2) and article 5(1)(*c*) and (*d*).

(3) The certificate referred to in sub-article (2)(*a*) hereof shall constitute definite and conclusive proof of its contents.

Article 22 - Transcription of act of marriage.

22. (1) Notwithstanding anything contained in this Act or in the Civil Code relative to the procedure whereby, and the term in which, an act of marriage is to be registered, the Parish Priest referred to in article 21(2)(*b*), **shall transmit to the Public Registry the act of marriage therein referred to for registration within five working days of the celebration of the marriage.**

(2) Failure to transmit the act of marriage for registration as is provided for in sub-article (1) shall not be an obstacle to such transmission after the lapse of such term. Either spouse may at all times demand that such transmission be effected by the Parish Priest who shall remain at all times obliged to effect such transmission.

(3) When the act of marriage has been transmitted to the Public Registry, the Director of the Public Registry shall ascertain that the provisions of article 21 apply to the marriage, and upon having so ascertained he shall register the act which shall be deemed for all effects at law to be an act of marriage referred to in article 12. Upon registration of the act of marriage the Director of the Public Registry shall, as soon as may be, give notice of such registration to the Parish Priest transmitting the act of marriage.

(4) A marriage which is recognised in accordance with article 21 shall upon transmission and registration of the act of marriage be recognise**d as from the moment of its celebration.** Such recognition shall not, however, prejudice any property rights lawfully acquired by third parties in good faith before the transmission of the act of marriage as aforesaid in this article, where such act of marriage is transmitted after the expiry of the term referred to in sub-article (1) hereof.

- . In such marriages, the usual conditions apply, so one must satisfy sections 3, 4, 5 and 6. Furthermore, the parish priest has to send a transcript of the marriage to the Public Registry. This the situation post 1995.

Article 23 - Recognition of decisions given by tribunals.

23. A decision which has become executive, given by a tribunal, and declaring the nullity of a catholic marriage shall, where one of the parties is domiciled in, or a citizen of, Malta, and subject to the provisions of article 24 be recognised and upon its registration in accordance with the said article 24 shall have effect as if it were a decision by a court and which has become *res judicata*.

Article 24 - Registration of decisions given by tribunal.

(5) The Court of Appeal registers that decision by giving a decree declaring the decision enforceable in Malta; such decree shall not be given unless the Court of Appeal is satisfied that:

i. the Tribunal was competent to judge the case of nullity of the marriage insofar as the marriage was a catholic marriage; and

ii. during and in the proceedings before the Tribunal there was assured to the parties the right of action and defence in a manner substantially not dissimilar to the principles of the Constitution of Malta; and

iii. there does not exist a contrary judgement binding the parties pronounced by a court, and which has become res judicata, based on the same grounds of nullity; and

iv. in the case of a marriage celebrated in Malta after the 11th August, 1975, there has been delivered or transmitted to the Public Registry the act of marriage laid down by this Act; and

v. in the case of a decision delivered on or after the 16th July, 1975, but before the coming into force of this article, the request for recognition is presented by both spouses; or where it is presented only by one of the spouses it is satisfied that the other spouse does not oppose the registration of the decision.

(6) Notwithstanding the provisions of sub-article (5)(v) where a request for the registration of a decision as is referred to in article23(1) issued by a tribunal on or alter the 16th July, 1975 but before the coming into force of this article, is made by one only of the spouses, and the other spouse opposes such registration, the Court of Appeal shall give the spouse opposing such registration a term not exceeding two months within which the spouse opposing such registration may present a plea, in accordance with Canon Law applicable, before the competent Tribunal to have the decision revoked; and the Court of Appeal shall only register that decision where the party opposing the registration has not entered the plea in the term established, or has entered the plea but the same was rejected or the decision declaring the marriage null was confirmed by the Tribunal.

- The Court of Appeal does not review the decision. If the marriage has been declared null by the tribunal then the court will not go into the details as to see if the tribunal has exercised its functions properly in assessing the evidence before it. The court of appeal, according to section 24(5), paragraphs 1, 2 and 3, check if the tribunal is competent to hear the case, if the proceedings were fair before the tribunal and there does not exist a contrary judgment binding the parties pronounced by a court and which has become res judiciata based on the same grounds of nullity. The tribunal is competent to hear the case if, according to section 23, if one of the parties is either domiciled or a citizen of Malta. The Court of appeal checks if everybody had the right to examine and cross-examine according to the Constitution of Malta. This is checks whether the proceedings were fair in-front of the tribunal. Here was one case, were the tribunal did not follow the right to cross-examine as one of the parties was not residing in Malta and he was not contacted about the proceedings. This lead to no cross-examination being done. The judge said that the court will not accept this nullity as an important part of procedure was not being followed. This right is found under section 39 of the Constitution of Malta.

- Sub-section 6 deals with a situation which prevailed in 16th July 1975, before the coming into force of this article. If it was made by one of the spouses only, while the other opposes, the court of appeal will give two months to the opposing spouse as to say why this decision should not be registered.

Article 25

25. A decree given by the Roman Pontiff "*super matrimonio rato et non consummato*", when one of the spouses is domiciled in or is a citizen of Malta, shall, subject to the provisions of article 26, be recognised and upon its registration in accordance with the said article 26, shall have effect as if it were a decision given by a court and which has become *res judicata* annulling a marriage on the grounds of non-consummation, in accordance with article 19A.

- Article 25 deals with marriages where it has not been consummated, meaning there has been a lack of sexual union. The provision of 19A deals with this, where one would go to the court stating that the partner has never showed any sexual interest and so the marriage should be annulled on these grounds. The final decision is made by the Roman Pontiff (the Pope).

Article 26:

(1) Registration of a decree as is referred to in article 25 shall be effected by the Court of Appeal.

(2) A request for such registration shall be made by application accompanied by an authentic copy of the pontifical decree filed in the registry of the said court, and which shall be served on the Director of the Public Registry and where it is presented by one only of the spouses, on the other spouse.

(3) The respondents shall have a right to file a reply within twelve working days of service upon them of the application.

(4) (a) Registration shall be effected by an order of the Court of Appeal declaring the decree of the Roman Pontiff enforceable in Malta.

(b) The Court of Appeal shall register the decree if it is satisfied that it refers to a catholic marriage which was celebrated after the coming into force of this article and either of the spouses is domiciled in or is a citizen of Malta.

(5) Notwithstanding the provisions of sub-article (4) hereof, the Court of Appeal shall give a decree which refers to a catholic marriage celebrated before the coming into force of this article where the application therefor is filed by both spouses, or where it is filed by one only of the spouses, the other spouse does not oppose the registration.

One must make an application as usual and like 25, one must have an authentic copy of the pontifical decree which is served on the Director of Public Registry. When it is presented to one of the spouses, it has to be served to the other spouse as well. The respondents will have 12 working days to reply. If there is no reply, it is taken that at they have accepted the decision.

Any decision has to be notified to the Director of the Public Registry within 10 working days from the day on which the decision shall have become res judicata.

In Article 28, we are told quite clearly that the Court of Appeal does not examine the issue but looks only at procedural points. Sometimes there is the need for the evidence of one person. In this case one may ask the Civil Court to order the evidence of such person be heard by one of the judicial assistants.

26A. In its decision by virtue of articles 19, 24 or 26, the competent court shall also order that the Registrar of Courts shall notify the decision to the Director of the Public Registry within ten (10) working days from the day on which the decision shall have become *res judicata*.

27. The provisions of article 19(2) shall apply to applications made in terms of articles 24 and 26.

28. In the course of an application under articles 24 and 26 the Court of Appeal shall not go into the merits of the case leading to the decision or the decree the registration of which is demanded in the application but shall limit itself to ascertain if the requirements of this Act for the registration requested exist.

29. (1) Where the evidence of any person is required before a Tribunal, any of the parties may request the appropriate section of the Civil Court to order that the evidence of such person be heard by one of the judicial assistants according to the residence of the witness, and upon such order being given the court shall fix a date for the hearing of the witness before the judicial assistant in the manner provided in articles 606 and 607 of the Code of Organization and Civil Procedure.

(2) The parties to the case before the tribunal shall be notified of the date fixed for the hearing of the witness before the judicial assistant and may be present and be assisted by an advocate or legal procurator.

(3) Any deposition taken in the manner provided in the preceding sub-articles shall also be signed by the supplementary judge or magistrate and deposited in the registry of the court. The Registrar shall give official copies of any evidence so registered to any of the parties or the Chancellor of the Tribunal.

(4) Article 610(4) and (5) of the said Code shall apply to evidence taken under this article.

(5) All the provisions of the Code of Organization and Civil Procedure and of any other law relating to the admissibility of evidence and to the competence and compellability of witnesses, as well as to privileged communications, shall apply to evidence taken under this article as they apply to evidence of witnesses before the Civil Court, First Hall.

Article 30

30. The fact that a case for the declaration of nullity of a catholic marriage is pending before a court or before the Tribunal at the time when another case is filed or is pending before a court or before the Tribunal for the declaration of nullity of the same marriage shall not hinder the court or the Tribunal from continuing to hear or from determining the case filed or pending before it.

- If you have an action pending in the first court civil hall or church tribunal or vice verse - the both he court and tribunal were to go heart the case - either in the court or the tribunal - this might have brought some differences - wha happens if the 2 judgement are about the same ground of nullity-

In oen a declaration of nukkituy and the other, nothing - this was may 2014, in order to settle certain disagreements if a person could start a litigation of a different court and tribunal and this wcase was meant to settle this case once and for all

32. Articles 11 to 17 shall not apply to catholic marriages celebrated after the coming into force of this article*.

Religious protection

32A. Nothing contained in this Act shall be construed as obliging an official of a religious body in accordance with article 37 of this Act to solemnise a particular form of marriage which is not recognised by the religious body of which that official is a member..

Miscellaneous

33. Without prejudice to the implementation of any regulation applicable between the Member States of the European Union, a decision of a foreign court or a decision or other official act of equivalent effect of a foreign competent authority on the status of a married person or affecting such status shall be recognised for all purposes of law in Malta if the decision is given or if the other official act is issued by a court or a competent authority of the country in which either of the parties to the proceedings is domiciled or of which either of such parties is a citizen.

- Domicile is more important aspect in this article, however citizenship may also be applied in such an article. Article 33 has a wider scope then Article 18.

- In public registry in Malta, one the back of the certificate, there has to be written that one obtained a divorce by the specific Courts.

- **Edward John Fuchs vs. Marrianne Fauchs Micallef (2007)**

Deals with the recognition of a foreign divorce. Normally it is a court which recognizes such, however according to Article 33 it is the director who has to dissolve the problems. A foreign marriage has to follow the form of the law of the land. Furthermore capacity of the domicile of each of the parties has to be followed. Under Article 33 there are also 4 connecting factors, where the citizenship of the husband is considered to be enough of the country where the annulment was given. The domicile of the wife is also enough where the divorce was given.

- **Dr. Patrick Spiteri vs. Sylvana Spiteri (Court of Appeal) (2011)**, which also deal with a recognition of a foreign divorce. What is strange about the case as it is about a backdated decision about a foreign competent court (competent is the court which can decide such matters). The court of magistrates or the court of criminal appeal inferior cannot decide on cases of alimony (maintenance). An application has to be made to the family court, this is the competent court.

- The law of thee domicile of each of the parties allows him or her to marry - look at the conditions of marriage in Italian ciivl code, as they do not have an act of its own like us, Judge believes that 255 should become part of the civil code.

- The problem start when you are not told that this man from Pakistan is already married, and sometimes there are people with high qualifications, and follow the husband and are then heartbroken to find out they are already married.

Article 35: Without prejudice to articles 21 to 31, Canon Law shall, in so far as it had effect as part of the law of Malta on marriage, cease to have such effect, and all jurisdiction in relation to marriage shall vest in the courts of Malta in accordance with the relevant provisions of the Code of Organization and Civil Procedure.

- This article states that Canon Law shall no long have effect in Malta.

36. (1) Save as hereinafter provided, the provisions of articles 18, 19, 19A, 20 and 35 shall apply to all marriages whether contracted before or after the commencement of this Act, *including a marriage in respect of which proceedings were instituted prior to such commencement.*

- (2) Nothing in this Act shall -
  - (*a*) affect the validity of a marriage which was valid at the time it was contracted; or
  - (*b*) affect the continued operation of a judgment having effect in Malta which is *res judicata* on or before July 15, 1975.
- (3) Where any signature is required of any person who cannot or is unable to write, the requirements of this Act shall be satisfied if in place of his signature there is set a mark of such person attested as provided in article 634(1) of the Code of Organization and Civil Procedure or by the Registrar.

37. (1) The Government may enter into agreements with other churches, religions or denominations regarding the recognition of marriages celebrated in accordance with the rules and norms of that church, religion or denomination, and declarations of nullity or annulment of such marriages by the organs of such church, religion or denomination having authority in accordance with its rules.

- Section 37 - agreement with other churches - because you can not discriminate - to eliminate all actions of discrimination, bias,

Marriages of convenience

38. (1) Any person who contracts a marriage with the sole purpose of obtaining -

- (*a*) Maltese citizenship; or
- (*b*) freedom of movement in Malta; or
- (*c*) a work or residence permit in Malta; or
- (*d*) the right to enter Malta; or
- (*e*) the right to obtain medical care in Malta,

shall be guilty of an offence and shall on conviction be liable to imprisonment for a term not exceeding two years.

(2) Any right or benefit obtained by a person convicted of an offence under sub-article (1) on the basis of the marriage referred to in that sub-article (1) may be rescinded or annulled by the public authority from which it was obtained.

(3) Any person who contracts a marriage with another person knowing that the sole purpose of such other person in contacting the marriage is one or more of the purposes referred to in sub- article (1) shall be guilty of an offence and shall on conviction be liable for the same punishment laid down in sub-article (1).

PM Vs NC, October 2021

P nigerian - D Maltese

Considers:
The presumption of the validity of a marriage has always and constantly been underscored in local jurisprudence. In ***L-Avukat A B noe vs ED,*** decided on the 31st of January 2018 by the Family Court differently presided, it was held that:

Huwa pacifiku illi z-zwieg huwa istitut ta' l-ordni pubbliku u bhala tali ghandu jgawdi minn dawk is-salvagwardji li jixraqlu u li huma necessarji biex jiggarantixxu l-importanza u s-solennita` li dan l-istitut ghandu fis-socjeta`. Appuntu ghal din ir- raguni, il-kuntratt taz-zwieg ma huwiex regolat bid-dispozizzjoniiet generali in materja ta' kuntratti li nsibu fil-Kodici Civili izda b'lex specialis taht il-Kap. 255, li tipprovdi dwar ir-ragunijiet li minhabba fihom zwieg jista' jigi dikjarat li huwa minghajr effett. Inoltre, tezisti a favur iz-zwieg prezunzjoni ta' validita` illi tesigi li z-zwieg ma ghandux jigix dikjarat li huwa invalidu, jekk ma jitressqux ghas- sodisfazzjon pjen tal-qorti, provi cari u konkreti li jezistu ragunijiet gravi u serji u eccezzjonali skond kif trid il-Ligi, li jiggustifikaw talba ghan-nullita`...

In-nullita` taz-zwieg hija ghalhekk eccezzjoni ghar-regola ta' validita` u konsegwentement, kull talba biex zwieg jigi dikjarat li qatt ma kien, ghandha titqies b'cirkospezzjoni filwaqt li tinghata wkoll interpretazzjoni ristrettiva...

In ***Carmel Farrugia vs Pauline Farrugia*** decided on the 12th July 1987, the Court of Appeal held:
Iz-zwieg huwa wiehed mill-kuntratti l-aktar essenzjali ghas-socjeta' u bla dubju ta' xejn huwa ta' ordni pubbliku li l-Qorti trid tersaq lejh bl-aktar rispett... Ghall-Qorti n-nullita' hija haga serjissima u eccezzjonali bbazata fuq ir-rekwiziti legali, u bhala materja eccezzjonali trid tkun interpretata restrittivament.

Similary in **Joseph Zammit vs Bernardette Zammit** decided on the 27th January 2006:
Irid mill-ewwel jiġi senjalat prinċipju fundamentali fil-liġi ċivili u cioe' li żżwieġ bejn il-kontendenti għandu jkun preżunt li jkun wieħed validu. Għalhekk huwa dover assolut ta' kull parti fil-kawża li tagħmel prova sodisfaċenti ta' lallegazzjonijet rispettivi tagħha dwar l-allegazzjoni u cioe' li ż-żwieg huwa null għaliex l-oneru tal-prova huwa dejjem fuq spallejn min jallega.

Jurisprudence has established that Articles 19 (1)(d) and (1)(f) are in conflict with each other and therefore contradictory. Whilst the citation of these two contradictory grounds does not invalidate the action, their simultaneous invocation debilitate their efficacy:

"Qabel xejn, peress illi r-rikorrent ibbaza t-talba tieghu ghan-nullita` taz-zwieg sew fuq is-subinciz (1)(d) kif ukoll fuq is-subinciz (1)(f) tal-Artikolu 19 tal-Kap. 255, ghandu jinghad illi diversi drabi gie dikjarat mill-Qrati taghna illi kawza dwar annullament ta' zwieg imsejsa fuq is-subinciz (1)(f) u fl-istess waqt ukoll fuq is-subinciz (1)(d), ghandha titqies li tikkontjeni talbiet kontradittorji. Ghalkemm ma jidhirx li tali kontradizzjoni twassal ghan-nullita' tal-att, pero` min-natura taghhom dawn iz-zewg kawzali flimkien inevitabbilment idghajfu lil xulxin.

Dwar l-inkompatibilita' bejn dawn iz-zewg sub-incizi intqal hekk fis-sentenza **Kenneth Cefai vs Louise Cefai** *Deciza mill-Qorti talAppell fil-11 ta' Novembru 2011:-*
"Ghar-rigward tal-kompatibilita` tas-sub-artikoli (d) u (f) imsemmija, din il- Qorti, ghal ennesima darba, tirribadixxi li talba bazata fuq dawn iz-zewg kawzali ma tistax, teknikament, treggi.

Fil-kawza **Baldacchino v. Duan,** *deciza minn din il-Qorti fit-3 ta' Dicembru 2010, kien intqal hekk fir-rigward:- "It should be noted from the outset that, technically, this case should not have been discussed on its merits, as the two grounds put forward to support a claim for nullity cannot stand together and mutually exclude each other. While claiming that the spouses had sufficient discretion to exclude an intention to marry (simulation), Plaintiff is automatically excluding the grounds of lack of discretion; similarly, while claiming a lack of discretion, he is automatically rebutting the ground under paragraph (f), as this implies a positive act of discretion to exclude marriage."*
Article 19(1)(f):

With regards to the application of article 19(1)(f) in the judgment **Anthony Gallo vs Dr Anthony Cutajar et nomine,** the Court held:

"Meta wiehed jitkellem dwar l-eskluzjoni taz-zwieg jew wiehed mill-elementi essenzjali tieghu, wiehed irid jifli jekk il-kontendenti jew wiehed (jew wahda) minnhom, allavolja hu kapaci jaghti l-kunsens validu taz-zwieg, pero` bl-att tieghu hu qabel u fil-hajja mizzewga, jew bl-ommissjoni tieghu, eskluda a priori z-zwieg.....hu jew hi eskludew xi wahda jew aktar mill-elementi essenzjali tal- hajja mizzewga."

Furthermore, in the judgment **Al Chahid vs Mary Spiteri** the Court there reiterated that:-
"... wiehed jinnota li taht l-artikolu 19 (1) (f) trid issir distinzjoni cara bejn zwieg li jfalli minhabba cirkostanzi li jirrizultaw waqt iz-zwieg, u zwieg li jfalli ghax wiehed mill-partijiet minn qabel ma' ta l-kunsens tieghu, kien gja mentalment dispost li ma jottemperax ruhu ma' xi wahda jew aktar mill-obbligi matrimonjali. Fl-ewwel ipotesi hemm ir-ragunijiet li jaghtu lok ghas-separazzjoni u fit-tieni ipotesi hemm l-estremi tal-annullament taz-zwieg".

Established Jurisprudence is to the effect that for this ground to subsist, one of the parties has to excluded marriage itself or one of its essential elements together with the simulation of consent to the marriage by that party.
The judgment **Simon Cusens vs. Romina Cusens,** considered that:

"*sabiex zwieg jigi kkunsidrat null ai termini ta' dan is-subinciz, irid jirrizulta ppruvat li entrambi l-partijiet jew xi hadd mill-partijiet tkun hadet decizjoni li ghalkemm ser tippartecipa fic-cerimonja taz-zwieg, hija tkun qieghda teskludi xi wiehed mill-elementi essenzjali taz-zwieg. Fi kliem iehor, filwaqt li esternament tidher li qed taghti l-kunsens ghar rabta matrimonjali, dik il-parti tkun fl-istess hin u minn qabel ma tat il kunsens taghha, diga` mentalment eskludiet a priori d-dispozizzjoni taghha li tottempera ruhha ma' xi wahda jew aktar mill-obbligi matrimonjali."*

The case **Alfred Tonna vs Maria Tonna** explained that:
"ikun hemm simulazzjoni meta fil-mument tal-ghoti tal-kunsens matrimonjali parti jew ohra (jew it-tnejn) esternament turi li qed taghti l-kunsens matrimonjali izda internament u b'att pozittiv tal-volonta' taghha tkun qed tichad il-kunsens ghal dak iz-zwieg (simulazzjoni totali jew dejjem b'dak l-att pozittiv tal-volonta', tkun qed teskludi xi element jew proprjeta' essenzjali ghaz-zwieg (simulazzjoni parzjali)."

Of the same opinion was the Court in the case **Charles Atkins vs Matilde Atkins** :-
"Tezisti simulazzjoni parzjali meta persuna teskludi biss wahda jew aktar mill- elementi essenzjali rikjesti biex jigi stabbilit iz-zwieg bhal per ezempju, l- eskluzjoni tal-prokreazzjoni u trobbija ta' l-ulied, jew l-eskluzjoni ta' l-obbligu tal-fedelta` lejn il-parti l-ohra".

The Court went on to state:-
"... rigward x'inhuma l-obbligazzjonijiet essenzjali taz-zwieg, dawn huma dawk l-elementi li dejjem gew ritenuti bhala l-obbligazzjonijiet tal-hajja mizzewga u cioe` dik ta' unjoni permanenti, esklussiva u irrevokabbli, diretta ghall- komunjoni ta' hajja u l-prokreazzjoni u t-trobbija ta' l-ulied."
In ***L-Avukat A B noe vs ED,*** the Court held that:

Illi gie konsistentement ritenut illi dan is-subinciz (f) jirreferi ghal dawk ic- cirkostanzi fejn xi hadd mill-partijiet ikun ha decizjoni li ghalkemm ser jippartecipa fic-cerimonja taz-zwieg, hija tkun qieghda teskludi jew iz-zwieg innifsu, jew xi wiehed mill-elementi essenzjali taz-zwieg b'tali mod li z-zwieg ikun qieghed jigi eskluz. Fi kliem iehor, biex zwieg ikun null ai termini ta' dan is-sub inciz, xi hadd mill-partijiet ma jkollux intenzjoni li jizzewweg u jghix hajja konjugali, izda jkun resaq ghac-celebrazzjoni taz-zwieg sabiex jilhaq xi ghan ulterjuri.

The *onus probandi* of the facts supporting the claim, lies on the Plaintiff alleging these facts. The Court observes that the only evidence produced by Plaintiff in support of his claim is limited to his testimony which, in substance, has been contradicted by that given by the Defendant. The Court also notes that in her testimony and submissions, the Defendant contends that the marriage contracted by the parties was only entered into to solve the Defendant's problems with his residence permit. Plaintiff categorically denies this.

Local Jurisprudence on the subject denotes that a marriage of convenience involves a simulation of that contract, and therefore a marriage that is based on this premise is null in the eyes of the law, particularly in cases where one of the parties contracted the marriage in order to be able to reside or work in Malta:
Meta l-uniku skop tal-kontraent jkun li jibqa' Malta biex jahdem u eventwalment jikseb ic-cittadinanza, hu jkun qieghed posittivament jeskludi z-zwieg innifsu, b'mod li jkun hemm simulazzjoni totali. Naturalment, f'dawn il-kazijiet wiehed ma ghandhux jistenna li jsib prova diretta tassimulazzjoni, fis-sens ta' xi dikjarazzjoni esplicita tal-intenzjoni ta' dak li jkun, pero' tali intenzjoni tista' tigi manifesta wkoll implicitament. (Vide Miriam Ramadan Mabrouk vs Lovay Ramadan Mabrouk decided on the 16th January 1998)

Plaintiff was not entirely satisfied with his job prospects in Italy. In fact, had told the Defendant that he wished to come to Malta for this purpose. However, he was aware of the fact that he would need to return back to his host country close to the lapse of the three months, whereas marriage with a Maltese citizen would resolve this.

This Court notes that in spite of the fact that the parties courted for around three year/four years, it is this Court's considered opinion that the parties' courtship lasted for such a long period of time ***solely because*** the Defendant was adamant not to rush the relationship. In fact, Defendant testified that the procedures relating to their civil marriage were then expedited due to the difficulties the couple was facing as a result of the Plaintiff's constant travelling to validate his residence permit. In fact, when cross-examined, Defendant states that she felt pressurised to hasten the relative documentation relating to the civil marriage.

Despite the fact that the Plaintiff *ex admissis* declares himself to be a Roman Catholic (Vide interview with Italian Commission a fol 54), nonetheless he opted for a civil marriage which also sheds light on his true intentions about this marriage.

Moreover, the Court also notes that the Plaintiff's sudden transformation following the marriage, coupled with his total disinterest to communicate with the Defendant to ameliorate the situation of their relationship, the constant unfounded allegations of Defendant's unfaithfulness, his avoidance of Defendant's family and his insistence to travel to Nigeria despite the fact that the couple at the time was not financially stable, corroborates Defendant's positions that the Plaintiff contracted the marriage for personal gain, namely that to acquire Maltese citizenship, and all the benefits linked to such citizenship, benefits the Plaintiff knew, would not subsist in an eventual separation. Hence Plaintiff's threats and insistence to reconcile following his return from Nigeria.
On the strength of the above, the Court is of the opinion that Plaintiff simulated his consent at the time of the celebration of marriage, and that his marriage to the Defendant was merely one of convenience aimed at residing in Malta, acquiring freedom of movement and eventually obtaining Maltese citizenship.

For the above mentioned reasons, whilst upholding the pleas of the Defendant, the Court declares and holds that the marriage contracted between Plaintiff and Defendant on the 16th April 2016 is null and void in terms of Article 19(1)(f) of the Marriage Act, Chapter 255 of the Laws of Malta for reasons solely attributable to the Plaintiff who positively excluded the marriage itself, or of any one or more of the essential elements of matrimonial life.
The costs are to be borne by Plaintiff.

The Civil Unions Act, Chapter 530

Article 2:

In this Act, unless the context otherwise requires - ...

"union of equivalent status" means any of the unions found in the list which the Minister by regulations may issue under this Act.".

The list is found in S.L. 530.01. Where there is a list with the various countries which have laws about the various countries about either civil union or something equivalent to it. The minister can add or amend such a list.

Article 3: Civil Unions Act

(1) Save as provided in this Act, all persons fulfilling the requirements to enter into marriage in accordance with the Act may register their partnership as a civil union.

(2) Registration of a partnership as a civil union shall be permissible between two persons of the same or of different sex.

- This article is not limited to people of the same sex as seen in sub-article 2. A civil union has the same consequences of a marriage, so in this case the community of acquests will apply also.

Article 6:

(1) Notwithstanding the provisions of article 4, with regard to a marriage celebrated abroad by two persons of the same sex, article 18 of the Act shall be construed in such a manner as to be applicable to such marriage.

(2) Without prejudice to the provisions of sub-article (1), a union of equivalent status celebrated abroad shall be valid for all purposes of law in Malta if:

- (a) as regards the formalities thereof, the formalities required for its validity by the law of the country where the union of equivalent status is celebrated are observed; and
- (b) as regards the capacity of the parties, each of the persons forming the union of equivalent status is, by the law of the country of his or her respective domicile, capable of entering into such a union of equivalent status**.**

- If there are two persons of the same sex who married abroad (even outside the EU), the format to see if the marriage is valid is sub-article 2. In such a sub-article we find the same wording as present in Article 18 of the marriage Act. The requirements are that the formalities of such a country have been followed and that the domicile each of the parties to be married allowed this type of union. Therefore the same criteria of a marriage is applied to a civil union.

Article 7: deals with when a civil union is void.

A civil union contracted between persons either of whom is bound by a previous marriage or civil union, or by another union of equivalent legal status contracted outside Malta shall be void.

- One must keep in mind Section 6 of the Marriage Act. A definition of union of equivalent status is found in Section 2.

Transitory provision

8. Where a same sex couple, one of whom is a citizen of Malta, has contracted a marriage or a union of equivalent status before the coming into force of this Act, in a country outside Malta and either of the persons in the couple is a citizen of a country which is not a Member State of the European Union, the legal residence of the said third country national in Malta shall be deemed to have commenced as from the official date of the marriage or of the union of equivalent status.

Equation of rights and obligations

9. In situations where the rights and obligations of civil partners are unclear, every effort shall be made to ensure that the determination of such rights and obligations is such that equates them to those enjoyed by spouses

Article 11: Conversion of civil union into marriage

Partners in a civil union contracted prior to the coming into force of the Marriage Act and other Laws (Amendment) Act, 2017* and in accordance with the provisions of this Act, may, within five years from the coming into force of the Marriage Act and other Laws (Amendment) Act, 2017†, convert their civil union into marriage:

Provided that persons who commenced the necessary procedures to contract a civil union prior to the coming into force of the Marriage Act and other Laws (Amendment) Act, 2017, and contract that civil union prior to the first day of December 2017, may also convert their civil union into marriage in accordance with this article.

Those who had a civil union before 1st September 2017, who would like to turn it into a marriage, had to wait 5 years after the act comes into force before turning it into a marriage. From 2017 one can simply do so.

BETROTHAL

- Chapter 5 - Promises of Marriage -

Thesis by Giovanni Bonello - "Promises of Marriage in Maltese Law" - 1958

- Development in Malta - up to the beginning of the British Domination, both marriage and bethrotal were governed by Canon Law.

- The moral and social importance of the contract of Bethrotal need hardly be stressed at all when it is realised that marriage constitutes the link of the family, and the family forms the basis of the State.

"the determination by two persons of contracting marriage, mutually externated and mutually accepted, transforms itself into a promise, reciprocal obligation of each other's will to put into effect what has been projected. This promise is a phenomenon of fact, which elevates into a contractual exigency what would otherwise be only a sequence of a biological laws."

"No definition of the contract of Bethrothal is to be found anywhere in our laws, nor any indication of what are its characteristics…. "We have to content ourselves with a definition adopted by our jurisprudence. Apparently the only occasion on which the court took it upon itself yo enunciate a definition of this contract, it ddid so by lifting the definition to be found in the Code of Canon Law, published three years previously. In this case, Filippo Said vs. Carmelo Said: **" Previus contractus de futuro matrimonio inter marem et foeminam initus"**

= *"Prior to entering into a contract concerning the future marriage between a man and a woman" translated from latin*

"Of course, such promises must be exchanged between the very parties who intend to contract marriage, and consequently, promises entered into by parents on behalf of their children do not produce any binding effect."

"The will to enter into the bethrotal-obliagtdon must be reciprocal, and therefore the "negotium juridical" is obviously a bilateral one.

- A just cause for breaking promises of marriage - page 49: "Serious illness has always been considered by our Courts to b a just cause for receding from a betrothal but also when it affects the other party. It is only fair and equitable that if a person feels that because of a disease he will be unable to carry out his duties toward the other spouse or will be unable to earn a living for the family, he should be allowed to break off the engagement"

If you enter into a promise of marriage, can anyone force you to fulfil that promise by getting married?

Article 2 of the Promises of Marriage Law makes it clear that “no court in Malta shall have jurisdiction, power, or authority, to compel, adjudge, decree or order any person specifically to perform or complete any promise of marriage made to another, or any contract or agreement entered into with another for the solemnization of marriage”.

Therefore, despite the fact that one has promised that s/he will get married, nobody may compel you to do so as that would nullify the marriage which is based on genuine consent.

Are you entitle to moral damages under Maltese law?

Jean Claude Micallef-Grimaud Thesis - The Rationale For Excluding Moral Damages From the Maltese Civil Code: A historical and legal investigation

Dr. Tonio Borg speaking in Parliament at Sitting Number 326 - Tuesday 18th October 1994.

"*..Jezisti dritt ta' danni morali* ***fanakroniimu liaj*** *Ii gnadu jezisti fis- sistema legali tagnna f'kas ta' tnassir ta' gnerusija...Ma nafx kemm gnad Jada! kazijiet ta' nies li jitgnarsu bi skrittura frivata u juru l-intenzjoni tagnhom liji:±zewwgudaqshekkformalment...*"

Victoria Farrugia vs Angelo Chircop - *case law has confirmed time and time again, this law only applies in those situations were the promise to marry was made in writing. Thus, when such promise is not in writing, no moral damages may be claimed if such promise is breached.*

Recent case law has also confirmed that the action for moral damages will fail ifthe promise to marry was merely verbal (as appears to be the general position nowadays). In the 2004 judgement, **Joseph Grech vs. Joanne Testa, 2004.**

The Court here, merely acknowledged in a factual manner that if the promise to marry is in writing then moral damages would be legitimate

The law under chapter 5 allows you both material damages and moral damages - in 1913, in a section which does not appear here,

Considering the fact that, at the time, it became apparent to all that forcing someone to go ahead with an unwanted marriage was unreasonable, an alternative 'remedy' was created. This took the form of monetary compensation for the injured party. This short law (containing merely three articles) prohibits the courts from ordering the specific performance of promises of marriage effect, but it then proceeds to grant an action for damages in case of a breach of such promise or contract to marry.

Damages and non-material damages. The latter kind of damages is granted by virtue of Article 3(2) of the law in question which states:

ARTICLE 3 - *(2)In any such action the party injured shall be entitled to recover, over and above and in addition to such damages and costs as may have been actually suffered and be due, according to law, such a reasonable sum of money, in compensation for the injury suffered, as to the court in its discretion, having regard to the character and station in life of the parties as well as to*

all others circumstances of the case, shall seem to meet, and as the court on the trial of the cause, shall award and assess.

Private Writing & Moral damages

Moral damages are those damages which are not pecuniary in nature and which relate to the harm caused to a person's integrity / dignity / reputation / self-esteem etc. As a general rule, moral damages may not be awarded in Malta except in those express cases when the law expressly provides that moral damages are due. This law is one of these exceptions.

The fundamental notion that is found in Chapter 5 (Article 3 (1) and (2)) revolves round a person who enters into a promise of marriage ('kitba tal-għerusija') by means of a private writing, and later on unlawfully breaches that promise or else, after making such promise, fails to honour that promise within a reasonable time from when a request to that effect is made. Such person shall be responsible to make good for the real damages and costs caused by such behaviour and also, for the moral damages suffered by the other party, which moral damages shall be assessed by the court after having regard to the character and station in life of the parties as well as to all the other circumstances of the case.

The requirement of a private writing for the promise of marriage emerges from Article 1233 (g) of the Civil Code which states that such a promise would not have any legal validity unless it takes the written form. Thus, a verbal promise of marriage would not suffice for the purposes of the consequences brought about by Chapter 5 of the Laws of Malta. This point was clearly established in an old and important judgement on this topic, namely 'Rosaria Dalli vs. George Atkins (23/01/1920)

The crucial point therefore is that in order for a person to claim moral damages when there is an unjustified breach of a promise of marriage, one must have previously entered into a written promise of marriage. If this has not been made, then one may rule out moral damages[1].

What about real damages?

Real damages refer to the actual expenses incurred by the other party as a result of the engagement as well as to the actual loss of income caused by this unlawful breach. Thus, if for example, one of the parties had already paid wedding deposits, bought a dress, refused to work overtime as a result of the wedding preparations and incurred other expenses, and then the other party calls off the wedding, the jilted party may seek compensation for such real damages. Obviously, any such claims must be backed up by substantial proof (receipts etc.)

In order to claim these damages, there must therefore have been some kind of promise of marriage but not necessarily in writing. [Very often, in real life, few couples would enter into a private writing today!!]. The giving of an engagement ring would leave no doubt as to the fact that this promise has been made – however, the giving of an engagement ring is not a sine qua non for a promise of marriage to have been made. There may well be other circumstances which clearly imply that a promise of marriage had been made. Typical scenarios include when the couple had bought a property together or when they have started making arrangements for a future wedding (ex: attending the Kana course etc). In the judgement below-mentioned (Caruana vs. Borg), the

couple hadn't even bought a property but they had been looking for a property and had already bought some items with the intention of using them during their marriage (a cooker and a fridge).

In **'Bernarda Caruana vs. Giuseppe Borg [1952],** the Court summed up the criteria required for an action for material damages to succeed, namely:
(i) the existence of the betrothal (l-eżistenza ta" gherusija)
(ii) the unjustified breaking off of the betrothal (reziliment ingust) and

(iii) material damages caused by this breaking off (danni materjali konsegwenza ta" dan ir-reziliment).

To determine the first element: "biex jinghad li hemm gherusija mhux mehtieg li jkun hemm kuntratt formali ta' gherusija jew li jkun gie moghti c-curkett [bhala arrha sponsalia] jew li jkun hemm l-istipulazzjoni taz-zmien taccelebrazzjoni taz-zwieg, jew il- konjizzjoni jew il-kunsens tal-genituri. Dak li hu mehtieg hija l-kapacita' tal-partijiet li jikkuntrattaw l-gherusija; u din il-kapacita' hija dik stess li wiehed jista' jikkuntratta z- zwieg".

In conclusion, one may add that one should not go to the other extreme where any form of relationship would be considered as constituting a betrothal. Thus, if a couple are simply frequenting one another / dating, this would definitely not amount to a betrothal and can lead to no such implications/ repercussions.

In the circumstances mentioned above, that is, when one of the parties breaks off the engagement without just cause, the other party may still seek real damages even when no writing has been made. See, once again, **'Rosaria Dalli vs. George Atkins (23/01/1920).** Such a demand would be regulated under the general provisions of the civil law regulating bilateral contracts which in terms of Article 992 of the Civil Code, cannot be annulled except with the consent of both parties. As the Court held in „Giuseppe Bellia vs. Giuseppe Grech [1958], "guridikament il-weghda taz-zwieg tikkostitwixxi veru proprju kuntratt bilaterali u ghalhekk wiehed mill-effetti tieghu huwa li ma jistax jithassar hlief bil-kunsens reciproku tal-partijiet u ghar-ragunijiet maghrufin fil-ligi [Art.992 Kap.16]."

In the case of **Dalli vs. Atkins (1922),** one of them said that they were not liable to pay any damages since there was **no private writing**. The court however considered this as not applying to the payment of moral damages. But for real damages, we have the law of tort. Real damages are the actual expenses made and payments for the loss of ability to work in the case of tor.

If someone carried out the plumbing of the house or the electricity of the house, then he can ask to be paid for them. This can be seen in the case of **Marcia Spiteri vs. George Cachia (CoA Superior) (2012).**

Form

Section 1233 in the Civil Code deals with the extinction of obligations and which is dealt with in obligations. However, in this section, there is a very important rule that all preliminary agreements have to be in writing to be valid. A private writing is enough. The public contract will usually follow. However, this is not in the same section which deals with preliminary agreements.

In this section it also states that a promise of marriage has also to be in writing. In Chapter 5, there is written that there is no just reason why you cannot continue with the marriage, if the reason is unjust then one would have to pay.

Reasons for breaking off marriage

There was a case in **1991** decided by the court of appeal civil superior, **Ines Barrbara vs. Carmen Igo,** the reason which was considered as a good reason for not going on with the marriage was that the male involved did not used to take care of his health.

Maria Spitervi vs. George Cachia (2009) (CoA Superior) gives an example of a good reason not materializing the marriage. In this case, the **groom was responsible for the baby which he had had with someone else.** The priest did not want to marry them in this case and the plaintiff did not want to proceed with a civil marriage and so she called off everything and asked for damages. The court did award her damages. There is a break down of these damages on pages 12, 13 and 14. There is also references to other judgments.

However, the Court said that the girlfriend was fully justified in refusing to marry him as there were grave reasons (the infidelity and the abortion) for so-doing. The Court awarded damages to the girlfriend to cover the expenses made for the wedding.

“Illi din hija kawza ta‟ reziliment ta‟ gherusija. Ghalkemm il-partijiet ma kienux irriducew il-weghda taz-zewg bil-miktub, u lanqas ma ghamlu skambju formali ta‟ crieket ta‟ gherusija, mhux kontestat, ghall-fini ta‟ din il-kawza, li -lpartijiet kienu “gharajjes” ghal kull fini u effetti tal-ligi.

Kienu ilhom johorgu flimkien ghal madwar sitt snin u nofs u kienu waslu biex ftehmu li jizzewgu, tant li kienu xtraw dar u hadu hsieb iwaqqawha u jergghu jibnuha skond ix- xewqa taghhom; kienu anke bdew jarredaw l-istess dar u ffissaw il-jum ghat-tieg. Kollox kien lest ghat-tieg li kellu jigi celebrat bir-rit kattoliku.”

If one recedes from the prospective marriage and it is my fault, she can keep that engagement ring even if it costed a fortune. It is considered as a kappara. This can be seen in the case of Mario **Dingli vs. Gladys Vella (2004)** (CoA Superior). In this case the question of the engagement ring is also taken into consideration.

‘Anthony Zammit vs. Monica Abela’ (Civil Court, First Hall) (15/10/2001), there was a situation where the couple had been together for 11 years and yet, the boyfriend was always procrastinating matters without ever giving a valid answer as to when they were getting married. Moreover, he was supposed to be working on the construction of their future matrimonial home when in fact, he was doing nothing of this sort and had lied about the construction permits. Moreover, he hadn’t even saved any money during their 11-year relationship and had shown aggressive tendencies towards her and others. The girlfriend had no option but to break off the relationship. The Court found that this was a just reason for termination and moreover granted her real damages in the form of a sum

money which she had spent on the property, a sum of money to cover the transport and food expenses which she had made on her boyfriend and a sum of money to cover a number of presents which she had given him.

- **Cohabitation Act - Chapter 614 of the Laws of Malta -**

We shall compare these articles, with the Civil Code provisions as in cohabitation, through states, recognises partnerships and in order to have a recognised partnership at law, it has to be registered, once registered and once there is a contract, the partners will engage a notary, which will draw a contract of partnership, cohabitation contract, and once enrolled in public registry, it will be registered in a special registry - acc to this act

"cohabitant" means a person who is continuously and habitually living with another person in the cohabitation home as a couple, and who enters into a public deed of cohabitation with the other person, provided that he is not already legally bound to another person.

“cohabitation home" means that home within which the cohabitants live together, belonging to either one of the cohabitants or to both of them, in whichever portion, and whether or not they possess it by title of lease or any other title, jointly or separately”.

Article 3 - Cohabitation by means of a public deed between the parties

1) persons who have the intention of cohabitating or persons who are already cohabitating and who want to be governed by the provisions of this Act, shall regulate their cohabitation by means of a public deed of cohabitation in conformity with the provisions of this Act.

2) the e cohabitation shall have effect from the date of the publication of the public deed of cohabitation with regard to the cohabitants, and from when it is enrolled in the Public Registery with regard to third parties.

Article 4 - Nullity of public deed

4 (1) 1) A public deed of cohabitation made between:

(a) persons, one of whom has not attained the age of eighteen (18) years, unless that person is so authorized by law in terms of sub-article (3);

(b) ascendants and descendents dances in the direct line;

(c) siblings, from the same parents, or from one of the parents;

(d) the person adopting and the adoptee;

(e) persons, one of whom is unable to give his consent for the public deed due to civil interdiction or incapacitation, or the lack of the use of reason;

(f) persons, one of whom, or both, who are married or are in a civil union, either between themselves or with a third parties, whether in Malta, or in any other country;

(g) persons, one of whom, or both, who are bound by aprevious public deed of cohabitation in accordance with this Act, together or with third parties;

(h) persons, or any one of them, who are bound by a registered or unilaterally declareded cohabitation in accordance with the Cohabitation Act, together or with third parties

- If I am already married or in a civil union, I cannot enter into a public deed to cohabit. Only in practice can this be done however, there cannot be establishment of this public deed. Sub-article f is the most important one. Persons who are under 18 also cannot cohabit. This also applies to ascendants and descendants in the direct line. Also persons who are civil incapacitated or interdicted.

- The public deed will also be null if it has any condition which indicates its dissolution. The notary will ask for a free status certificate, that is that one is not bound by anybody. This is found in Article 251(3) of the Civil Code. In schedule number 5, there is stated that when there is enrollment in the public registry, the registrar must give a certificate of cohabitation. Article 5(4) also has to be taken into consideration.

Article 5:

(4) The parties must declare before the notary if they had already entered into a previous public deed of cohabitation together, which act was dissolved, and the notary is obliged to record this declaration in the said deed.

- While the deed is being prepared, one cannot say a day which is going to be dissolved on or it will be dissolved for a particular cause. If a manner of exclusion of dissolution is included in the original public deed, then that public deed would be null and void. One must also include if they are going to included the community of assets between them. This is found in part 3 and has to be declared.

- A community of assets will be from the publication of the public deed. It will cease upon the dissolution of the cohabitation. The community of assets will consist of the cohabitation home, it will be the co-habitation home despite the deed being done in one of the names only. This is seen in Article 11.

Article 6, Chapter 614 insists on this registration…

Applicability of the Regulation on registered partnerships.	**6.** The provisions of the Regulation on registered partnerships shall apply to cohabitations enrolled by virtue of a public deed in terms of this Act.

The cohabitants who are not married acquire certain rights which belonged to the community of acquests - so a sort of community of acquits,

How ? Imagine a registered cohabitation and one of cohabitants requires a place of residency, and once acquired and he or she can appear on the contract on her own, the law says that if is a registered partnership, half of that property will be the property of the other cohabitant, so there is a co-ownership even if one of co-habitants appears on deed of sale and acquires an immovable property - since there is a registered cohabitant, half of the other property will be the other co habitant's.

Community of assets between cohabitants

10. (1) In the public deed of cohabitation, the parties may establish the community of assets in accordance with this Part.

(2) Saving any other provision of the law, the right of everyone cohabitant to the community of assets commences from the date in the publication of the public deed of cohabitation, and ceases upon the dissolution of the cohabitation.

11. (1) The community of assets between the cohabitants shall only comprise the following:

(a) the cohabitation home, when the acquisition is made after the public deed of cohabitation, even though the acquisition is made in the name of one cohabitant only, and even when the acquisition was made by moneys or other things which either of the cohabitants possessed prior to the cohabitation, or which, after the cohabitation, were transferred to him under any title of donation, succession, or other title, saving the right of such cohabitant to deduct the sum disbursed for the acquisition
of such property:

Provided that the said cohabitation home shall not be included in the community of assets if it was transferred to either of the cohabitants under any title before the cohabitants on, notwithstanding that such cohabitant may have been vested with. the possession of the property only after the cohabitation:

Provided also that the said home shall not be included in the community of assets when it was transferred to. either of the cohabitants by donation or succession, before or after the deed of cohabitation; and

(b) movables found in the cohabitation home, acquired after the public deed of cohabitation, even when such acquisition is made in the name of one cohabitant only, unless those movables were given to either of the cohabitants by a donation, personal gift or devolved upon them by succession from third parties:

Provided that in this article, "movables" shall include the ornamental and decorative movables kept at the cohabitation home, and shall exclude moneys, securities, vehicles, boats, and any movable which is purchased with the purpose of being used excludedsively by one cohabitant.

Article 12

12. Articles 1322, 1323 and 1325 to 1333 (both inclusive) of the Civil Code shall apply mutatis mutandis, limited to the community of assets between the cohabitants in terms of article 11

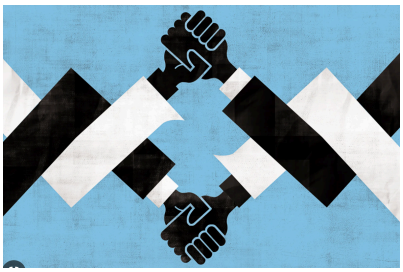
Article 25

25. (1) When two cohabitants contract a marriage or civil union between them, the public deed of cohabitation shall be terminated ipso facto from the day on which the same marriage or civil union is contracted.

(2) The Director of Public Registry shall record an annotation of this on the Cohabitation Certificate.

This Act makes reference to cohabitations that are registered, so the partners appear on a deed and the deed of cohabitation is registered at identity Malta. If it is registered, the notion of community od acquests also applies to cohabitation limitedly, because if one of the co-habitants buys on his own an immovable property to be used as a place of residence of the cohabitants, if something goes wrong and the cohabitation is terminated, that property which was bought by one of the cohabitants on his own, would be considered to belong to the both of them, just like in community of acquests.

Refer to Part III of the co-habitation act (chapter 614), Articles 10-12. Article 12 makes certain provisions that you find under the title of the community of acquests applicable to this limited community of assets between the cohabitants. Distinguish between the regime of the community of acquests in the case of married spouses and cohabitants, as with regards to cohabitants the law does not refer to the community of acquests but the community of assets. It is a very simplified regime of the community of acquests. Article 11 is an exhaustive list stating that the community of assets between the cohabitants shall only comprise the things listed. In the proviso, it includes that the movables found within the cohabitation home will also belong to both of them.



MEDIATION

Mediation is a matter to resolve disputes without going to court

Originally the notion of mediation was one with conciliation but through time it became an independent concept.

The word MEDIATION derives from the Latin MEDIUS/ MEDIUM - "in the middle"

A process in which participants are assisted by an impartial third party (Mediator/s) to explore the options available to them and to consider ways of reaching agreement. That is the role of the mediator, he is there between the parties facilitating, helping them, giving them opportunities to communicate and discuss and create options for a solution, he is there in the

Chapter 474, Mediation Act - Definition

"mediation" means a process in which a mediator facilitates negotiations between parties to assist them in reaching a voluntary agreement regarding their dispute;

Definitions

- Mediation is a **process** in which a Trained neutral facilitator assists the disputing parties in communicating their issues and exploring solutions.
- The Mediator does NOT render a decision or provide any evaluation of the case to the parties

In Maltese legislation **"mediation** means a process in which a mediator facilitates negotiations between parties to assist them in reaching a voluntary agreement regarding their dispute

Mediation - requires the consent of both parties ? NO

IMP the first step which is procedurally necessary both from a domestic *pov* and as well as from an international *pov*, in so far as Brussels too is concerned, is the letter of mediation -

Mediation procedure runs in the presence of an external mediator, an impartial party, who facilitates the discussion between the parties in the presence of their respective lawyers. The Mediator does not assign fault or make any orders but assists the parties in communicating with each other to reach an amicable settlement.

Whilst mediation is considered to be one of the most effective and efficient ADR methods, suitable for most civil and commercial matters, it can help resolve almost all disputes, including disputes related to employment, family and property law. In certain cases, such as personal separation or disputes related to certain types of leases, **mediation is compulsory**.

Going through mediation procedure can bring the following outcomes:

- **Reconciliation**: the possibility of restoring the relationship between the parties;
- ***Bonarja* or amicable settlement:** in case of no possibility for reconciliation, the mediator will try to find a solution suitable for both parties in order to reach the settlement of the conflict without a need to proceed to Court;
- **Close of mediation without a settlement:** if a favourable solution has not been reached, a case will move towards litigation in Court and mediation will be closed.

Mediator's Oath
The Minister responsible for Justice appoints a person to act as a mediator after consulting with the Judge/s presiding the Civil court (Family Section).

An Oath is taken before the Attorney General to discharge the duties of the office of mediator faithfully and impartially and keep all information received during the mediation sessions confidential.

Steps

1. Amicable letter (informing the other party with the wish to separate)
2. Conciliation
3. Mediation

Reconciliation

Mediator's first obligation - at the beginning of the mediation sessions, the mediator is obliged to attempt to reconcile the parties in both separation cases and divorce cases

S.L 12.20 - *Article 4 (4) The mediator shall in the first place attempt to reconcile the parties. During this stage the mediator shall hear the parties.*

IN FAVOUR OF RECONCILIATION FUNCTION - **Jean Poitras - Mediation: depolarising responsibilities to facilitate reconciliation**

"Reconciliation is the process of recreating a friendly relationship between the parties to a conflict. Parties are reconciled when they feel they have rebuilt their relationship during the course of mediation."

elationship during the course of mediation."

FINER REPORT 1974 - reconciliation - :the process of reuniting persons who are estranged

Conciliation: "Assisting the parties to deal with the consequences o the established breakdown of their marriage, whether resulting in a divorce or a separation, by reaching agreements or giving consents or reducing the area of conflict upon custody, support, access to and education of the children, financial provision, the disposition of the matrimonial home, lawyers' fees and every other matter arising from the breakdown which calls for a decision on future arrangements."

"The process of endangering common sense, reasonableness and agreements in dealing with the consequences of estrangement."

CONCILIATION HELPS COUPLES REACH A SETTLEMENT without resorting to litigation

Mediation/ Conciliation

(5) Where parties fail to reconcile the mediator shall mediate between them in an effort to reach an agreement to enter a deed of personal separation by mutual consent.

If no reconciliation of the parties is achieved, the Mediator is obliged to mediate between the parties and dedicate his efforts and skills "to reach an agreement to enter a deed of personal separation by mutual consent."

— Regulation 4, this is the actual role of the mediator in family mediation to reach an agreement. To help the parties to facilitate, so that the parties can reach a settlement that helps there futur and the well-being of there future.

Introduction

Mediation is mandatory in cases of personal separation, employment issues, property issues and company issues. During a mediation process, a mediator is present who directs and supports the parties to reach an amicable solution.

It is important to note that in family issues, during separation or divorce process, mediation is of utmost importance and is mandatory in separation cases under Maltese Law. Mediation also helps families to reach an amicable solution when children are present with regard to legal care and custody of children and visitation rights.

Mediation is also used in property issues and company issues since it is a cheaper and faster process by which one can reach a friendly agreement which is also helpful for any future business opportunities that the parties might have.

Sultana Legal will assists its clients throughout the mediation process by assisting them in order to try to reach the most advantageous result for its clients in the least possible short of time with the least expenses possible.

HISTORY ON SUBSIDIARY LEGISLATION ON MEDIATION

In family mediation, the law is found in subsidiary legislation SL 12.20. Family law on mediation is found in a subsidiary legislation and not in the main act because there is a historical explanation – up to 2003 there were 2 civil courts which were the civil court first hall (FHCC), the commercial court and the civil court second hall. The jurisdiction of the latter court was to consider matrimonial matters such as care and custody in relationships which was presided over by just one judge.

The second hall civil court had its advantages as it was presided over a judge which used to hold hearings after each of the parties presented an application in court either to proceed with a case of separation or for the court to establish who has the care and custody. Due to the backlog faced by this court, the legislator decided to act upon this as this emergency was tackled rather well.

The minister for justice grew up - under the major act - COCP - so subsequent legislation is made and in this, 2 panels of experts are very possible and in fact it started with the creation of 2 panels - experts and mediators

First we had this subsequent legislation, then a few years later we had the fully fledged mediation act - subsidiary legislation 2020, which deals with the family court mediation.

Legislation Framework

National legislation: Mediation Act - Chapter 474 of the Laws of Malta: Mediation Act AND S.L.12.20

Caruana first reefer to the subsidiary legislation 12.20, now why do I refer to the subsidiary legislation before the mediation act, simply because we have to distinguish between mediation in the family court and the general mediation across the board.

S.L.12.20 - That is Subsidiary legislation 12.20, the two panels, than the same rules appoint or establish what competency the mediation process has in the family court. Anything that has to do with separation and divorce first has to go through the mediation process. If there was a relationship and there not married and there is children, in order to safe gourd the interest of the children, the matters on maintenance, care and custody, the residence of the children, the issue of a passport, matters dealing with expenses for health and education, all these are also brought before the mediation.

Mediation Act - Chapter 474 of the Laws of Malta - The mediation act is structured in a way, that you have the definitions on what is mediation, and from there you can conclude that mediation in our jurisdiction is facilitative, it helps the parties, than there are the definitions on who is the mediator and how is the mediator appointed, it's very flexible. We saw at the beginning when we saw the definition of mediation we refer to the mediator as an independent trained individual. So skills are necessary and he has to have integrity and is independent and no conflict of interest between the parties.

SUBSIDIARY LEGISLATION 12.20 - Article 4

•4.(1)Any party wishing to proceed to initiate a suit for personal separation against the other spouse shall first demand authority to proceed from the Civil Court (Family Division), the Court of Magistrates (Gozo) (Superior Jurisdiction) (Family Division) as the case may be, each of such courts hereinafter in this regulation called the "Court", by filing a letter to that effect in the registry of the Court addressed to the registrar, stating the name and address both of the person filing the letter as well as that of the other spouse, and requesting the Court to authorise him or her to proceed. Such letter shall be signed and filed by the party personally or by an advocate or legal procurator on behalf of such party.

Authority to proceed

•(2) Where authority to proceed for personal separation is granted by the Court, it shall be lawful for either spouse to bring a suit before the Court, or counter claim for personal separation on the same or any other of the grounds mentioned in the Civil Code as if such leave referred to both parties on all of the said grounds.

Mediation

•(3) Before granting such leave the Court shall summon the parties to appear before a mediator, either appointed by it or with the mutual consent of the parties, and where the Court deems it expedient so to do, either of its own motion, or at the request of the mediator, or of either of the spouses, may appoint a children's advocate to represent the interests of any minor children of the parties.

Attempt to reconcile

•(4) The Mediator shall in the first place attempt to reconcile the parties. During this stage the mediator shall hear the parties.

Failure to reconcile

•(5) Where parties fail to reconcile the mediator shall mediate between them in an effort to reach an agreement to enter a deed of personal separation by mutual consent.

Hearing

•(6) The mediator may in camera hear the parties separately or together, in the presence of their advocates or legal procurators, and he may also hear any minor children of the spouses, the children's advocate, if any, and the advocates or legal procurators of the parties.

Without prejudice

•(7) The spouses and all other persons shall not be required to take any oath and no evidence may be adduced before any Court of anything divulged to the mediator in the conciliation or mediation procedures, of any proposal made by him or any other person during the procedures or of the reaction of either spouse to such proposals.

Reconciliation

•(8) Where the mediator manages to reconcile the parties he shall make a note to that effect in the records of the case, and transmit the records to the judge who shall thereupon close the proceedings.

Request for authorisation to publish deed

•(9) Where the parties have not reconciled, but they have through the office of the mediator or otherwise agreed to enter into a deed of personal separation by mutual consent, the mediator shall transmit to the judge a draft of the deed of personal separation, together with any comments thereon by the advocates or legal procurators of the parties, the children's advocate, if any, and his views, for the grant of the authorisation by the judge.

Why may authorisation not be given ? why is that ?

Example - I was involved in a separation which was INKOMBATTUTA - finally we came to an agreement and we submitted the contract and we receive the degree of authorisation, except the contract was not authorised - thankfully, k the judges had the decency of explaining why the judge was not authorised - as we said that access and sleepovers were gong to start when the children were 3 - the judge tough that in her opinion no sleepovers should start at 4 - and hence you had the case thrown back because of the judge's personal opinion =who the judge is will make a difference unfortunately even though it shouldn't

Authorisation to publish deed

•(10) The judge shall give his authorisation by decree in camera, but may before proceeding to give such decree hear either of the parties, the children or their respective advocates and legal procurators.

Note

- The primary intention of mediation is reconciliation - it is the mediator's obligation to ask but if one of the parties, either the husband or wife says that reconciliation is not possible it is not the job of the mediator to try and force reconciliation - at that point in time, the role of the mediator is that to assist the spouses to come with an out of court settlement -
- Mediation - has failed - so what happens then ? Then you have 2 months from the closing of the mediation to proceed wirth a lawsuit and you can only do that if you receive authorisation from the court -

Appointment of Judicial Assistant (ASG)

•(11) (a) During the mediation period the parties may jointly request the Court to appoint a judicial assistant in order to receive evidence on oath intended to facilitate the proceedings before the Mediator.

•(b) The judge shall decree on any such demand in camera, after hearing, if he so deems fit, the spouses, the minor children, and, or, their respective advocates and legal procurators.

- The appointment of a judicial assistant - somebody who is there to assist the judge - the law tells you that during mediation period - the judge shall decree on any camera— basically what is being said here is that the court can appoint a judicial assistant to receive certain evidence -

Imagine you have agreed on everything except bank account - as the wife has never interfered with husbands business and does not know what is in - at that time, it is possible to ask the court to interfere to break any deadlock -

Judicial assistant- that is a proof - with GURAMENT - and DAK LI JEZEBIXXI HUHWA PROVA

Time in which to proceed

•(12) Where the attempts of the mediator to reconcile the parties or to assist them in reaching an agreement as aforesaid have failed or upon the lapse of two months from the filing of the letter referred to in paragraph (1) (or such longer period as the Court may for good reason grant) no such conciliation or agreement has been reached, the mediator shall inform the judge in writing to that effect and the judge shall thereupon grant the leave requested.

•Provided that where in the opinion of the mediator, it is unlikely that such conciliation can be achieved or such agreement reached, the mediator shall inform the judge in writing before the lapse of the said period of two months or before such longer period as aforesaid.

Sub 12 - 2 month period - to open case of mediation or any other period for good reason - can ask for those 2 months to be extended to 3 months or 4

Provisional Orders

•**(13)** Without prejudice to paragraph 11 of this regulation, any party may during the pendency of the procedures in the conciliation, mediation, pre-trial or trial stages, request the Court to make such provisional orders or to issue such writ or warrant as may be necessary to safeguard its interest.

- also referred TO *PENDENTE LITE* Orders - HEENCE THESE proceedings take long - and it is often the case that you will need to ask the court for assistance - if the husband leaves the matrimonial home to pursue an affair an the wife stays with children at home - without any assistance =- she goes to a lawyer and starts proceedings - mediation is appointed and there is a 2 month Tim for when mediation started and during this time no maintenance is paid - and hence because these proceedings take ling it is possible to request provisional orders for maintenance, custody, access, or who is going to live in the matrimonial home - a form of interim relief - they do not expire - a court order remains a court order - it is done to help someone during proceedings -

It is not immediate - what we file in court a RIKORS - saying we have been married for so long - our marriage broke down as he is running away with the maid - he is not paying maintenance - pls give maintenance - however due to *audi alterem aprtem* - he has a right to be heard - and hence there is the with which he should answer - usually a 5 day period - it is a slow process still -

Decree agreements on collateral matters

•5.(1) Where during the conciliation or mediation stage the parties reach an agreement on the payment of an amount for maintenance that may be payable by one of them to the other either in respect of him or herself or in respect of the children, or agreement is reached as to the custody for visitation rights with respect to, the children, or on who is to continue to reside in the matrimonial home, the mediator shall make a note of such agreement which note shall be subscribed by the parties, and shall forthwith transmit such note to the Court which shall decree on the matter accordingly.

•(2) Where any party is not assisted by an advocate or legal procurator the mediator shall inform that party of the importance of the agreement and of his or her right to be assisted by an advocate or legal procurator or to take legal advice before subscribing to any such agreement.

Commencement of separation proceedings

•7.(1) Where the Court has authorised a spouse to proceed with a suit for personal separation, either party may initiate proceedings within two months or such longer period as the Court may, for grave reason, grant.
•(2) Upon such case being initiated and upon the close of the written proceedings, the Court shall proceed to appoint a children's advocate where in its opinion this is required in the interests of any minor children of the spouses, and shall thereupon proceed with the pre-trial stage of the case in which the Court shall fix time limits within which the parties shall produce all documentary evidence in support of their case and produce such witnesses whose evidence cannot be produced by affidavit.

Article 7 - this slide and the next - take with a pinch of salt which is a good procedure which if used would shorten litigation - judges have never ever applied this law - so here for instance we are talking about the written proceedings and the pre trial stage - KNOW THIS ONLY FOR ACADEMIC PURPOSES ONLY -

Pre- trial period

•(3) The pre-trial period shall close when all the documents and other evidence of the parties have been produced or the time within which they were to be so produced has elapsed. During such period the Court may also appoint such experts as it may deem necessary to assist it.
•(4) Except for grave and serious reasons to be stated by the Court, the pre-trial period shall not extend beyond one year after the close of the written proceedings.
•(5) During the pre-trial period and until it passes to give judgement, the Court may, on the demand of either party, give such provisional orders as it may deem fit, and may likewise, where grave reasons or change of circumstances so necessitate, alter or revoke such orders.

Then there is the pretrial sage and then the opening submissions -which are what you see in suits — explaining why their client is correct - the initial address to court - this doesnt happen wither - the first sitting in court is very quick and very hollow - opening solilquoys do not happen

Opening submissions
•(6) After the close of the pre-trial stage the judge shall fix the date for the trial where the advocates for the spouses and any children's advocates that may have been appointed shall make their submissions and counter submissions and the Court shall thereupon proceed to give judgement on all points at issue.

•Provided that if the Court shall not be in a position to determine the manner in which any community of property between the parties is to be liquidated, it may first determine all the other issues and then proceed to give judgement on that point at a later stage. The Court may also at any stage encourage the parties to enter into an arbitration agreement as provided for in the proviso to sub-article (6) of article 15 of the Arbitration Act.

Domestic violence during mediation proceedings.

8. Where, in the course of mediation proceedings, the mediator becomes aware of, or has reason to suspect, the occurrence of domestic violence, the mediator shall immediately inform the Judge in writing to that effect.

Exception to mediation - There is one exception to mediation and it is domestic violence - In such case you can ask for the mediation procedure to be waived - this is nice on paper but in practice it is not that easy as there are people who claim domestic violence but there isn't - or there is but are unable to prove it.

- As a rule, whatever takes place on mediation the mediator has to keep it secret but an exception is placed on the rule of confidentiality -this is an a case of domestic violence - this results during the mediation sessions, the mediator can break the rule of confidentiality, simply by drawing the attention of the court - and it has to be made in writing - but you must always keep in mind that if

there is danger, apart from wiring you can seek audience from the judge - but if it is a question of life and death, you draw the judge's attention and confirm it in writing

Mediation to apply also in other cases

9 (1) •prejudice to the provisions of regulations 4 to7 where any person desires to proceed before the Court in connection with:
•(a) disputes between parties, whether married or otherwise, concerning the custody and maintenance of, or visitation rights to their children; or
•(b) maintenance between spouses; or
•(c) variations of any matter regulated by any judgement of personal separation or by a deed of personal separation; or
•(d) Variation of any agreement in any matter referred to in sub-paragraph (a) hereof such party shall, in the first place, file a letter in the registry of the Court stating his or her claim containing the details listed in paragraph(1) of regulation 4 and signed and filed as therein provided.

Where party fails to appear before mediation
•11. Where a person has under the provisions of these regulations been summoned to appear before a mediator and fails to do so, the mediator shall inform the Court and indicate such failure together with any reason, if any, adduced by such person for the failure, and the Court when deciding the matter before it shall take due account and give due consideration to such failure.

Article 11 - not common but imp to keep in mind - not appearing for mediation can be taken into account by the court - what do you think the court would take into consideration and what would the court's reaction likely to be - one of itt is that it would not work n their favour - but in practical terms how will it not work in their favour

- the mediator can inform the judge of the absence - lack of commitment and lack of consideration - could affect the custody

The consequence of not appearing for mediation ? DR THAKE used absence to say - mediation as unsuccessful as you did not attend hence you forced me into litigation and litigation comes with costs and as a result you should be the one to bare those costs =-

- DURA LEX SAD LEX - it is the law and you have to accept it - you have to accept your fate

KEEP IN MIND

- The mediator DOES NOT come up with the decision.
  Who decides then in a mediation? **The parties themselves.**

- So after this huge exercise that takes place in mediation, with all the issues highlighted and discussed and options suggested and dis cussed and in the end a reality test is carried out to see which of the option / proposals might resolve the issue. Then it's not the mediator who decides whether they would accept such a settlement or not, it's the parties.

The parties themselves will inform the mediator and during the last session that they agree with the compromise that they have reached and they are ready to sign a simple contract known as the heads of agreement. That contract, if the dispute was a complicated one, let's say a civil or a commercial mediation, that settlement will than, that heads of agreement, that simple agreement would than be referred to there respective lawyers to come up with a more formal document / contract.

- In Malta the family court, the civil court, family section has a setup of mediators and in order to have a consensual separation, for example or a separation through judicial proceedings, you need to go to mediation first it's obligatory. So there we have mandatory mediation because the regulation impose this.

- There are two panels of mediators when we examine the law, where the parties can either choose to appoint a mediator themselves, so here we have a voluntary appointment and a private mediation, they don't need to go to court the mediator can invite the estranged spouses or partners to his office.

IF THEY AGREE
- They can discuss, they can carry out the mediation and do not even step into court. The private mediator would than (if they agree) read too them and the lawyers assisting the parties / spouses / partners by giving them advice on what the terms and conditions within the consensual separation contract. Once it is read, the mediator than draws up a report recommending that contract to the judge. There would be a decree as well before for the appointment of the private mediator and once the mediation takes place and once the parties settle on a contract, that particular draft would be referred for approval to the judge preceding the civil court family section.

IF THEY DONT' AGREE
- Now, if they don't agree, that same mediator appointed voluntarily by the parties would file a note informing the judge that sessions had taken place however the parties did not reach an agreement and recommends the mediation would be closed. The judge usually closes the mediation, issues a decree authorizing the parties to proceed to file judicial proceedings. They enter the normal litigation that we are used to at the civil court family section.

PROCEDURE

How the mediation and competences In the family court take part -so usually one of the parties seeking separation files a letter addressed to the registrar of courts, informing them that a particular spouse is seeking to separate for several reasons from party b - in their marriage they have a child or more and they ask the registrar to appoint a mediator, under certain regulations under S.L. 12.20 -as soon as it goes to the judge - it is the mediator on the roaster - a mediator is appointed and the decree obliges the mediator first to consider if a reconciliation between spouse is possible if it results that it is not possible then the mediator is obliged to try and help the parties to reach an agreement, a consensual separation agreement - a separation or divorce. During those sessions, all the items are considered - so first the interests of the child are considered - the mediator will discuss with the parties how this care and custody of the minor child are gong to be regulated - is it joint care and custody or exclusive ?

With regards to our situation, since it is a voluntary method, the legislator was correct to establish a panel - in which you would have a list of mediators and experts and this list would serve the parties who voluntarily choose a mediator from this list - hence itt is up to the parties themselves to chose a mediator to mediate in their family disputes - if the parties do not agree on who the mediator should be then there s a second panel - so in the family court, mediation can either be voluntary, the parti must go to mediation, hence it is compulsory, the mediation itself is compulsory., you can not institute a case for separation before you ahve a decree that you go to mediation mediation failed and the judge allows you to file a case.

In order to obtain authorisation from the court, I am obliged to go to mediation - hence under our law it is obligatory, the choice of the mediator is voluntary and if they do not chose it the court will choose the mediator for them.

The mediator listens and discusses all possible ways to find a favourable solution to settle the dispute, acting more as an advisor but without making any decisions himself. The final decision is made jointly by the involved parties.

The settlement of the mediation is generally non-binding unless specifically demanded by the parties.

Mediation in a family court - is free of charge - you write a letter and a mediator is appointed to your case, and usually the mediators provided but the court, unless the parties chose a mediator of their choice but the vast majority are alll free of charge - but the mediator is payed by the state so it is affordable - as it is flexible, mediation can take place anywhere and at whatever time agreed upon by the parties.

Everything depends on the will of the parties.

Benefits of mediation

1, Affordability - Mediation services are typically free or less expensive than other traditional means

2, **Timelessness** - no adjournments like in court - no submission of evidence - discussions between the parties and usually there is a time limit - mediation cases are usually heard in a more expedited manner. you are not bound by time. Time is within the reach of the parties themselves and they decide on the appointments and how long the mediation takes and that is that.

3, **Convenience** - can do mediation anywhere not like a court case - you are not logistically tied to a premises, so whatever the parties decide with the mediator, there is that flexibility.

4. **Understandability** - in a mediation language is simple - as understood by the parties - mediators are trained to set the participants at ease and they explain the mediation process and the mediators role in the process

5. **Privacy** - mediation is not a public affair like a court case - mediation it is private - with few exceptions, mediation sessions are held in private so that the parties need not air their grievance or complaint in a public setting.

Generally after a settlement and after a good mediation, the mediator gives a questionnaire to the parties to assess how they experience the mediation process and the mediator will know where he went wrong or when improvement is necessary.

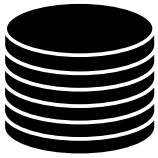
6. **Effectiveness** - High percentages of mediation cases mediated in a control dispute resolution situation show that the parties reach an agreement.

7. **Satisfaction** - Participants report a hight degree of satisfaction with the process and the results, the parties maintain control over the outcome.

Mediators role is not to be a detective!

Mediator structures the process and is able to separate the emotions - usually concentration will be on what is the interest of each party, how imp relationships are saved, in order to reach an agreement - with both interests, both parties, — there is communication in mediation. Proposal, when an option is payed on the table and it is discussed, the option will be discussed so there is reality testing there is encouragement to brainstorm. With the help of mediator you can not just say no, you have to say okay what other options can I come up with if I am not agreeing with that option. Hence it helps the parties to try and reach a compromise and the mediator through his her skills will see whether there are any hints to an agreement.

FEES



For example a family mediation, if the parties where to appoint the mediator themselves from the first panel they would have to pay about 35 euro per hour.

If a mediator is assigned to them by a court by a second panel because they didn't agree on a mediator than it is free of charge because the court, the state provides mediation at no cost at all. The mediator is not paid by the parties but is engaged by the state, the court services agency, they have a contract and they are paid by there own fees. If it where for the parties to appoint a mediator themselves voluntary and it's a private mediation they would have to pay per hour the mediator circa 35 euro according to the tariffs established by law.

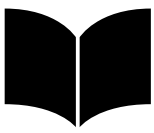
So it is affordable because if you have one session and during that session you mange to agree, it only costed you 35 euro which is split between the two parties. In court we know what happens, there is litigation, who ever wins the case has the right to claim the expenses from the losing party and court fees can be quite high.

The Mediator's Role

His role is NOT:
- to be a detective - get information and stop
- To be an arbitrator - decide the best outcome

The Mediator structures the process to:

- separate out emotions
- Move from positions to interests,
- Channel communication between the parties
- Provide a reality check
- Initiate brainstorming and generation of options
- Create opportunities to see the other side and
- Identify the signposts of agreement



In her book, 'Family Mediation' Lisa Parkinson, says that we need to distinguish between normal mediation and family mediation;

In this definition **Lisa Parkinson** states that;

"Mediation involves helping couples and their children manage conflict and change as constructively as possible. Family relationships can get very tangled. Family mediators cannot work magic in unravelling the tangles and the knots. They may, however, help parents and children (and, less directly, other family members) keep hold of the threads that are most important to them."

- This is a very interesting publication by Lisa Parkinson, she was a mediator herself, she is a solicitor and her specialty is family mediation. This abstract from her book is intriguing because it gathers everything that is connected with family mediation. This is facilitative mediation, it is not a question just to reach a settlement through he publication of a consensual separation contract, it's what is in that contract that must be discussed and how it will effect the parents in the future, the children and their interest, their well being, their education, their health, their bonding between their parents and the family. So the mediator roles is to facilitate to help the parties, put for a time being the emotions and arrive objectively at certain terms and conditions that will help them. Not only now but for the future through mediation.

- So the role of the mediator in family mediation, Mr Caruana would add is far more difficult, he has far more responsibility on his shoulders, referring to the mediator, because whatever is decided by the parties, whatever is discussed that could move forward towards a decision would effect not only the lives of those parties, the partners or the spouses who are now estranged but also the children especially and there family, grandparents and all that. Whatever terms and conditions are found in a consensual contract following a mediation will effect the whole family.

Lisa Parkinson: *"... a **form of mediation** in which the **mediator helps couples at any stage of** separation or divorce to consider the options available to them and to **communicate better** with each other in reaching joint decisions on present and future arrangements. These may include arrangements for children, finance, and property matters and the separation or divorce itself. The mediator has no power to impose a settlement. Parents are helped to consider their children's needs and feelings, as well as their own, and if appropriate children may be included in the mediation process. The p*arties are encouraged to take legal advice on the proposed terms of settlement."

<u>CHILDREN & Mediation</u>

It it rarely that children are brought into mediation room, in the family court. If there are concerns that effects directly the children and that they are not making progress, you can either close the mediation or discuss the issue whether to ask the family court to appoint an expert.
This expert is the children's advocate who would defend the children and raise matters concerning their interest, (the role of the children's advocate is regulated by law).

We have to be careful in this quotation, children normally we don't bring them to court. It is only through the child's advocate or if we are dealing with a juvenile court case this is something that doesn't have to do with mediation, there are the rules on how children are interviewed and these rules are found in the recently enacted law, chapter 602 which deals with care orders and what takes place in the juvenile court when children need to be interviewed, they are represented by child advocates but they are usually interviewed by way of evidence, by court appointed experts like psychologists.

In this abstract from Lisa Parkinson book, be careful when you read this phrase and if appropriate, children may be included in the mediation process. In Malta, no children are brought into the mediation session if there are concerns, the judge will decree and appoint a children advocate to report back to the court.

Now, Lisa Parkinson seems to say that, a mediation takes place only with the party, now as we know in family court, the parties are normally and consistently accompanied by there legal advisor, and if the contract is drawn up, usually the parties are advised on those provisions.

Article 89 COCP - 89. (1) The Minister responsible for justice shall nominate such panels as he may deem fit, each panel considering of such number as he may deem fait of advocates, legal procurators and other experts, to perform the duties of curators, advocates or legal procurators ex officio and experts in the Courts of Malta and Gozo, and public auctioneers as occasion mat require under this Code.

- refers to panels of expert, it was quite encouraging that a mediator is placed with this panels and confirms that the mediator is an expert in his field and has the necessary skills to facilitate communication between the parties and possibly an agreement between the parties.
- A mediator falls under the category of "other experts"
- Article 91 COCP - list of panel members published in the Government Gazette
- Article 92 COCP - duties are performed in rotation

Article 3, S.L12.20 - appointment of 2 panels of mediators

- a panel of experts in family matters (hereinafter in these regulations called mediators) being persons who in the opinion of the Minister have the necessary qualities to undertake the functions assigned to mediators by these regulations which panel shall consist of two lists as follows:
  (i) a first list consisting of persons qualified as aforesaid from amongst whom the parties in a case may select by mutual consent a person to act as mediator; and
  (ii) a second list of persons qualified as aforesaid who shall be appointed by the Court on a roster basis to act as mediators in a particular case.
  A person who has the necessary qualities as aforesaid may be included in both the first and second list;

- (*b*) a panel of experts in family law (hereinafter in these regulations called children's advocates) being persons in possession of the warrant to practice as advocates.

<u>European Framework</u>

Directive 2008/ 52/EC - this has been transposed into our law - of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters

- The objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.

- Now in our general mediation act which also transposed into our law the EU directive on mediation, it provides that if a mediator finds that he has a conflict of interest and declares it, it is up to the parties to decide whether to let the mediator continue with the mediation or not. There are case where there was conflict of interest and the mediation would stop there. The mediator may not ask the parties if they would like to continue. If you have a conflict of interest you stop there. Another mediator would than be assigned.

Council regulation EC - 2201/2003 - of 27th November 2003 - concerning jurisdiction and the recognition an enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation no 1347/2000.

Council Regulation no 4/2009 - of 18th December 2008 - on jurisdiction applicable law, recognition and enforcement

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The first point was mediation is a process. As explained mediation is divided into several stages;

- There is the pre-mediation stage where the mediator gets to know the parties and what the dispute is all about.

- Than there is the plenary session where the parties discuss and lay down their position in the dispute.

Mediators = summarise to make sure they got all the points correctly

The next step is once the story telling is finished during the plenary session, then on the bases on what was stated, the facts of that particular dispute, the mediator would discuss with the parties what are the different issues of that dispute.

And using the mediation tools, for example, a whiteboard or a flip chart, these issues are written down and highlighted. The parties actually have sight of the issues of their disputes. You have these issues written down. The mediator will discuss those issues which, first of all he would invite the parties to identify which of the issues are more important than the others, so there is a form of ranking.

Secondly a discussion will begin on each and every issue.
Now if there is a deadlock on a particular issue, what usually happens is that, the mediator who has the control of the process, who manages the process will break up the meetings, **the sessions into one to one meetings, known in other words as (technical word) in caucus**. There will be in caucus one to one meetings and there the parties can speak and discuss freely any concerns that they might have, any suggestions, any proposals that they would like to make to the other party but only with the discuss takes place on with the mediator.

- So once a one to one session with each of them finishes than on what the bases on what has been discussed, further discussions take place in plenary. The advantage of having one to one meetings especially in a family matter is that you might have an imbalance of power between the spouses.

LB vs Dr Victor Bugeja and PL Veronica Rossignaud as curators to represent LLT, 21st March 2023

The plaintiff LB, Maltese had a relationship with D, who is absent and nowhere to be found and is being represented by curators. The D, is Irish, and is currently living in Ireland.

The P and D had a daughter, EB, from their relationship, who is now 3 years old. The D left Malta Arbitrarily.

"the defendant jeopardised the best interests of the minor EB and is still putting these best interests in jeopardy until today, and this since she has vanished from the minor's life and escaped the responsibilities of parenthood"

MEDIATION - "That the mediation process has been closed by order of this Honourable Court and also due to the urgent nature of the case at hand, and the exponent has been duly authorised to proceed with the present sworn application by virtue of a court decree of this Honourable Court of the sixth of June of the year twenty twenty-two (06.06.2022) (here attached and marked as Dok D);"

it appears that the mother developed a chronic mental illness after the birth of the child, and although initially she sought the help of medical practitioners, by time she stopped receiving this help and refused to have medication. Her condition worsened, and by May 2022 she upped and left Malta to return to Ireland, her homeland. Plaintiff became the sole carer of the child after that point and instituted these proceedings to protect the interests of the child.

the Court will not go into detail as to the various incidents and episodes of the mother's mental breakdown as stated by plaintif

The Court is of the opinion that plaintiff's requests with regard to care and custody are to be upheld, given that defendant is no longer living here in Malta.

The court had to figure out a sum of maintenance which the D had to pay to P since he was raising up the child. The court said that P earns a wage of 3k a month, which should be enough to maintain them both but since the D's wage was unknown and her illness was taken into consideration, it was said that maintenance should be of 150eu per month from D.

The Court is of the opinion that plaintiff should be granted full parental authority over the child, to the exclusion of defendant, in order to facilitate any application needed for educational or health requirements, as they may arise from time to time, without the need to obtain defendant's prior consent in writing, given that the mother is presently absent from the life of the child. The Court finally stresses the importance of the role of the mother, all the more so in this case, for the better growth of the child. It is hoped that defendant will seek all the necessary medical help and participate in the child's upbringing, as E, will surely require her mother's presence in her life sooner or later.

Personal Separation

What is Separation?

Separation v. Divorce

- Separation doesn't end the marriage; it ends the effects of marriage. 1 of the things it ends is cohabitation – the fact that you lived together whilst married isn't a choice but an obligation imposed by law.
- With divorce the marriage ends.

Obligation of cohabitation to cease on separation - Article 35 of the Civil Code

•35.(1) By personal separation pronounced by a judgment, or authorised by a decree, of the competent civil court, the obligation of cohabitation of the spouses shall cease for all civil effects.
•(2) Separation pronounced by any other court shall not produce any civil effects.

Separation, divorce, annulment

- With an annulment the marriage was null ab initio. Never valid
- Divorce ends the marriage
- Separation ends the effects of the marriage

Most important obligations of marriage

- Maintaining the family
- Cohabitation

How is separation obtained?

1st step: mediation. It is untrue that you can stop someone from getting separated. If someone initiated a separation against you, it's going to happen – have to participate or case goes on without you and you suffer the consequences.
If there's an agreement, it's done by means of contract, if not it is done by means of the court.

Parties being admonished - doesn't happen anymore.
Before: parties would be summoned to court and judge would try to persuade them not to get separation - doesn't happen anymore as they're adults.

Article 36 of the Civil Code - How separation may be obtained.

36. Personal separation may not take place except on the demand of one spouse against the other and on any of the grounds stated in the following articles, or by mutual consent of the spouses, as provided in article 59.

Article 59 of the Civil Code - Separation by mutual consent.

•59.(1) Personal separation may, subject to the authority of the court by means of a decree in accordance with article 35, be effected by mutual consent of the spouses, by means of a public deed.
•(2) The court shall, before giving its authority, admonish the parties as to the consequences of the separation, shall endeavour to reconcile them, and may revoke, modify or add those conditions it may deem fit.
•(3) This decree shall have the same effect of the judgment given by the competent court.

Personal seperation

•37. (1) All suits for personal separation shall be brought before the appropriate section of the Civil Court as may be established by regulations made by the Minister responsible for justice:

•Provided that prior to the commencement of proceedings, a demand may be made for determining the amount of an allowance for maintenance during the pendency of the proceedings and for the issue of a decree ordering the payment of such allowance or a demand for the court to determine by decree who of the spouses, if any, shall during the pendency of the proceedings continue to reside in the matrimonial home.

Domestic Violence

•(2) The application containing the demand referred to in the proviso to sub-article (1) shall be duly appointed for hearing by the court and shall be served on the respondent together with the notice of such hearing:

•Provided that where domestic violence is involved, the said application shall be appointed within four days and the court may of its own motion before or after hearing the parties, issue a protection order under article 412C of the Criminal Code and, or a treatment order under article 412D of the same Code and the provisions of those articles shall mutatis mutandis apply to an order issued under this article as if it were an order issued under the corresponding article of the said Code:

•Provided further that for the purposes of this article and of article 39, "domestic violence" shall have the same meaning assigned to it by article 2 of the Gender Based Violence and Domestic Violence Act.

Domestic violence

When DV is involved, it's possible to forgo mediation and can also ask for 2 different types of orders

1. Treatment order – in case of anger management, alcohol/drug abuse etc. for something that can be treated
2. Protection order – referred to restraining order i.e. cant approach or in any way contact person in whose favour the order is issued.

Personal separation

•(3) The court shall summarily hear the applicant and the respondent and shall then, by decree, decide on the demand: Provided that the court may decide on the demand where the applicant or the respondent or both the applicant and the respondent fail to appear on the day of the hearing.
•(4) The decree referred to in sub-article (3) shall be an executive title deemed to be included amongst the decrees mentioned in article 253(a) of the Code of Organization and Civil Procedure and shall be enforceable in the same manner and under the same conditions in which such acts are executed.
•(5) The decree referred to in sub-article (3) shall cease to been forceable if the action for separation is not instituted within two months of the date of the decree or within such longer period as the court may in the same or in a subsequent decree allow.

•(6) The provisions of article 381 of the Code of Organization and Civil Procedure in pursuance of which a court of contentious jurisdiction may make the order therein specified shall apply, mutatis mutandis, as if the court in that sub-article were a reference to the appropriate section of the Civil Court before which the demand referred to in the proviso to sub-article (1) is made.

•(7) The decree and the order mentioned in this article may be only reviewed, altered or revoked upon an application made by the party seeking such review, alteration or revocation.

•(8) Subject to the provisions of article 39 of the Constitution, regulations made under this article may provide for the hearing of causes in camera.

•(9) The provisions of this article shall also apply in cases relating to maintenance, access, and, or care and custody of children, even when the parents are not married.

CAUSES FOR SEPARATION

ADULTERY •38. Either of the spouses may demand separation on the ground of adultery on the part of the other spouse.

DESERTATION •41. Either of the spouses may also demand separation if, for two years or more, he or she shall have been deserted by the other, without good grounds.

Main issues for separation:

Adultery (Art 38) and Desertion (art 41)
Art 41. Not simply someone leaving the matrimonial home. For there to be desertion TWO YEARS OR MORE need to pass.
Good ground for leaving the house: domestic violence, the best interest of the child, drug abuse etc.
What is a good ground is up to the judge.

Protection and Treatment Orders in lawsuit for personal separation

•39. Where a law suit for personal separation has been filed by either spouse and evidence of acts of domestic violence has been produced, the court may, either on an application of one of the parties or on its own motion in order to protect the safety of the parties involved or in the best interests of the child or children or of any other minor dependants of any of the spouses, issue a protection order under article 412C of the Criminal Code and, or a treatment order under article 412D of the same Code and the provisions of those articles shall mutatis mutandis apply to an order issued under this article as if it were an order issued under the corresponding article of the said Code.

Excesses, cruelty, etc.

•40. Either of the spouses may demand separation on the grounds of excesses, cruelty, threats or grievous injury on the part of the other against the plaintiff, or against any of his or her children, or on the ground that the spouses cannot reasonably be expected to live together as the marriage has irretrievably broken down
•Provided that separation on the ground that the marriage has irretrievably broken down may not be demanded before the expiration of the period of four years from the date of the marriage, and provided further, that the court may pronounce separation on such ground notwithstanding that, whether previously to or after the coming into force of this article*, none of the spouses had made a demand on such ground.

Another issue for separation: excesses, cruelty etc.
Insisting on spending a lot of time on a person of the opposite sex – husband had repeatedly asked her not to spend time with him. Court ruled this case as cruelty

Irretrievable breakdown
Applies when none of the others do. Spouses stop getting along. Nowadays it no longer needs to be justified.

Annulment = Need to prove there was a defect at the time when consent was given.

Reconciliation

Because separation doesn't end the marriage, it merely terminate its effects, its possible to reconcile.
Reconciliation can be as easy as living together again. Combination of intention (of ending separation and living together) and actually living together.

•42. (1) The action for separation shall be extinguished by the reconciliation of the spouses.
•(2) Nevertheless, where a fresh ground for separation arises, the plaintiff may in support of his demand also allege the previous grounds.

43. Death of either spouse

•43. The death of either of the spouses shall, except in the case in which the judgment of separation may produce the effects referred to in articles 48 to 52 inclusively, extinguish the action of separation, even though such death takes place after the demand.

If someone dies, the action for separation is extinguished – nature done that for you.
1 element of separation you can continue if heirs want to continue it. What part of the separation is that? In the case of community of acquests.

Case going on: wife mentions boyfriend in her will whilst getting separated from her husband. Technically husband was the heir. In the will she mentioned her boyfriend.

Grounds on which both spouses may demand separation not to bar action by either of them

•44. The existence of grounds on which both spouses may demand separation shall not operate so as to bar either of them from bringing a suit for separation against the other.

Discretion of court where defendant also might have demanded separation

•45. Nevertheless, where it appears that the defendant also had grounds on which he or she might have demanded separation, the court may take such grounds into consideration for the purposes of the provisions contained in article 52.

Consequences for spouse giving cause to separation

•48.(1) The spouse who shall have given cause to the separation on any of the grounds referred to in articles 38 and 41,shall forfeit –

•(a) the rights established in articles 631, 633, 825, 826 and 827 of this Code;

•(b) the things which he or she may have acquired from the other spouse by a donation in contemplation of marriage, or during marriage, or under any other gratuitous title;

•(c) any right which he or she may have to one moiety of the acquests which may have been made by the industry chiefly of the other spouse after a date to be established by the court as corresponding to the date when the spouse is to be considered as having given sufficient cause to the separation. For the purposes of this paragraph in order to determine whether an acquest has been made by the industry chiefly of one party, regard shall be had to the contributions in any form of both spouses in accordance with article 3 of this Code;(d) the right to compel, under any circumstances, the other spouse to supply maintenance to him or her in virtue of the obligation arising from marriage.

(d) the right to compel, under any circumstances, the other spouse to supply maintenance to him or her in virtue of the obligation arising from marriage.

- right to receive maintenance for yourself is lost. The children are unaffected by this.

(2) The things mentioned in paragraph *(b)* of sub-article (1) of this article shall revert to the other spouse, and the acquests mentioned in paragraph *(c)* of the said sub-article shall remain entirely in favour of such spouse, saving any right which the children or other third parties may have acquired thereon prior to the registration of the judgment of separation in the Public Registry.

- 48. (IMP) Consequences for the breakdown of the marriage

Marriage is technically a contract and if you breach a contract there are consequences. Art 48 mentions which these consequences are.

If you either cheat on or desert your spouse, you lose the right to inherit them. You lose gifts in contemplation of marriage.

- As a rule anything which is acquired in marriage is jointly owned and each spouse has half. This is an exception as a punishment to the spouse who caused the separation.

- If A's wife cheated on him on Jan 1st and A bought a car from his salary on December 31st, that car belongs to both. If A bought the car on Jan 2nd, from his salary or "chiefly through his industry" that car is his. There has to be a date.

51. power of court in certain cases

•51.Where separation is granted on any of the grounds mentioned in article 40, it may produce any of the effects mentioned in article 48, if the court, having regard to the circumstances of the case, deems it proper to apply the provisions of that article, in whole or in part.

- Exception to the rule. It doesn't need to be adultery or desertion only – those are automatic but court had discretion to apply it in case of art 40 as well. Art 40= excess, cruelty…

Discretion of Court in certain cases

•52.It shall also be in the discretion of the court to determine, according to circumstances, whether the provisions of article 48 shall be applied, wholly or in part, in regard to both spouses or to one of them, or whether they shall not be applied at all in regard to either of them, if both spouses shall have been guilty of acts constituting good grounds for separation.

Pendente litem orders

46. Matrimonial Home

•46.During the pendency of the action for separation, either spouse, whether plaintiff or defendant, may leave the matrimonial home and may, whether or not he or she has left the matrimonial home demand that the court shall determine who of the spouses if any shall reside in the matrimonial home during the pendency of such action.

Maintenance

Article 46A

•46A. During the pendency of the action for separation, either spouse, whether plaintiff or defendant, may demand from the other spouse a maintenance allowance in proportion to his or her needs and the means of the other spouse, and taking into account also all other circumstances of the spouses.

- One of the orders a court can give is who lives in the matrimonial home for the duration of the separation. If you're getting separated, it can be detrimental to either of the parties or the children

MAINTENANCE

•54.(1) The spouse against whom the separation is pronounced shall not, as a result of such separation, be relieved from the obligation of supplying maintenance to the other spouse, where, according to the provisions of Sub-title I of this Title, such maintenance is due.

•(2) The amount of maintenance referred to in sub-article (1),and the maintenance due to children in the event of separation, shall be determined having regard to the means of the spouses, their ability

to work and their needs, and regard shall also be had to all the other circumstances of the spouses and of the children, including the following:

Custody
47. Care of children

•*47. During the pendency of the action the court shall give such directions concerning the custody of the children as it may deem appropriate, and in so doing the paramount consideration shall be the welfare of the children.*

Custody is a **decision-making** right. Whoever has custody has the authority to decisions on behalf of the child. Where the child goes to school (gov school etc), hospital, can they or can they or can they not go abroad.

Can lose custody for grave reasons: Domestic violence – on the wife in front of the children is considered to be violence as well.
Others: alcohol abuse, drug abuse.

Custody

•56.(1) On separation being pronounced the court shall also direct to which of the spouses custody of the children shall been trusted, the paramount consideration being the welfare of the children.

•56A. The court may, for grave reasons, at any time during the cause for separation or when the parties are separated, upon the demand of one of the parties, declare that the other party is not fit to have the custody of the minor children of the parties, and where the court issues such a declaration, the party so declared, upon the death of the other party, shall not be entitled to assume the custody of the minor children without the authorisation of the court.

Community of Acquests

•55. (1) The court may, at any time during the cause for separation, upon the demand of any of the spouses, order the cessation of the community of acquests or of the community of residue under separate administration existing between the spouses.

•(2) The order for the cessation of the community as provided in sub-article (1) shall be given by means of a judgement from which every party shall have a right of appeal, without requiring permission from the court for this purpose.

•(3) The order of cessation shall have effect between the spouses from the date of the judgement on appeal or, if no appeal is entered, from the date when the time allowed for the appeal lapses, and it shall remain valid even if the cause for separation is discontinued.

•(4) Prior to ordering the cessation of the community as provided in this article, the court shall consider whether any of the parties s**hall suffer a disproportionate prejudice** by reason of the cessation of the community before the judgement of separation.

•(5) The order of cessation under this article shall, at the expense of the party who demanded such cessation, be notified to the Director of Public Registry and it shall have effect as if the cessation of the community of acquests or of the community of residue under separate administration were made by public deed.

•(6) Unless the court, in its discretion, upon the demand of one of the parties, shall have ordered the cessation of the community of acquests or of the community of residue under separate administration existing between the parties at the time of commencement of the cause for separation, on separation being pronounced, the court shall direct that the community of acquests or the community of residue under separate administration shall cease as from the day on which the judgement becomes res judicata.

•(7) The court may however where in its opinion circumstances so warrant direct that an asset or assets comprised in the community be not partitioned before the lapse of such period after the cessation of the community as it may in its direction determine.

•(8) Any direction given by the court in virtue of sub-article (7),may on good cause being shown, be changed or revoked by the court.

•Desiree Lowell sive Desiree Lowell Borg v Michael Lowell

•F'dan ir-rigward jigi osservat illi l-ilment tal-attrici illi id-dhul mensili tal-konvenut huwa superjuri ghad-dhul mensili taghha ma hiex konsiderazzjoni fid-decizzjoni jekk it-terminazzjoni hiex ser tirreka pregudizzju lill-attrici. Jekk is-sottomissjoni tal-attrici f'dan ir-rigward ghandha tinftiehem illi sakemm ma tigiex terminata l-komunjoni tal-akkwisti allura hija qed tippartecipa mid-dhul mensili tal-konvenut billi ir-residwu mis-salarju jifforma parti mill-komunjoni, il-Qorti hi tal-fehma illi tali ragunament ma jikkwalifikax bhala pregudizzju mhux proporzjonat u dan ghaliex fil-kawza odjerna intavolata mill-istess attrici wahda mit-talbiet taghha hija proprju it-terminazzjoni tal-komunjoni tal-akkwisti.

•Fit-tielet lok il-Qorti tosserva li l-waqfien tal-komunjoni tal-akkwisti ma jista' jkun ta' ebda pregudizzju ghas-sehem tal-attrici mill-assi li talvolta din tiskopri wara li twaqqfet il-komunjoni, ghax il-waqfien tal-komunjoni jirriferi ghal futur u mhux ghal dawk l-assi li diga` dahlu u qeghdin fil-komunjoni anke jekk ad insaputa tal-attrici.

•Daniela Mizzi vs Duncan Peter Mizzi

•"it-terminazzjoni tal-komunjoni kien ser igib beneficcju in kwantu jevita li xi parti jew ohra taghmel xi dejn li 'l quddiem ikun jista' jigi imputat lill-komunjoni."

Moral, recent (incorrect) interpretations

•SB vs LB (273/2018 JPG) Qorti Civili (Sezzjoni tal-Familja), 6 Frar 2019.

•Fir-rigward tal-argument tal-intimat illi r-rikorrent tista' tirrikorri ghal proceduri tal-mandat kawtelatorju jekk hija thoss li tista' tbati xi pregudizzju irrimedjabli, din il-Qorti taghraf li r-rikorrenti qed tallega illi l-intimat heba minnha, l-assi appartenti lil komujoni tal-akkwisti, u li ghalhekk m'ghandhiex stampa cara tal-assi kollha formanti parti mill-komunjoni tal-akkwisti. Il-Qorti ghalhekk tqis illi f'dawn ic-cirkostanzi ma jkunx ghaqli li tordna t-terminazzjoni tal-komunjoni tal-akkwisti f'dan l-istadju tal-proceduri.

•AB vs CB (155/2016 AGV) Qorti Civili (Sezzjoni tal-Familja), 14 Gunju 2019

•Dan iwassal lil dina l-Qorti biex tkun imhasba, fis-sens jekk l-attur ma sab l-ebda problema biex jippregudika dak li kien haqqha l-konvenuta waqt iz-zwieg, aktar ser ikun f' posizzjoni li jippregudikalha d-drittijiet taghha, jekk tigi tterminata l-komunjoni tal-akkwisti, u allura indubbjament mhux ser ikun pregudizzju proporzjonat.

Matrimonial home

•55A.(1) In pronouncing the judgement of separation, the court shall on the demand of either of the parties, order, according to circumstances:

•(a) that any one of the parties shall be entitled to reside in the matrimonial home, to the exclusion of the other party, for the period and under those conditions as it considers appropriate; or

•(b) that the matrimonial home is to be sold, where it is satisfied that the parties and their children shall have adequate alternative accommodation, and that the proceeds of the sale shall be assigned to the parties as it considers appropriate; or

•(c) where the matrimonial home belongs to both parties, to assign the matrimonial home to any one of the parties, which party shall compensate the other party for the financial loss suffered

Liquidation of COA. There more there is the more complicated it gets.

Everything acquired from the moment one gets married is jointly owned irrespective of who bought it.

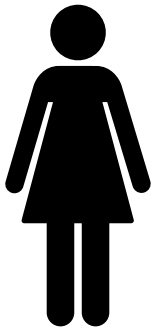
Car bought during marriage in wife's name, it belongs to both.

This applies to the good and the bad – if there's a debt, it's also shared.

There are 2 exceptions to the COA

1. Inheritance – its yours
2. Donation – it's yours

Anything you had before marriage is also yours.



A has a house before marriage. House is sold during marriage. The proceeds of that house are technically COA money as they happened in marriage. Credit against the COA.

You can request the termination of COA pendente lite i.e. don't need to wait for the termination of the case, in order to liquidate the COA and start living a financially free life.

CORSA.
You live your married life having the separate administration of assets. Live like you don't have COA but when you come to liquidate the community or the administration, you split what has accumulated jointly. If 1 person nothing and the other has 100,000, each gets 50,000.

Power of court to suspend action of separation.

•58.(1) The court may, where it shall deem it expedient so to do in the interest of the spouses and the children, order the suspension of the action of separation for such time as it may deem proper, and give such interim directions as circumstances may require.(2) The decree ordering the suspension of the action, or giving such interim directions, shall be subject to appeal.

Surnames
•62.(1) Notwithstanding the provisions of sub-article (4) of article 4 of this Code, the wife may, on separation, choose to revert to her maiden surname or to the surname of her predeceased husband. In the case of a consensual separation, a declaration of such choice shall be made in the public deed of separation, and in the case of a judicial separation, by a note filed in the records of the case before final judgment.

•(2) The court may also, at the request of the husband which may be made at any time before judgment, prohibit the wife from continuing to use the husband's surname after separation, where such use may cause grave prejudice to the husband.

•(3) Upon separation, spouses who have contracted marriage after the coming into force of the Marriage Act and other Laws(Amendment) Act, 2017 may choose to revert to their surname at birth or to the surname of the predeceased spouse.

•(4) In the case of a consensual separation, a declaration of such choice shall be made in the public deed of separation, and in the case of a judicial separation, by a note filed in the records of the case before final judgment. (5) The Court may also, at the request of any one of the spouses which may be made at any time before judgment, prohibit the other spouse from continuing to use the surname of the other spouse after separation, where such use may cause grave prejudice to the spouse making the request.

Erga omnes

•62A. Personal separation shall only be operative in regard to third parties from the day on which the judgment or the public deed, as the case may be, shall have been registered in the Public Registry. Any such registration shall include a reference to any declaration or prohibition with regard to the surname of the spouses after the judgment.

•66.In all cases, the effects of the separation shall not cease in regard to third parties, except from the day on which the deed is registered in the Public Registry.

Reunion

•63.The spouses separated whether by a judgment or by mutual consent may at any time reunite, and thus put an end to the effects of separation, wholly or in part, saving any right which third parties may have acquired.

Voluntary cohabitation to operate as a reunion

•64.(1) Voluntary cohabitation shall operate as a reunion, and shall restore the obligations of cohabitation and of maintenance arising from marriage. Other effects of separation may cease by public deed

•(2) Any other effect of the separation, however, shall not cease except in virtue of a public deed.

•**65**.Any such deed may take place even after the spouses shall have returned to cohabitation, but, in any such case, the deed shall be void if it is not made with the authority of the court.

Carmen Spiteri v. Joseph Spiteri, 2018 COURT OF APPEAL

The wife P, **L-attrici qed titlob dikjarazzjoni ta' separazzjoni personali minn ma' zewgha u tallega li l-hajja konjugali taghhom tfarket ghar-ragunijiet unikament imputabbli lill-konvenut fosthom abbandun, sevizzi, minaccji, vjolenza, eccessi u ingurji gravi fil-konfront taghha kif ukoll inkompatibilita' ta' karattru bejniethom.**

Il-partijiet izzewgu fil-15 ta' Lulju 1988 u ghandhom tlett itfal li illum huma kollha maggiorenni.

ABBANDUN.

L-attrici tghid li l-konvenut abbanduna d-dar u l-familja, l-konvenut jghid li hadem u stinka ghall-familja u telaq mid-dar meta ma setax jissoporti aktar l-provokazzjonijiet tal-mara.

Fil-kawza fl-ismijiet "**Giuseppa Camilleri vs Rocco Camilleri**" deciza mill-Prim Awla tal-Qorti Civili fit-18 ta' Novembru 1964, ntqal li:

" L-essenza tal-abbandun tirrisjedi fil-persistenza u l-kontinwita' ta' wiehed jew wahda mill-konjugi illi jghix apparti mill-konjugi l-ohra jew l- iehor, skont il-kas minghajr raguni tajba".

"**Jane sive Giovanna Cordina vs Dottor Albert V Grech et noe**" deciza fil-11 ta' Jannar 1965, dwar l-abbandun ntqal li:

"Biex l-abbandun jkun kawzali ta' separazzjoni personali hemm bzonn li (1) jkun ghall-perjodu ta' almenu sentejn u (2) li jkun minghajr giusta kawza. L-apprezzament ta' cirkostanzi ta' fatt jekk tezistiex jew le giusta kawza huwa mholli fil-kriterju tal-guidikant".

ADULTERJU.

Il-konvenut jallega li martu ikkommettiet adulterju ma' Charles Poole, illum mejjet, li kienet impjegata mieghu fix-xoghol tal-banka tal-lottu. Hu jghid li kien hemm wisq kunfidenzi bejniethom, kienet izzommlu il- kelb, twasslu l-airport meta jsiefer u issuq il-karozza Pajero, propjeta' tieghu. Hu jghid li inkariga investigator gharbi li ghamel xaharejn fuq il-kaz u l-unici ritratti li rnexxhielu jigbed kienu meta wasslet lil Charles Poole l-airport.

"**Rosina Micallef vs Angelo Micallef** " deciza mill-Prim Awla tal-Qorti Civili fis-27 ta' Gunju 1964, dwar l-adulterju ntqal:

"L-adulterju jista' jigi ppruvat permezz ta' indagni u presunzjonijiet, purche dawn jkun gravi, precizi u konkordanti, b'mod li ma jhallux ebda dubbju f'min ghandu jiggudika."

Fil-kawza fl-ismijiet "**Josephine Edwards vs Avukat Dottor Joseph H. Xuereb noe**" deciza mill-Prim Awla tal-Qorti fit-22 ta' Frar 1961, ntqal:

"Ghall-prova tal-adulterju ma hemmx bzonn ta' testimonjanza 'de visu' jew il-flagranza, imma bizzejjed il-konkors ta' cirkostanzi precizi, gravi u univoci, illi jwasslu lill-giudikant ghall-konvinciment tal-fatt."

Mill-banda l-ohra pero' dak tal-konvenut jirrizulta ammess. Hu ma jichadx li Doreen Zammit ghamlet xi zmien tghix fl-apartament mieghu f'Bugibba, pero jinsisti li kien ha hniena minnha ghax kien kecciha 'l barra zewgha, u gieli wassalha il-Qorti. Jghid li ma kellux relazzjoni maghha, meta ried seta' jitfaghha 'l barra, u kienet torqod fuq sufan fis-salott. Pero' dwar Rita Agius, fis-seduta tal-20 ta' Novembru 2012, Fol 1059, iddikjara: " Ghandi partner habiba tieghi bhal ma ghandha hi. Jisimha Rita Agius u toqghod Santa Venera. Gieli rqadt ghandha pero' ma nghix maghha. Relazzjoni maghha ma ghandix".

Ezaminat mill-gdid ir-rikors guramentat tal-attrici jirrizulta li fil-premessi taghha ma takkuzax lill-konvenut b'adulterju, izda fost l-akkuzi taghha hemm inkluz "ingurji gravi". Gie diversi drabi ritentu mill-Qrati taghna illi konfidenzi zejda minn ragel jew mara mizzewga ma' terzi jammonta ghal 'ingurja gravi' anke jekk ma jirrizultax l-adulterju. Multo magis jekk l-adulterju jirrizulta fil-konfront tal-konvenut bhal fil-kaz odjern.

Ghaldaqstant il-Qorti qed issib lill-konvenut hati ta' ingurji gravi fil- konfront tal-attrici.

"**Rose Gauci vs Salvatore Gauci" (P.A. tal-1 ta' Ottubru 2002)** *in vista tad-diffikolta` tal-prova ta' l-adulterju, l- adulterju jista' jigi ppruvat permezz ta' indizji u cirkostanzi ohra li ma jhallu ebda dubju fil-gudikant.*

Fil-kaz in ezami ma hemmx dubju li l-appellat ikkommetta adulterju, tant li, matul il-kors tal-kawza, ammetta li kien qed jikkonvivi ma' mara ohra wara li meta telaq mid-dar huwa kien mar jghix ma' mara differenti minn dik li qed jghix maghha bhalissa. Kif inghad fis-sentenza "**Rose Gauci vs Salvatore Gauci" (supra)** *"... l-artikolu 38 tal-Kapitolu 16 tal-Ligijiet ta' Malta jghid illi "Kull parti mizzewga tista' titlob il-firda minhabba l- adulterju tal-parti l-ohra". Illi kif tajjeb osservat din il-Qorti s-sentenza taghha tas-16 ta' April 1953 fil-kawza fl-ismijiet "**Rita Spiteri vs Avukat Dr. Albert V. Grech et noe". (P.A. Kollez. XXXVII.II.693)** l-adulterju "hija bla dubju l-kawza l-izjed gravi li ghaliha l-ligi tawtorizza s- separazzjoni personali; izda, stante d-diffikulta` tal-prova, kif turi l- assenza ta' dispozizzjoni legislattiva li tillimita din il-prova, huwa ormai pacifiku fid-dottrina u fil-gurisprudenza li l-adulterju jista' jkun pruvat permezz ta' indizzji u prezunzjonijiet, purche` dawn ikunu gravi, precizi u konkordanti, b'mod li ma jhallu ebda dubju f'min ghandu jiggudika".("**Rosina Micallef vs Angelo Micallef" P.A. - 27 ta' Gunju 1964**).*

wara li ezaminat l-atti hija tal-fehma li l-appellat huwa li jahti principalment ghat-tkissir taz-zwieg. Huwa minnu ukoll li l-partijiet ftit ghexu effettivament flimkien peress li l-appellat ghal hafna snin kien jahdem barra minn Malta. Ghalhekk in linea mal-gurisprudenza citata, din il-Qorti tilqa' dan l-

aggravju u taddossa r-responsabilita` principali lill- appellat – anke ghaliex l-allegazzjonijiet tieghu li martu ukoll ikkomettiet adulterju ma gewx sufficjentement pruvati, kif anke qalet l-ewwel Qorti u

Fuq kollox, l-appellanti qatt ma abbandunat il-familja kif effettivament ghamel l-appellat u kif jirrizulta mill-istess sentenza appellata. Ghalhekk mhux necessarju li l-Qorti tezamina l-aggravji l-ohra ghar-rigward tar-responsabilita` ghat-tkissir taz-zwieg.

ECCESSI, MOHQRIJA u SEVIZZI.
Fil-kawza fl-ismijiet "**Caterina Agius vs Benedict Agius**" deciza mill-

Prim Awla tal-Qorti Civili fit-13 ta' Gunju 1967 ntqal li:

"Il-ligi taghna tqieghed bhala mottiv li jiggustifikaw l-azzjoni, l-episodji saljenti tal-hajja konjugali u mhux incidenti minuri".

Antonia Mifsud vs Giuseppe Mifsud" deciza mill-Qorti tal-Appell fil-21 ta' Frar 1969 ntqal:

" biex jkun hemm mohqrija jehtieg jkun hemm mhux xi att izolat ta' xi daqqa waqt xi tilwima imma l-persistenza f'certa mgieba hazina li turi li l-konjugi ma jistghux jkomplu jghixu flimkien".

t "**Maria Mifsud vs Vincenzo Mifsud"** deciza mill- Prim Awla tal-Qorti Civili fit-30 ta' Gunju 1961, ntqal li :

"Certi fatti, kliem u modi ta' azzjoni jew atteggjamenti illi jistghu jirrendu l-hajja komuni insopportabbli, huma ritenuti mid-dottrina bhala sevizzi".

MANTENIMENT

L-appellanti ghalhekk ilmentat ukoll mill-fatt li l-Ewwel Qorti ma ordnatx aktar hlas ta' manteniment ghaliex il-konvenut appellat kellu jkun addossat bit-tort wahdu ghat-tkissir taz-zwieg. Mill-atti tal-kawza jirrizulta li sakemm giet deciza l-kawza mill-Ewwel Qorti, l-appellat kien qed ihallas is-somma ta' €140 fix-xahar bhala manteniment lill-appellanti peress li sa dak in nhar l-istess appellat ma kienx ghadu jahdem.

Il-Qorti jidhrilha li, fid-dawl ta' dak li diga` issemma, dan id-digriet (tat-28 ta' Setembru 2010) ghandu jibqa' *in vigore* ghaliex ma jirrizultawx kambjamenti fil-posizzjoni finanzjarja tal-partijiet minn dakinhar.

DAR MATRIMONJALI

Minhabba f'hekk ukoll il-Qorti ma hijiex se takkorda dritt ta' abitazzjoni *in aeternum* lill- appellanti anke minhabba l-fatt illi f'dan il-kaz ma hemmx tfal minorenni. Se testendi t-terminu impost mill-Ewwel Qorti ghal sena biex taghtiha aktar zmien tipprepara ruhha ghall-bejgh tad-dar.

ASSI PARAFERNALI

Aggravju iehor tal-appellanti huwa li hija kellha tigi assenjata aktar flus minn dawk akkordati mill-Ewwel Qorti ghar-rigward ta' dawk l-ammonti li tallega li nefqet mill-wirt taghha ghall-bzonnijiet tal-familja u xi ammonti ohra.

Din il-Qorti pero` jidrilha li ghandha taqbel mal-Ewwel Qorti li hafna minn dawn il-pretensjonijiet taghha ma kinux sufficjentement pruvati skond kif ghadu kif gie dikjarat fir-rigward tal-artiklu 562. Fil-fehma tal-Qorti, l- unika parti fejn l-allegazzjoni taghha timmerita akkoljiment huwa fir-rigward tas-somma ta' €5832,43c li kien sar bhala depozitu biex inxtrat l-ewwel dar matrimonjali tal-partijiet. Ghalhekk in addizzjoni ghall- ammont ta' €9320 akkordat mill-Ewwel Qorti ghandha tizdied din is- somma u kwindi t-total huwa ta' **€15,143.43.**

KONTIJIET BANKARJI

F'dan ir-rigward l-appellanti tissotolinja li ghalkemm l-Ewwel Qorti ordnat li l-kontijiet bankarji rispettivi ghandhom jigu assenjati lill-parti li hija intestatarja, hija naqset li tiddikjara li d-dejn dovut mill-appellat fir- rigward tal-Visa Card mal-HSBC Bank ghandu jkun dovut minnu. Din il- Qorti taqbel ghaliex huwa evidenti li dan id-dejn l-appellat inkorrih wara li telaq mid-dar matrimonjali w allura ma intefaqx ghall-bzonnijiet tal- familja izda esklussivament ghal dawk tieghu.

KONTIJIET PENDENTI

F'dan il-kuntest l-appellanti qed titlob billi li l-appellat ghandu jkun ikkundannat ihallas ukoll is-somma ta' €140 *reconnection fee* wara li l- appellat ghat-tieni darba qata' l-provvista tad-dawl u ilma. L-appellanti hawnhekk ghandha ragun ghaliex dan sar semplicement b'pika da parti tal-appellat.

Fir-rigward tal-komunjoni tal-akkwisti, l-appellant incidentali qed jitlob li jigi assenjat is-somma ta' €50,000 ghal dak li qed isejjah danni li sofra minhabba l-problemi li holqot martu ghall-bejgh tad-dar matrimonjali. Madankollu din it-talba ma ghandha ebda fundament guridiku ghaliex il- bejgh tal-fond imsemmi qed jigi ordnat minn din il-Qorti u waqt li l- partijiet kienu fi stat ta' komunjoni l-appellata incidentali kellha kull dritt izzomm fermi d-drittijiet taghha fuq il-proprjeta`. Oltre dan, it-talba tieghu ma ghandha lanqas sostenn fattwali kif rizultanti mill-provi.

u tiddikjara l-konvenut appellat responsabbli principalment ghat-tifrik taz-zwieg; tordna lill-konvenut biex jibqa' jhallas is-somma ta' €140 fix-xahar bhala manteniment lill-attrici appellanti, kif ukoll is- somma ta' €9.695.86 minflok dik assenjata mill-ewwel qorti bhala arretrati ta' manteniment; tordna ukoll li l-appellanti tithallas is-somma ta' €15,143.43 minflok is-somma ta'€ 9320 bhala prelevament mill-bejgh tad-dar matrimonjali; id-dejn fuq il-*visa card* intestata f'isem l-appellat mal-HSBC Bank ghandu jithallas minnu; u tordna ukoll lill-konvenut appellat ihallas is-somma ta' €140 *reconnection fee* aktar qabel imsemmija; testendi t-terminu ghall-bejgh tal-fond matrimonjali ghal sena millum; mill-bqija tikkonferma s-sentenza appellata hlief ghall-kap tal-ispejjez li ghandu jigi kollu addossat, in kwantu ghall-ewwel istanza, lill-konvenut;

AB vs. CDE, March 2018

That the parties resided in a rented property after the marriage up until August 2010 and in this period, defendant abandoned the matrimonial home.

That after vacating the matrimonial home, Applicant had no further information about defendant's whereabouts and was later informed that she had set up residence abroad permanently.

That the marriage broke down irretrievably due to Defendant's abandonment of the matrimonial home in terms of Article 41 of the Chapter 16 of the Laws of Malta.

That the parties did not have and do not have any assets as the matrimonial home consisted of a rented property, parties had no vehicles and they had and have no assets or monies of whatever nature in common.

That the marriage naturally broke down due to defendant's abandonment and since they have been separated factually for over six years, the parties have separate lives and there is no possibility for reconciliation.

This is a case of personal separation followed by divorce proceedings between the plaintiff and his absent wife, the defendant, who contracted marriage together in Malta on the 26th of October 2009.

- a) The plaintiff, a Russian national, came to Malta in 2007. At that time, he was still young and was still a student although eventually he started to work here;
- b) After a short relationship with CDE, a national of Kazakhstan, the parties married at the Marriage Registry in Valletta, when the plaintiff was twenty (20) years old and the defendant was only twenty-two (22) years old;
- c) Their relationship was based on fun, going out and all activities that young adults engage in. The plaintiff thought that the marriage was an interesting adventure that would add to the fun;
- In August 2010, just a few months after the marriage, C moved out of the flat. Initially the plaintiff felt hurt. He did not see his wife around much. Later he did not see her at all and he was told that she had left Malta for good. Since then he has not seen her again, nor did he have any contact with her;

From the sworn application, it is evident that the plaintiff relies on desertion as the cause of the breakdown of the marriage between the parties. Desertion is in fact a ground for separation under Maltese law as **Article 41 of the Civil Code** lays down:

41. Either of the spouses may also demand separation if, for two years or more, he or she shall have been deserted by the other, without good grounds.

Both from the wording of the cited article and from case-law, it results that the criteria for a successful action of separation motivated on desertion are two: that the desertion prolongs for two years or more; that there is no just cause for the spouses' abandonment;

In the case in the names of **Andrea Avellino vs. Regina Avellino**, one finds a clear definition of these criteria, whereby it was said: "Illi dwar l-abbandun, jingħad li l-istess, biex jista' jikkostitwixxi kawżali tas-separazzjoni, irid, apparti ż-żmien, li fil- każ se maj jikkonkorri, illi jkun sar bla ġusta kawża.

Huwa fatt li l-apprezzament taċ-ċirkustanzi "di fatto" li l-abbandun mid-dar ikun sar volontarjament (ċjoe bla kawża ġusta), b'mod li jkun jista' jagħti lok għas-separazzjoni personali għall-ħtija ta' min jirrikorri għalih, huwa mħolli fil-kriterju tal-maġistrat deċidenti; kif ukoll ġie deċiż illi mhux kwalunkwe allontanament ta' konjuġi mid-domiċilju konjugali jikkostitwixxi l-prova ta' l-abbandun volontarju: imma jrid ikun jirriżulta minn fattijiet li juri l-intenzjoni żgura, ferma u pożittiva, ta' min jabbanduna, li ma jerġax imur jgħammar mal-parti l-oħra.

U biex ikun kundannabbli, l- abbandun irid ikun kapriċċuż, u mhux ġustifikat minn xi motiv raġjonevoli."

Reference is also made to the case in the names Josephine Anne Edwards vs. Avukat Dr. Joseph Xuereb noe. Where the court stipulated that: "Biex jikkostitwixxi motiv ta' separazzjoni, l-abbandun irid ikun inġust fiż-żmien tiegħu kollu ta' sentejn..."

48. (1) The spouse who shall have given cause to the separation on any of the grounds referred to in articles 38 and 41, shall forfeit -
(a) the rights established in articles 631, 633, 825, 826 and 827 of this Code;

(b) the things which he or she may have acquired from the other spouse by a donation in contemplation of marriage, or during marriage, or under any other gratuitous title;

(c) any right which he or she may have to one moiety of the acquests which may have been made by the industry chiefly of the other spouse after a date to be established by the court as corresponding to the date when the spouse is to be considered as having given sufficient cause to the separation. For the purposes of this paragraph in order to determine whether an acquest has been made by the industry chiefly of one party, regard shall be had to the contributions in any form of both spouses in accordance with article 3 of this Code;

(d) the right to compel, under any circumstances, the other spouse to supply maintenance to him or her in virtue of the obligation arising from marriage.

As, opposed to other grounds of separation, the Court must apply these consequences in cases of desertion and adultery and has no discretion whether to apply them or not.

With regards to the request for the declaration of divorce between the parties, for the Court to uphold such a request, it must be satisfied that:

a) on the date of commencement of the divorce proceedings, the spouses shall have lived apart for a period of, or periods that amount to, at least four years out of the immediately preceding five years, or at least four years have lapsed from the date of legal separation; and

b) there is no reasonable prospect of reconciliation between the spouses; and

c) the spouses and all of their children are receiving adequate maintenance, where this is due, according to their particular circumstances, as provided in article 57.

APPLICATION OF THESE LEGAL PRINCIPLES TO THE CURRENT CASE

There is no doubt that the cause of the marital breakdown between the parties, was the defendant's desertion of her husband as well as the abandonment of the matrimonial home. Her desertion fits perfectly the legal definition of the ground for separation in that

1. It has prolonged for over two years. The defendant left the matrimonial home in August 2010, never to return again, probably having also in the meantime left the island. She has therefore been absent from the marriage for over seven years and one can positively conclude that she has a resolute intention of never returning to the plaintiff and the marriage;

2. There was no just cause for defendant to abandon her husband. The plaintiff gives evidence that the parties were young in age and that the defendant just walked away on one fine day; His version of the facts is in no way contradicted by the defendant;

In view of this, the Court feels that it is just to conclude that the plaintiff's request for a personal separation motivated by the ground of desertion is just and should be upheld;

With regards to the request for a declaration of divorce between the parties, it has been proved to the satisfaction of the Court that the requisites laid down by Article 66B of the Civil Code have, in the present case, been fulfilled since the parties have not lived together for over seven years and furthermore there is no reasonable prospect of reconciliation between the parties;

AB vs. CB, March 2023

The spouses in this case had 4 children and in their married they had the Community of Aqcests active as according to A1316. The 2 have split and have even split the matrimonial home and developed it into 2 apartments, where both are living separately.

"l-partijiet ilhom ghaddejin bil-proceduri ta' separazzjoni sa mit-2018 u ilhom jghixu separatament de facto sa minn Marzu 2020 u l-esponenti tixtieq tibni hajja ghal rasha izda dan ma jistax isehh stante li ghad hemm il- komunjoni tal-akkwisti vigenti bejn il-partijiet"

"iżda ukoll tkun tghin sabiex l-esponenti tirriakkwista d-dritt illi taghmel l-atti kolha tal-hajja civili u kummercjali u dan minghajr il-htiega tal-kunsens u/jew approvazzjoni jew l-intervent tal- parti l-ohra;"

"Illi l-esponenti titlob il-waqfien tal-konunjoni tal-akkwisti qabel il-gudizzju finali a tenur tal-Artikolu 55(1) tal-Kodiċi Ċivili, b'dan illi m'hu se jinholoq l-ebda pregudizzju mhux proporzjonat ghall-intimat"

Prinċipji Legali:

F'dan l-istadju l-Qorti tagħmel referenza għall-Artikolu 55 subinċiż 1 tal- Kapitolu 16 tal-Liġijiet ta' Malta li jagħtiha l-fakolta' li f'kull żmien matul is- smiegħ tal-kawża ta' firda personali, tordna l-waqfien tal-komunjoni tal-akkwisti jew tal-komunjoni tar-residwu taħt amministrazzjoni separata.

L-istess Qorti trid neċessarjament tevalwa jekk xi waħda mill-partijiet tkunx ser tbati preġudizzju mhux proporzjonat bil-waqfien tal-komunjoni qabel is-sentenza tal-firda u dan *ai termini* tal-Artikolu 55(4) tal-Kapitolu 16 tal-Liġijiet ta' Malta.

In sinteżi, l-iskop tal-Artikolu 55 tal-Kapitolu 16 tal-Liġijiet ta' Malta jiġi delinejat fis-sentenza fl-ismijiet **Daniela Mizzi vs Duncan Peter Mizzi**, fejn ġie mgħallem illi: *"In tema legali jinghad illi l-Artikolu 55 tal-Kap. 16 li fuqha hija bbazata t-talba attrici, jaghti l-fakolta' lil parti jew ohra li "f'kull zmien matul is-smiegh tal-kawza ta' firda titlob il-waqfien tal-komunjoni tal-akkwisti jew tal- komunjoni tar-residwu taht amministrazzjoni separata li tkun tezisti bejn il- konjugi.....t-talba għall-waqfien m'ghandiex tinghata jekk parti tkun ser issofri "pregudizzju mhux proporzjonat". Inoltre, l-oneru tal-prova ta' dan ir-rekwizit jirrisjedi fuq min qed jallegah, skont il-principju incumbit ei qui dicit non ei qui negat."*

Dan kompla jiġi kkonfermat riċentament fis-sentenza fl-ismijiet **Claire Pisani vs Joseph Pisani**,[6] fejn il-Qorti tal-Appell kompliet tirriafferma illi *"dak li trid il- ligi huwa li kull parti pendenti l-proceduri tas-separazzjoni jkollha l-fakolta` li jekk trid tista' titlob il-waqfien tal-komunjoni u li din it-talba m'ghandhiex tintlaqa' biss jekk il-Qorti tara li bil-waqfien tal-komunjoni parti jew ohra tkun ser issofri pregudizzju mhux proporzjonat. Ghalhekk dak li hu sostanzjalment relevanti huwa d-dritt moghti lill-parti biex jaghmel talba simili u li tali talba ma tintlaqax jekk fic-cirkostanzi tal-kaz il-waqfien ser jikkaguna pregudizzju mhux proporzjonat lil parti l-ohra".*

Il-Qorti tagħmel ukoll referenza għas-sentenza fl-ismijiet **Dorianne Sammut vs Charles Sammut**, fejn kompla jiġi affermat illi: *"Fi kliem iehor il-pregudizzju irid ikun sproporzjonat fis-sens li mhux kull pregudizzju jaghti lok ghal cahda ghat-talba in kwistjoni. Huwa evidenti ukoll li l-ghan tal-legislatur, certament konxju kemm jistghu jitwalu vertenzi simili, kien li tieqaf kemm jista' jkun malajr il-komunjoni tal-akkwisti biex ghall-inqas f'dan l-aspett, il-partijiet ikunu jistghu ikomplu jghixu hajjithom separatament gialadarba l-konvivenza bejniethom mhijiex aktar possibli. L-appellanti gia kellha erba' snin qabel id-decizjoni appellata (u issa sitt snin) biex tressaq il-provi taghha u din il-Qorti hija konsapevoli ukoll ta' kemm idumu ghaddejjin dawn il-vertenzi hafna drabi minhabba lusingar tal-partijiet biex iressqu l-provi kollha taghhom".*

Applikazzjoni tal-Prinċipji Legali għal Każ Odjern:

Il-Qorti hija marbuta permezz tal-Artikolu 55 subinċiż 4 tal-Kodiċi Ċivili li, qabel tordna l-waqfien tal-komunjoni tal-akkwisti, hija għandha teżamina u tara jekk xi parti jew oħra tkunx sejra tbati xi preġudizzju mhux proporzjonat b'tali waqfien pendenti l-kawża.

Fil-każ odjern, il-Qorti tara illi għat-talba tal-attriċi għall-waqfien tal-komunjoni tal-akkwisti, il-konvenut ma għandu l-ebda oġġezzjoni. Magħdud ma' dan, il- Qorti rat ukoll illi fir-risposta ġuramentata tal-konvenut għar-rikors promotur, il- konvenut qabel illi l-Qorti għandha ixxolji l-komunjoni tal-akkwisti xolta *"izda ghandu jitqies dak illi diga' gie likwidat bejn il-partijiet qabel ma nfethet din il- kawza"*, u *di piu'* fir-rigward tad-disa' talba tal-attriċi dwar l-assenjar tal-*flats* li skont il-konvenut minħabba fihom sar l-imsemmi qbil dwar likwidazzjoni ta' uħud mill-assi, il-konvenut jeċċepixxi illi *"hemm qbil dwar l-ghaxar talba limitatament kif l-appartamenti ghandhom jigu assenjati izda ma hemmx qbil illi l-attrici tigi kkumpensata ghad-differenza tal-valur tal-istess proprjetajiet (ghal ragunijiet li se jigu mogtija fil-kawza)"*. Barra minn hekk, fil-kontro-talba tiegħu stess, il-konvenut jitlob it-terminazzjoni tal-komunjoni tal-akkwisti, filwaqt li jitlob ukoll dwar kif

għandu jsir l-assenjar tal-*flats* u li jiġi kkumpensat għad- differenza fil-valur, għal liema talbiet, l-attriċi fir-risposta tagħha qablet ma' kollox għajr li l-konvenut jingħata differenza fil-valur.

Stabbilit il-premess, il-Qorti tara illi ma hemm l-ebda xkiel sabiex tippronunzja ruħha dwar it-terminazzjoni tal-komunjoni tal-akkwisti f'dan l-istadju, anzi temmen illi ser tkun ta' benefiċċju għaż-żewġ partijiet. Il-fatt illi qed jiġi allegat li kien hemm xi ftehim jew likwidazzjoni tal-assi, u dan qabel ma ġiet intavolata il-kawża odjerna, il-Qorti tissottolineja illi dan ma għandu x'jaqsam bl-ebda mod mat-talba li għandha quddiemha l-Qorti f'dan l-istadju għat-terminazzjoni tal- komunjoni tal-akkwisti viġenti bejn il-partijiet. *Se mai*, tali kwistjoni għandha tiġi ppruvata u konsegwentament, jekk ikun il-każ, dan kollu jiġi kkunsidrata fis- sentenza finali.

Għaldaqstant, mill-atti jirriżulta li jekk il-Qorti tilqa' t-talbiet tal-attriċi, ebda mill-partijiet mhu ser isofri xi preġudizzju mhux proporzjonat. Fi kwalunkwe każ, il-Qorti tfakkar illi jekk talba għall-waqfien tar-reġim tal-komunjoni tal-akkwisti tiġi akkolta u b'hekk dan ir-reġim jiġi tterminat matul is-smigħ tal-kawża għall- firda personali, kull parti jibqala' d-dritt li ttella' l-provi rigward l-assi, kemm dawk parafernali u kif ukoll dawk appartenenti lill-komunjoni tal-akkwisti, stante illi *"il-waqfien tal-komunjoni jirreferi ghall-futur u mhux ghal dawk l-assi li diga' dahlu u qedghin fil-komunjoni anke jekk ad insaputa tal-attrici"* u dan kif ġie mgħallem fis-sentenza fl-ismijiet **Desiree Lowell sive Desiree Lowell Borg vs C Lowell.**

GĦALDAQSTANT u fir-rigward tar-rikors odjern, il-Qorti qiegħda taqta' u tiddeċċiedi billi tilqa' it-talba tal-attriċi u tordna l-waqfien tal-komunjoni tal- akkwisti eżistenti bejn il-partijiet b'mod immedjat u dana ai termini tal-Artikolu 55 tal-Kodiċi Ċivili, b'dana illi r-reġim matrimonjali li għandu japplika bejn il- partijiet mill-ġurnata li din is-sentenza tgħaddi in ġudikat huwa dak tas-separazzjoni tal-beni; tordna ukoll lir-Reġistratur tal-Qrati sabiex fi żmien ġimgħa minn mindu din is-sentenza preliminari tgħaddi in ġudikat, javża lid- Direttur tar-Registru Pubbliku bl-istess sentenza sabiex ikun jista' jirreġistraha ai termini tal-Artikolu 55 subinċiż 5 tal-Kodiċi Ċivili.

ABC vs DC March 2023

Illi pendenti bejn il-partijiet hemm il-proceduri gudizzjarji odjerni ntizi sabiex tkun ippronunzjata s-separazzjoni personali tal-partijiet filwaqt ukoll li tigi tterminata l-komunjoni tal-akkwisti ezistenti bejniethom, fost talbiet ohrajn.

Illi z-zwieg tal-partijiet tfarrak irrimedjabbilment u s'intendi hija m'ghandha l- ebda vizibilita' u/jew kontroll tal-obbligi li qieghed jassumi l-intimat.

Illi minbarra dan, illum l-esponenti tixtieq tkun f'posizzjoni li tamministra ahjar l-assi taghha in vista' tal-fatt li l-partijiet stabbilew hajja ndipendenti minn xulxin snin ilu.

Court makes reference to A55 and sub-4

Għal kull buon fini u f'dan il-kuntest, il-Qorti rat illi fir-rikors promotur, l-attur stess li talab it-terminazzjoni tal-komunjoni tal-akkwisti, u b'hekk il-Qorti tifhemmili huwa ma għandu l-ebda problema *per se* illi tiġi tterminata l- komunjoni tal-akkwisti viġenti bejn il-partijiet. Magħdud ma' dan u fin-nuqqas ta' dikjarazzjoni ta' oġġezzjoni għat-talba kif dedotta u provi dwar kwalunkwe preġudizzju sproporzjonat li jista' jiġi soffert, il-Qorti tara li t-terminazzjoni tal- komunjoni tal-akkwisti f'dan l-istadju ser tkun ta' benefiċċju għaż-żewġ partijiet. Għalhekk, il-Qorti hi tal-fehma li effettivament jekk il-Qorti tilqa' t-talbiet tal- konvenuta ebda mill-partijiet mhu ser isofri xi

preġudizzju mhux proporzjonat. Fi kwalunkwe każ, il-Qorti tfakkar illi jekk talba għall-waqfien tar-reġim tal- komunjoni tal-akkwisti tiġi akkolta u b'hekk dan ir-reġim jiġi tterminat matul is- smigħ tal-kawża għall-firda personali, kull parti jibqala' d-dritt li ttella' l-provi rigward l-assi, kemm dawk parafernali u kif ukoll dawk appartenenti lill- komunjoni tal-akkwisti, stante illi *"il-waqfien tal-komunjoni jirreferi ghall-futur u mhux ghal dawk l-assi li diga' dahlu u qedghin fil-komunjoni anke jekk ad*

GĦALDAQSTANT u fir-rigward tar-rikors odjern, il-Qorti qiegħda taqta' u tiddeċiedi billi tilqa' it-talbiet tal-konvenuta u tordna l-waqfien tal-komunjoni tal- akkwisti eżistenti bejn il-partijiet b'mod immedjat u dana ai termini tal-Artikolu 55 tal-Kodiċi Ċivili, b'dana illi r-reġim matrimonjali li għandu japplika bejn il- partijiet mill-ġurnata li din is-sentenza tgħaddi in ġudikat huwa dak tas-separazzjoni tal-beni; tordna ukoll lir-Reġistratur tal-Qrati sabiex fi żmien ġimgħa minn mindu din is-sentenza preliminari tgħaddi in ġudikat, javża lid- Direttur tar-Registru Pubbliku bl-istess sentenza sabiex ikun jista' jirreġistraha ai termini tal-Artikolu 55 subinċiż 5 tal-Kodiċi Ċivili.

AB vs CDB, May 2018

Illi bla pregudizzju ghas-suespost u sussidjarjament, skont l-Artikoli 51 u 52 tal- Kodici Civili, id-dekadenza mid-dritt ta' manteniment m'hijiex mandatorja izda fakoltattiva ghall-Qorti skont ic-cirkostanzi tal-kaz u tali dekadenza zgur mhux applikabbli fil-kaz odjern.

harles Zammit vs Jacqueline Zammit:-

Illi inoltre hija opportuna l-osservazzjoni li, mill-kuntratt ta' separazzjoni, li, ghar-rigward ta' dak li hemm konvenut, jikkostitwixxi ligi bejn il-partijiet, il-hlas tal-manteniment pattwit mhuwiex sottopost ghall-ebda kondizzjoni; u ghalhekk in difett ta' stipulazzjoni espressa fil-kuntratt li tippermetti riduzzjoni jew tnehijja ta' dan il-manteniment fil-kaz li l-konvenuta jkollha relazzjoni adultera wara l- iffirmar tal-kuntratt, it-tnehijja tal-manteniment pattwit tista' ssir biss jew bil-kunsens tal-partijiet, jew b' sentenza tal-Qorti li tistabilixxi l-htija tal-firda."

Aktar ricentement, din l-istess gurisprudenza giet riaffermata:-

"Illi rigward l-ewwel talba attrici, il-Qorti tosserva li din it-talba hija necessarjament preordinata ghat-talba ghad-dekadenza mid-dritt tal-konvenuta li tkompli tircievi manteniment, u kif abbraccjat mill-gurisprudenza, ma timminax l- azzjoni ta' dekadenza, anzi hija meqjusa bhala talba necessarja sabiex jigi applikat l-artikolu 48 tal-Kap. 16".

Huwa ghalhekk pacifiku li s-sanzjonijiet li jissemmew fl-Artikoli 48 u 52 tal- Kodici Civili huma proprjament applikabbli f'kawza fejn jkun hemm talba ad hoc sabiex tkun ippronunzjata l-firda bejn il-konjugi, u l-istess regola tapplika ugwalment meta diga` jkun hemm separazzjoni personali bejn il-konjugi, u meta d-dekadenza mid-dritt ghall-alimenti tkun qed tintalab fuq fatti godda li graw wara dak il-pronunzjament. Wara kollox, kif gie affermat mill-Qorti tal-Appell fis-sentenza fl-ismijiet C Concetta Cunningham pro et noe vs Andrew James Cunnigham:-

"F'dawn ic-cirkostanzi l-appellant ma' ghandux mod iehor skont il-ligi kif jista' jezonera ruhu mill-obbligu tieghu li jmantni lil martu hlief billi jottjeni, jekk jista', dikjarazzjoni tad-dekadenza taghha minn dan id-dritt f'kawza ta' separazzjoni."

L-attur da parti tieghu jaghmel referenza ghall-Artikolu 66B tal-Kodici Civili, fejn hemm stipulat li l-pronunzjament tad-divorzju bejn persuni mizzewgin li kienu separati b'kuntratt jew b'sentenza,

ma jgib ebda bidla f'dak ordnat jew miftiehem bejniethom hlief ghall-effetti tad-divorzju li johorgu mil-ligi. L-attur ikompli jsostni li l-kuncett ta' no fault divorce fis-sistema legali taghna ma jnaqqas xejn mill-kuncett tar-responsabbilita` konducenti ghall-applikazzjoni tal- Artikolu 48 tal-Kodici Civili, peress li s-separazzjoni personali gie maghmul jghodd indaqs ghall-kaz ta' divorzju.

Ikkunsidrat;

Skont il-konvenuta huwa inkoncepibbli l-pronunzjament tas-separazzjoni personali bejn il-partijiet meta llum iz-zwieg gie xjolt. Ghalhekk fil-qafas tal- vertenza li ghandha quddiemha din il-Qorti f'dan l-istadju, dak li ghandu jigi determinat huwa jekk il-hall taz-zwieg bid-divorzju bejn konjugi li huma diga` legalment separati, jolqotx allura id-dritt tal-attur bhala l-konjugi obbligat ghall-manteniment, ifittex ghad-dekadenza tal-konvenuta mill-jedd taghha ghall- manteniment minhabba adulterju li jghid li sehh wara s-separazzjoni personali izda qabel il-hall taz-zwieg bejn il-partijiet.

Effett tas-Separazzjoni Legali fuq l-Obbligi Matrimonjali

Illi kif inhuwa assodat fis-sistema guridika taghna, nonostante s-separazzjoni personali il-konjugi jibqghu marbutin bil-vinkolu matrimonjali u ma jigux mehlusin bis-separazzjoni hlief mill-obbligu tal-assistenza morali, il-konvivenza matrimonjali u f'certi kazijiet, mill-manteniment reciproku. Certament is- separazzjoni legali ma tehlisx lill-partijiet milli jipprovdu ghall-htigijiet ta' wliedhom, jew li jibqghu jkunu fidili lejn xulxin.

Konformament mal-premess u fid-dawl tad-dispost tal-Artikolu 66L tal-Kap. 16, hija l-fehma ta' din il-Qorti li sakemm iz-zwieg ma jkunx ghadu mahlul b'effett tad-divorzju jew bil-mewt ta' xi wiehed mill-konjugi, l-obbligu tal-fedelta` reciproka jibqa' veljanti anke wara s-separazzjoni u dan anke wara li jigi kkunsidrat illi s'issa, il-gurisprudenza nostrana hi konkordi fis-sens illi l-obbligu tal-fedelta' matrimonjali jibqa' jippersisti anke wara l-pronunzjament gudizzjarju ta' separazzjoni personali jew war l-kuntratt ta' separazzjoni personali.

Kif inghad fis-sentenza fl-ismijiet Giulia Mizzi vs Salvatore Mizzi[10], is- separazzjoni gia` pronunzjata ma ghandhiex l-effett li tnehhi kull vinkolu u l- obbligi reciproci tal-konjugi bejniethom.

<u>Effetti Generali tad-Divorzju</u>

Il-Qorti tqis illi f'dan l-istadju jkun siewi li jigu ezaminati l-effetti tal-hall taz- zwieg fuq ir-relazzjoni guridika bejn il-mizzewgin, anke dawk li jkunu separati legalment. Fir-rigward, taghmel referenza ghall-proviso ghall-Artikolu 66B tal- Kap. 16 li jipprovdu illi:-

"Iżda wkoll id-divorzju ppronunzjat bejn persuni miżżewġin li kienu separati b'kuntratt jew b'sentenza ma jġib ebda bidla f'dak ordnat jew miftiehem bejniethom, ħlief għall-effetti tad-divorzju li joħorġu mil-liġi.

L-effetti tad-divorzju li johorgu mil-ligi huma dawk stipulati fl-Artikolu 66L, u cioe`:-

Wiehed mill-effetti ewlenien fuq koppja mizzewga li z-zwieg taghha jigi mahlul permezz ta' divorzju huwa l-helsien mill-obbligu tal-fedelta` peress li kif rajna konjugi li jottjeni d-divorzju jista' jerga' jizzewweg. L-effetti tad-divorzju msemmija fis-subinciz (4) tal-Artikolu 66L isibu riskontru bl-iktar qawwa f'dawk il-kazijiet fejn il-mizzewgin ma jkunux diga` separati b'kuntratt jew b'sentenza tal-qorti. F'kull kaz pero`, huwa evidenti li l-ligi ftit thalli lok ghal dubju in kwantu

dawk li huma l-effetti tad-divorzju ghaliex dawn jinsabu elenkati espressament u kategorikament fl-imsemmi subinciz (4).

Illi huwa palezi wkoll li l-effetti tad-divorzju jsehhu proprju minn dakinhar li s- sentenza tad-divorzju tkun ghaddiet in gudikat ‘il quddiem, meta l-partijiet ikunu inhallu definittivament u b’mod assolut mir-rabta taz-zwieg. Korollari ta’ dan hija l-osservazzjoni li x-xoljiment taz-zwieg bid-divorzju - diversament mill- annullament taz-zwieg fejn hlief f’kaz ta’ zwieg putattiv dan jigi meqjus li qatt ma ezista u qatt ma pproduca ebda effett - filwaqt li jholl il-vinkolu matrimonjali li kien gia` ezistenti bejn il-konjugi, ma jxoljix iz-zwieg ab ovo u ghalhekk ma jxejjinx b’effett retrospettiv l-obbligi u d-drittijiet naxxenti miz-zwieg, anke dawk mahluqa b’effett tas-separazzjoni legali bejn il-partijiet.

Fid-dawl tal-konsiderazzjonijiet appena maghmula, il-Qorti hija tal-fehma li bil- pronunzjament tad-divorzju bejn il-partijiet, l-allegazzjoni tal-attur li l-konvenuta kisret l-obbligu matrimonjali tal-fedelta' fiz-zmien antecedenti d-divorzju, u cioe' meta l-partijiet kien ghadhom marbutin bl-obbligu tal-fedelta` reciproka, cioe` qabel ix-xoljiment taz-zwieg, ma titlifx ir-relevanza taghha fil-qafas ta’ talba ghall-pronunzjament tal-htija ghall-firda minhabba adulterju. Bl-istess mod tibqa’ applikabbli s-sanzjoni tad-dekadenza mill-jedd ghall-manteniment kontemplata mill-Artikolu 48 tal-Kodici Civili liema sanzjoni, f’kaz ta’ adulterju ppruvat, issib applikazzjoni ex lege fil-konfront tal-konjugi hati.

Divorzju Pronunzjat ai termini tal-Artikolu 66D(2) tal-Kap. 16 u Effetti fuq il-Htija ghall-Firda

Ikkunsidrat;

F’dan il-kaz odjern, jirrizulta li d-divorzju sar a tenur tal-Artikolu 66D(2) li jipprovdi dwar talbiet ghad-divorzju sussegwenti ghal sentenza jew kuntratt ta' separazzjoni personali.

L-Artikolu 66D(2) tal-Kap. 16 jipprovdi hekk:

C Dolores Agius vs A Agius, sabiex id-dispozizzjonijiet tal-Artikolu 48 jigu applikati:-

“...jrid ikun hemm pronunzjament inter alia dwar l-artikolu 38 u 41 tal-Kap 16, u artikoli ohra bhal l-artikolu 40 b’applikazzjoni tal-artikoli 51 u 52 li kollha jirreferu ghar-responsabilità tal-konjugi li taghti aditu ghall-dikjarazzjoni ta’ firda personali, u din tista’ tigi kontemplata biss f’kawza ta’ separazzjoni,”

AB vs. CD, March 2023

Parties got married from which EFD was born.

- Whereas the applicant has been living in Malta together with her minor daughter since June 2019, and the defendant lives abroad, however the applicant does not know his exact whereabouts;

- the parties have been de facto separated since September 2015 and there is no reasonable prospect of reconciliation between the parties;

- Whereas the absentee is not paying any maintenance for the plaintiff or the minor; and is not seeking any maintenance payment from him in this regard;

- - Whereas in view of the fact that the parties have been de facto separated for the past five years, the plaintiff requests this Honourable Court to pronounce divorce between the parties, according to Article 66B of the Civil Code, Chapter 16 of the Laws of Malta.

The parties had a relationship from which the minor E F D was born on 5th July 2013 in England. Consequently, the parties got married in Gibraltar on 16th April 2015, but it is said that such marriage did not last long as the parties *de facto* separated from each other in September of the same year. The plaintiff then relocated to Malta with the minor, whilst on the other hand there is no clear indication as to where the defendant is residing. It is also said that the defendant is not present **in the minor's life, and he does not contribute financially for the minor or the plaintiff, so much so that the plaintiff is waiving her maintenance right.** On the other hand, the defendant is absent from Malta and despite the fact that an attempt was made to communicate with him, from the **acts of the case it transpires that he never replied back.**

In light of the premise, and after the mediation process was terminated by means of a decree dated 10th June 2020, the plaintiff lodged the present acti**on for divorce, as well as to regulate the issue of care, custody and parental authority in relation to the minor.** From the acts it appears that even though the parties have been *de facto* separated from each other for a considerable time, they are not legally separated through a public contract or judgement.

Regarding Divorce:

The Court starts off by referring to Regulation number 4 of Legal Notice 397/2003 (Subsidiary Legislation Number 12.20), which is relevant to the matter in question, which provides that:

(1) Any party wishing to proceed to initiate a suit forpersonal separation or divorce against the other spouse shall firstdemand authority to proceed from the Civil Court (FamilyDivision), the Court of Magistrates (Gozo) (Superior Jurisdiction)(Family Division) as the case may be, each of such courts hereinafter in this regulation called the "Court", by filing a letter, inthe case of personal separation, or by filing an application, in the case of divorce, as the case may be, to that effect in the registry ofthe Court addressed to the Registrar, stating the name and address both of the person filing the letter as well as that of the other spouse, and requesting the Court to authorise him or her to proceed. Such letter shall be signed and filed by the party personally or by an advocate or legal procurator on behalf of such party".

Having established the premise, reference is made to Article 66A subsection 1 of the Civil Code, which stipulates that:

"(1) Each of the spouses shall have the right to demand divorce or dissolution of the marriage as provided in this Sub-Title.It shall not be required that, prior to the demand of divorce, thespouses shall be separated from each other by means of a contractor of a judgement".

Article 66B of the Civi Code, about the conditions required for divorce, holds:

"Without prejudice to the following provisions of this article, divorce shall not be granted except upon a demand made jointly by the two spouses or by one of them against the other spouse, and unless the Court is satisfied that:

(a) on the date of commencement of the divorce proceedings, the spouses shall have lived apart for a period of, or periods that amount to, at least four years out of the immediately preceding five years, or at least four years have lapsed from the date of legal separation; and

(b) there is no reasonable prospect of reconciliation between the spouses; and

(c) the spouses and all of their children are receiving adequate maintenance, where this is due, according to their particular circumstances, as provided in article 57".

Article 66D of the Civil Code, holds:

"(3) Where the spouses are not separated by means of a contractor a court judgement, the spouse making the demand for divorcemay, together with the same demand, make all those demands thatare permissible in a cause for separation in accordance with Sub-Title III of this Title. The court shall hear and determine these demands as provided in the said provisions mutatis mutandis. Theother party may, in addition to the defences mentioned in previous sub-article, put forward all those defences which that party would have been entitled to make in a cause for separation.

(5) Notwithstanding the other provisions of this article and only where the community of acquests or the community of residue under separate administration shall have ceased, the parties shal lhave a right, in any case, if they both agree, to divorce without liquidating the assets which they hold in common".

Article 66G of the Civil Code stipulates:

"(2) The application for the commencement of divorce proceedings shall:

(a) where the spouses are not separated by means of acontract or a court judgement, be accompanied by anote in which the advocate confirms that he hasobserved the requirements of sub-article (1); or

Provided that where the advocate assisting a client in a cause for divorce shall not have presented the said note, the copy ofthe judgement of separation or of the contract of consensual separation, as the case may be, the advocate shall present these documents not later than, or during, the first sitting in the cause".

Article 66I of the Civil Code holds:

"(1) Where a demand for divorce is made to the competent civil court by either of the spouses, or by both spouses after havingagreed that their marriage is to be dissolved, and where the spouses are not separated by means of a contract or a court judgement,before granting leave to the spouses to proceed for divorce, the court shall summon the parties to appear before a mediator, either appointed by it or with the mutual consent of the parties, and this for the purpose of attempting reconciliation between the spouses,and where that reconciliation is not achieved, and where the spouses have not already agreed on the terms of the divorce, for the purpose of enabling the parties to conclude the divorce on the basis of an agreement. The said agreement shall be made on some or allor of the following terms:

(c) the maintenance of the spouses or of one of them and of each child;(d) residence in the matrimonial home;(e) the division of the community of acquests or the community of residue under separate administration".

Care, Custody and Parental Authority:

In respect to care and custody, the Court maintains that in such aspects our jurisprudence has always taught that it should consider the best interest of the minor. In the case **Jennifer Portelli pro.et noe. vs. John Portelli** was told: *"Jingħad illi l-kura tat-tfal komuni tal-mizzewġin, sew fil-liġi antika u sew fil-liġi viġenti, kif ukoll fil-ġiurisprudenza* estera *u f'dik lokali hija regolata mill- prinċipju tal-**aqwa utilita' u l-akbar vantaġġ għall-interess tal-istess tfal li ċ- ċirkustanzi tal-kaz u** l-koeffiċjenti tal-fatti partikulari tal-mument ikunu jissuġġerixxu. Illi in konsegwenza, ir-regola sovrana fuq **enunċjata għandha tipprevali dwar il-kustodja u l-edukazzjoni tat-tfal komuni tal-mizzewġin,** sew meta l-konjuġi jisseparaw ruħhom ġuddizzjarjament, sew meta jiġu biex jisseparaw konsenswalment".*

In the cases of **John Cutajar vs. Amelia Cutajar et**, and **Maria Dolores sive Doris Scicluna vs. Anthony Scicluna**, it was also held that *"apparti l-ħsieb ta' ordni morali u dak ta' ordni legali, li għandhom setgħa fil-materja ta' kura u kustodja tat-tfal in ġenerali, il-prinċipju dominant in 'subjecta materia', li jiddetermina normalment u ġeneralment il-kwistjonijiet bħal din insorta f'dina l- kawza, huwa dak tal-aktar utilita' u dak tal-aqwa vantaġġ u nteress tal-istess minuri fl-isfond taċ-ċirkostanzi personali u 'de facto' li jkunu jirrizultaw mill- provi tal-kaz li jrid jiġi rizolut...".*

Taking into account the basic principles as enunciated by the jurisprudence just cited, and namely the principle of the most utility and that of the best advantage for a minor, according to Article 56 of the Civil Code, the Court has the faculty to entrust the care and custody of the minor to only one parent and this so that the supreme interest of the minor is always safeguarded. The Court underlines that the interest of the minor is paramount to the rights of the parents. In the judgment in the names of **Frances Farrugia vs. Duncan Caruana**, and **Marlon Grech vs. Charlene Banks** it was held that the Court *"filwaqt li dejjem tagħti piz għad- drittijiet tal-ġenituri, l-interess suprem li zzomm quddiemha huwa dejjem dak tal- minuri, kif anke mgħallma mill-ġiurisprudenza kostanti tagħna".*

On the other hand, and in relation to the parental authority, the Civil Code deals with this particular section under Title IV entitled *'Of Parental Authority'*. The salient legal provisions are Article 131 and Article 154(1):

"131. (1) A child shall be subject to the authority of his parents for all effects as by law established.

(2) Saving those cases established by law, this authority isexercised by the common accord of both parents. After the death ofone parent, it is exercised by the surviving parent.

"154. (1) Saving any other punishment to which he may be liable according to law, a parent may be deprived, by the said court,wholly or in part, of the rights of parental authority, in any of the cases following:

It is noted that Article 3B which makes reference to Article 154 quoted above stipulates: *"(1) Marriage imposes on both spouses the obligation tolook after, maintain, instruct and educate the children of the marriage taking into account the abilities, natural inclinations and aspirations of the children"*. The Court reminds that these obligations should not be applied only in relation to children of married parents, but also to those children who are born out of wedlock. In fact, the law itself in Article 7 of the Civil Code stipulates that: *"(1) Parents are bound to look after, maintain, instruct andeducate their children in the manner laid down in article 3B of this Code"*.

Application of Legal Principles to the Current Case:

Firstly, the Court observes that the parties are not legally separated and, this is in view of the fact that no personal separation contract or court judgement pronouncing separation between the parties has been exhibited in the acts. Therefore, the provisions of the Civil Code in the matter of a request for divorce between parties who are not separated by means of a contract or a judgement, are applicable *in toto*.

However, and before the Court comments on the application of the above- mentioned provisions, it underlines that the plaintiff failed to follow the mediation procedures in accordance with the aforementioned provisions. From the acts it appears that the primary purpose of the plaintiff was to get a personal separation from her husband, as she proceeded initially by presenting a letter to the Registrar of the Civil Courts for such purpose. But it turns out that at the end of the mediation, the plaintiff filed a sworn application whereby her requests do not fall within the parameters of what was requested by her goodself in the letter addressed to the Registrar, as instead she asked for divorce. The Court sees that if the intention of the plaintiff was to obtain a divorce, in terms of Regulation 4 of the Subsidiary Legislation 12.20, she was then obliged to file an application in the Court's registry and not a letter. In light of this, the Court sees that this in itself creates an obstacle to pronounce itself in favour to the paintiff's request, as this was even confirmed by the Court of Appeal in the judgment of **Anthony Pisani vs. Maria Rita Pisani**.

In addition to the above, the Court sees another obstacle for the granting of the divorce and this in light of the issue regarding the dissolution and liquidation of the matrimonial regime in force between the parties. The Court sees that the parties got married in the Gibraltar and consequently formed their family in the Czech Republic. Therefore, in the case under examination, there is in play the so-called foreign element, and thus it was necessary for the plaintiff to at least bring an expert's testimony on the foreign law concerned so that the Court would be in a position to determine what kind of matrimonial regime was in place. This was necessary because subsection 5 of Article 66D of the Civil Code in brief,

"jikkoncedi dritt lill-parti li jrid jikseb il-hall taz-zwieg tieghu, f'kazijiet fejn tkun diga` waqfet il-komunjoni tal-akkwisti, illi jghaddi ghad-divorzju minghajr ma jitlob ukoll li tigi likwidata l-komunjoni, basta jkun hemm "qbil" mal-parti l- ohra. Altrimenti, jekk m'hemmx il-qbil tan-naha l-ohra, il-parti li jrid jinhall miz-zwieg tieghu jkun tenut ukoll li jitlob, mhux biss li jittermina izda wkoll jillikwida l-istess komunjoni. Il-Ligi ma tesigix talba kongunta, kif qalet l-ewwel Qorti, izda huwa sufficjenti li jkun hemm semplici qbil li l-komunjoni tista' tigi terminata minghajr ma tigi likwidata".

Therefore, the Court is of the opinion that the request for divorce is not sustainable given that: (i) the mediation procedure was not followed correctly, and, (ii) in the circumstances of the present case the plaintiff should have also brought forward proof as to the matrimonial regime applicable between the parties as from date of marriage and her claim against her husband for divorce, should have also be accompanied by a claim for the termination and liquidation of their matrimonial regime. The Court reteriates what the Court of Appeal has taught, that: *"Ghalkemm huwa risaput illi l-komunjoni tal-akkwisti tigi terminata mas-sentenza tal-Qorti li tippronunzja l-hall taz-zwieg a tenur tal-Artikolu 1319 tal-Kodici Civili, din il-Qorti tqis li dan il-fattur ma jistax ikun ta' ghajnuna ghal- attur ghaliex f'kull kaz, il-konvenuta ma qablitx li l-komunjoni tigi terminata*

minghajr ukoll tigi likwidata. Kieku l-konvenuta fil-kors tal-proceduri wriet l- aderenza taghha fir-rigward, allura din il-Qorti taqbel li l-procedura maghzula mill-atturi bir-rikors tieghu kif imfassal, kienet tkun sanata u ma kienx ikun hemm dan ix-xkiel ghall-pronunzjament tal-hall taz-zwieg fic-cirkostanzi".

Despite the above, the Court sees that even though the requst for divorce should not be granted, it is of the opinion that the request regarding the minor E F D should be considered anyway and this for the sake of the supreme interests of the minor herself. Therefore, and despite the above, in terms of Article 149 of the Civil Code, the Court will proceed to utilise its powers in the best interests of the minor concerned. It is said that where the supreme interest of the minor is dealt with, the Court should not be hindered by the strict and rigorous procedural rules, so much so that the Family Court has the power to take any provision in the best interest of the minor even if none of the parties has made a request in this respect.

Having established the premise, the Court sees that this is a request made by the plaintiff so that this Court grants her the exclusive care, custody and parental authority of the minor E F D. From the uncontradicted testimony of the plaintiff, it appears that the minor was born from the relationship of the parties on 5th July 2013 in England, and therefore the minor is now nine (9) years old. It also emerges that the plaintiff and the minor have been residing in Malta since June 2019 and it is not disputed that since that time the contact between the defendant and the minor has not been stable and frequent, nor it is disputed that the defendant doesn't have a particular interest in his daughter.

In fact, it is noted that the defendant has completely abandoned his daughter and has no contact with the plaintiff.

However, the Court points out that, although it was not provided with any concrete evidence from the defendant, it appears that at least from the time when the plaintiff relocated to Malta from the Czech Republic, it was the plaintiff who assumed the effective care and custody of the minor. It is also clear that the plaintiff has the interests of the minor at heart.

In light of the above, the Court is satisfied that it is in the best interests of the minor, that the care and custody of the minor E F D should be vested exclusively in the hands of the plaintiff, whereby the minor shall continue to reside with the plaintiff in the premises which the plaintiff herself establishes as her residence. The Court continues to confirm its consideration in view of the fact that there is no communication between the parties. In this regard, the Court makes reference to the judgment in the names of **Miriam Cauchi pro et noe vs. Francis Cauchi**, where the Court of Appeal held that it is *"tiskarta t-talba ghall-kustodja kongunta ghax, bhala sistema, mhux prattikabbli meta l-genituri ma jitkellmux bejniethom"*. This was further elaborated in the judgement of **Scott Schembri vs Dorianne Polidano**, wereby the Court held that *"filwaqt li tiddikjara li taqbel ma' tali pronunzjament izzid illi l-istess principju japplika fejn iz-zewg genituri m'humiex kapaci jitkellmu b'mod civili ma' xulxin li l-kura u kustodja ma ghandhiex tkun kongunta ghaliex immankabilment tkun sors ta' litigji ulterjuri b'detriment serju ghall-benessere tal-minuri"*. This was reconfirmed in the judgement of **Claire Booker vs Roger Mahlangu**.

In light of the above, the Court holds that the issue of the parental authority is not equal to that of care and custody, and thus if a parent is not vested with the care and custody of a minor this should not mean that such parent is also stripped of his parental authority. In this context the Court sees fit to refer to the judgment in the names **Mark Micallef pro et noe vs. Ramona Caruana**, where this principle was clarified:

"(...) s-setgħa tal-ġenitur ma hijiex ugwali għal kura u kustodja, izda huwa kunċett legali li emanixxa mid-Dritt Ruman li jinkorpora fih, fost oħrajn, il-kunċett tal-kura u kustodja. Fil-fatt jekk wieħed ma jkollux f'idejh il-kura u kustodja, ma jfissirx li jitlef id-drittijiet l-oħra li jappartjenu lilu bħala ġenitur, fosthom id-dritt ta' aċċess, id-dritt li jieħu deċizjonijiet flimkien mal- ġenitur l-ieħor, id-dritt li jkun infurmat dwar il-progress tal-minuri, u d-dritt li jiffirma u jġedded passaport. Għaldaqstant ġialadarba ġenitur ikun għadu f'pozizzjoni li jezerċita dawn id-drittijiet, minkejja li ma jkollux il-kura u kustodja tal-minuri, ifisser li xorta waħda jkollu s-setgħa ta' ġenitur, liema setgħa tista' titneħħa skont id-disposizzjonijiet tal-liġi kif misjuba taħt is-Sub-Titolu II tat- Titolu IV tal-Ewwel Ktieb".

In the present case and considering the child's abandonment from her father is proven, the Court considers that it is not in the best interest of the minor that her mother has to resort to judicial procedures every single time the defendant's signature is needed, such as for example the minor's enrolment in schools, an educational school trip, or any decisions in the medical field. Therefore, the Court orders that the defendant be stripped of his parental authority in terms of Article 154 of the Civil Code, provided that the plaintiff will have the sole parental authority over the minor with the right to take exclusively on her own any decision regarding minor, both ordinary and extraordinary.

MATRIMONIAL HOME

The components of a marital break down - ends up with maintenance, property regimes, care and custody, matrimonial home; A break down in a couple these are the 4 main elements underlined

If the couple are living together they will be living in the ***matrimonial home***.

Article 3A of the Civil Code - Matrimonial Home

The couple together decide where the matrimonial home will be - the family takes on a persona, it has no persona but the legislator embodies it like this

Once you establish where you will be living - becomes protected - so if we have decided that my paraphernalia flat will be our matrimonial home, I can no longer use it as I did before, before I was free to do on my own, as soon as it becomes matrimonial home, things change. So if I want to alienate my right of the matrimonial home, I need my consent of my other spouse, or where the spouse withholds consent I can go to court to over ride that decision, if there is a judicial auction, they can sue the matrimonial home - so if you turn a dwelling into a matrimonial home, it is turned in this way

3A. *(1) The* ***matrimonial home*** *shall be established where the* ***spouses may by their common accord*** *determine in accordance* ***with the need of both spouses*** *and the overriding interest of the family itself.*

(2) Where the matrimonial home is wholly or in part owned or otherwise held under any title by one of the spouses, ***such spouse may only alienate by title inter vivos his or her right over the matrimonial home:***

- *(a) with the consent of the other spouse; or*
- *(b) where such consent is unreasonably withheld, with the authority of the competent court; or*
- *(c) in a judicial sale by auction at the instance of any creditor of such spouse.*

(3) The party who has not given his or her consent to a transfer, may bring an action for the annulment of a transfer which has not been effected in accordance with sub-article (2) of this article, within one year from the registration of the transfer.

Article 6 of the Civil Code - Cessation of duty to supply maintenance.

6. *The duty of one spouse to maintain the other shall cease if the latter, having left the matrimonial home, without reasonable cause refuses to return thereto.*

- if you leave matrimonial home without reasonable cause, then the person who owes you maintenance, need not pay you maintenance
- Reasonable cause - domestic violence
- Unreasonable cause - adultery, infidelity, having an affair - not a reasonable cause

Article 6A - Disagreement between the spouses.

6A. *(1) In case of any disagreement either spouses may apply to the competent court for its assistance and the presiding judge, after hearing the spouses and if deemed opportune any of the children above the age of fourteen years residing with the spouses, shall seek to bring about an amicable settlement of such disagreement.*

(2) Where such amicable settlement is not attained and the disagreement relates to the establishment or change of the matrimonial home or to other matters of fundamental importance, the presiding judge, if so requested expressly by the spouses jointly, shall determine the matter himself by providing the solution which he deems most suitable in the interest of the family and family life.

(3) No appeal shall in this case lie from the pronouncement of the presiding judge.

- Article 6A - famous article but this was written as back in the day there was no councillor, but today there is so they resort to that rather than the court
- The court may decide that only one party should enjoy the matrimonial home and it could be the paraphernalia property of the other spouse,
- The matrimonial home may be given by the court on demand of one of the parties to one party, to the exclusion of the other party, and for that period and under those conditions that the court may deem fit:
- the court may also rule that the matrimonial home should be sold when it is satisfied when both parties and their children will have alternative and appropriate accommodation and that the proceeds of the sale shall be assigned to the parties as the court deems fit;
- or, if the matrimonial home belongs to both parties, it shall assign the matrimonial home to one party and the latter shall compensate the other party for the financial loss sustained

Article 37 - Personal Separation

37. (1) All suits for ***personal separation*** *shall be brought before the appropriate section of the Civil Court as may be established by regulations made by the Minister:*

Provided that prior to the commencement of proceedings, a demand may be made for determining the amount of an allowance for maintenance during the pendency of the proceedings and for the issue of a decree ordering the payment of such allowance or a demand for the court to determine by decree who of the spouses, if any, shall during the pendency of the proceedings continue to reside in the matrimonial home.

(2) The application containing the demand referred to in the proviso to sub-article (1) shall be duly appointed for hearing by the court and shall be served on the respondent together with the notice of such hearing:

Provided that where domestic violence is involved, the said application shall be appointed within four days and the court may, of its own motion before or after hearing the parties, issue a protection order under article 412C of the Criminal Code and, or a treatment order under article 412D of the same Code and the provisions of those articles shall mutatis mutandis apply to an order issued under this article as if it were an order issued under the corresponding article of the said Code:

- However if you have made due with those arrangements, courts are unlikely to change them - of you have an amount of maintenance, invariably the court will confirm that amount, same with arrangements for children and matrimonial home - so the decree you get pendent lite is super imp - not jsut a stop gap, but it is imp a lot as it will set the tone for the case

Article 46 - Matrimonial home *pendente lite.*

46. *During the pendency of the action for separation, either spouse, whether plaintiff or defendant,* ***may leave the matrimonial home*** *and may, whether or not he or she has left the matrimonial home demand that the court shall determine who of the spouses if any shall reside in the matrimonial home during the pendency of such action.*

- Who will be with the children will play a very important part - as the court will determine that it is in the best interest of the child

- When would you Not want the children to remain in the house ? IF THERE IS ABUSE, bad memories connected - a good reason for everyone to leave = if alternative housing is not possible, the person who commits the abuse is the one excluded from the matrimonial home and the victims are left with the memories in the same home - matrimonial home; a target of a great number of vented feelings; people take out their anger on the matrimonial home

Article 55 - Cessation of community of acquests and community of residue under separate administration.

55A. *(1) In pronouncing the judgement of separation, the court shall on the demand of either of the parties, order, according to circumstances:*

(a) that any one of the parties shall be entitled to reside in the matrimonial home, to the exclusion of the other party, for the period and under those conditions as it considers appropriate; or

(b) that the matrimonial home is to be sold, where it is satisfied that the parties and their children shall have adequate alternative accommodation, and that the proceeds of the sale shall be assigned to the parties as it considers appropriate; or

(c) where the matrimonial home belongs to both parties, to assign the matrimonial home to any one of the parties, which party shall compensate the other party for the financial loss suffered:

Provided that, in every case, the court shall consider the following:

- *(a) the **best interest of the minor children**, including the impact that there may be on the minor children if the court were to grant a demand made according to this article;*
- *(b) the **welfare of the parties and of the children**; and*
- *(c) whether the parties have, or, whether their means and abilities permit them to have, **another place where to reside.***

(2) The court may, upon a demand of either party, vary a decision taken by it under sub-article (1) (a), where there is a substantial change in circumstances.

(3) The provisions of article 3A(2) shall not apply in the case of spouses who are legally separated, unless the contrary is not agreed to between the spouses or is ordered by the court having jurisdiction to pronounce the personal separation; and such agreement or order shall only be effective in regard to third parties as from the date when the deed or order is registered in the Public Registry.

Article 66I - Powers of the court

66I. (1) Where **a demand for divorce is made to the competent civil court by either of the spouses,** or by **both spouses after having agreed that their marriage is to be dissolved,** and where the spouses are not separated by means of a contract or a court judgement, before granting leave to the spouses to proceed for divorce, the court shall summon the parties to appear before a mediator, either appointed by it or with the mutual consent of the parties, and this for the purpose of attempting reconciliation between the spouses, and where that reconciliation is not achieved, and where the spouses have not already agreed on the terms of the divorce, for the purpose of enabling the parties to conclude the divorce on the basis of an agreement. The said agreement shall be made on some or all or of the following terms:

- (a) the care and the custody of the children;
- (b) the access of the two parties to the children;

- (c) the maintenance of the spouses or of one of them and of each child;
- **(d) residence in the matrimonial home;**
- (e) the division of the community of acquests or the community of residue under separate administration.

- If there is a lease who will pay the lease, the agreement to matrimonial home is important

Article 89 - A child conceived and born out of wedlock of a spouse, born before or during a marriage.

89. A child conceived and born out of wedlock born to a spouse before or during marriage, and acknowledged during a marriage may not be brought into the matrimonial home, except with the consent of the other spouse, unless such other spouse has already given his or her consent to the acknowledgement.

- You need the consent of the other spouse as you will be taking the child into the matrimonial home as the child is not his - you need the consent of the other party, - he might not wish to welcome the child into the matrimonial home , and in those cases the child may feel estranged from the parent, and maybe the other siblings feel uncomfortable - unless they are in agreement they shouldn't let him in

Use of contents of the matrimonial home

635. The surviving spouse shall also have the right of use over any of the furniture in the matrimonial home belonging to the deceased spouse.

Application of articles 633 and 635 in cases of personal separation or divorce.

639. The rights referred to in article 633 and article 635 shall also apply in cases where:

(a) the spouses were personally separated and the surviving spouse was either in terms of article 55A or in terms of a public deed of consensual separation entitled to reside in the matrimonial home; or

(b) the person who died was divorced and his former spouse was, at the time of his death, entitled to reside in the matrimonial home by virtue of the applicability of the provisions of article 66(5) and article 55A.

Article 2095A sub 6

(6) When the matrimonial home is the subject of trusts for the benefit of the spouses or any one of them, nothing in the trust instrument or in the law shall imply that a spouse enjoys lesser rights to the home and its enjoyment than under article 3A, and the terms of the trust may not be revoked or varied, nor may the trustee dispose of the said property, without the consent in writing of both spouses or, in the absence of consent, without the authorisation of the Court.

- baseline is that the surviving spouse enjoy the matrimonial home

The matrimonial home in marriage an separation - a study of the evolitiuoon - Maria Refalo to look at

THE MATRIMONIAL HOME IN MARRIAGE AND SEPARATION : A STUDY OF THE EVOLUTION OF THE RELATION REFALO, TIZIANA MARIA 2010

Back in the day, the husband was pronounced to be the main leader in the household and the matrimonial home

A landmark code of law to be present on our Island was the Code de Rohan which was enacted in 1784. In its chapter on marriage and matrimony, the Code de Rohan considered marriage to be a partnership with its respective property rights; however no express provision or implied reference was made to the matrimonial home.

In 1853, Sir Adrian Dingli produced a Civil Code in accordance to which, civil law in Malta regulated the establishment of the conjugal residence, and notions ancillary thereto, through the rights and duties which the spouses acquired upon marriage. The notion of the conjugal residence was something of a personal nature inherent with the husband. His exclusive role and the subordinate position of the wife in marriage were crystallised in the Civil Code through Articles 3 and 4. By way of illustration, Article 3 (2) stated that the husband was duty bound to receive the wife in his house. The wife, on the other hand, through Article 4 (2) was to live with her husband and follow him wherever he deemed fit to establish his residence.

Furthermore, prior to Act XLVI of 1973, not only was the concept of the matrimonial home alien to our Civil Code, but it was also chauvinistically established by the principle that the house, in which the spouses were to establish their married life, was to be considered as the house of the husband.

This ideology was also upheld by Laurent in his observations on the French Civil Code. The author held that the obligation of the wife to follow the husband in the matrimonial home chosen by him was of the essence to the institute of marriage

Cascun vs. Cascun, 1953 the FHCC held that „dan l-obbligu tal-ħajja in komune huwa wieħed mill-aktar qawwijin li ż-żwieġ jimponi lill-konjugi; u peress illi d-direzzjoni tal-familja hija f‟idejn ir-raġel bħala kap tagħha, huwa biss għandu d-dritt li jistabilixxi d-domiċilju konjugali.‟

The notion of the matrimonial home is a notion which has evolved and progressed with the passage of time and legislative development. Today the matrimonial home is one of the issues which necessitates not only cooperation but compromise on the part of the spouses. This was not always the situation, in particular when one considers the reality that up to forty years ago, the matrimonial home was a concept affiliated exclusively with the figure of the husband as head of the household and the family. Upon the widening of society's mentality on the latter and with Malta's adhering to new commitments in upholding the concept of gender equality, the archaically setting up of domestic legislation required revision so as to conform with the day's reality. My reading has revealed to me that Malta was one of the very latest states in Europe to recognise the equality existent between the spouses, their vital cooperation on the choice of the matrimonial home and its protection once established. With the equality of spouses being established, in particular with regards to the matrimonial home, the role of the Courts was also given an imperative role. In determining matters on the matrimonial home, particularly in situations of personal separation, the Court has never adopted a uniform approach however, in view of the case law which has been tackled, it transpired that although the Court takes into consideration the best interests of the

children in the marriage, as well as the interests of the parties concerned, the harsh reality persists, that at least one party to the marriage and the family respectively is ultimately ejected from the place which he or she once called a home. There is no doubt that a lot of progress has been made however loopholes are still present both on the legislative level as well as on the social level. Both areas may require further awareness in order to appreciate this fundamental notion of the matrimonial home and the significance of the issues which are related thereto.

CASES

AB vs CDE, CIVIL COURT (FAMILY SECTION), 7th March, 2018

Jurisdiction re matrimonial home – order to sell and share proceeds

R U vs SU, 28th April 2016

Fl-affidavit tieghu[3] il-konvenut jghid *inter alia*, illi d-dar matrimonjali hija parafernali tieghu. Kien iddecieda li jwaqqaghha waqt iz-zwieg u jixhed kif ix- xoghol ta' twaqqiegh u bini ghamlu kollu hu bl-ghajnuna ta' huh xxxx. Jghid li kien hallas spejjez minimi ghax hafna mix-xoghol ghamlu hu.

Hija l-fehma tal-Qorti li una volta d-dar matrimonjali hija parafernali tar-ragel li qed jinstab responsabbli ghat-tkissir taz-zwieg tal-partijiet, huwa indikat li l-attrici tinghata d-dritt li mal-pronunzjament tas-sentenza ta' separazzjoni tibqa' tirrisjedi fid-dar matrimonjali ghall-perijodu ta' hames (5) snin.

- In this case even though it was parahphernal property, even though it was his hard work, since he was the cause of tiebreak down o the marriage, she should continue to live in the matrimonial home for a period of 5 years - what happens at the end of the 5 years ?
- What happens to her ? She has to leave - a lot of cases on eviction of people who stay on in this kind of reprieve

Tessie Cutajar f'isimha u bhala kuratrici ad litem ta' bintha Kathleen Cutajar b'digriet tas-6 ta' Awwissu 2012 v. Leo Cutajar, Court of Appeal 2018

'…fir-rigward tal- kreditu parafernali pretiz mill-attrici, l-ewwel Qorti kkonkludiet li ma ngabux provi sodisfacjenti li juru li l-attrici ghandha kreditu parfernali kontra l-komunjoni u ordnat li r-rikavat tal-bejgh tal-fond gia` matrimonjali jinqasam ugwalment bejn il-partijiet.

"Dwar l-aspett patrimonjali l-unika assi appartenenti l-komunjoni li saret prova dwarha hija l-appartament li kien jintuza bhala d-dar matrimonjali u li llum tirrisjedi biss fih l-attrici. Ghalkemm l-attrici allegat li ghandha tiehu xi flus rapprezentanti flus parafernali li skond l-attrici intuzaw **sabiex saru benefikati fid-dar, ma saret l-ebda prova sodisfacenti f'dan ir-rigward.** Ghalhekk il-Qorti qed tiddeciedi illi l-attrici naqset milli tipprova sodisfacentement li ghandha xi kreditu kontra l-komunjoni.

Tikkontendi li l-fatt li hi ma kellhiex ircevuti ta' x'nefqet fid-dar ma jfissirx li dawn il-flus ma ntefqux, tant illi lanqas il-konvenut innifsu ma jikkontesta l-fatt li saru benefikati fil-fond matrimonjali b'investiment tal-flejjes parafernali taghha. Skont l-attrici, jekk il-flus li nefqet fid-dar ma jintraddx lilha mir-rikavat tal-bejgh tal-istess dar, liema bejgh gie ordnat fis-sentenza appellata, il-konvenut ikun qed jarrikkixxi ruhu a skapitu taghha.

…cahad li l-attrici nefqet dan l-ammont fil-proprjeta` matrimonjali. Isostni ulterjorment illi minkejja li l-ewwel Qorti kienet ikkoncediet lill- attrici iktar zmien biex tipproduci r-ricevuti li qalet li ghandha dwar il- benefikati li saru fid-dar mill-flus parafernali taghha, baqghet ma ressqitx il-provi mehtiega.

Ghalkemm huwa minnu li l-attrici naqset milli tipproduci prova konkreta u oggettiva tal-ispejjez li nefqet fid-dar, din il-Qorti lanqas tista' twarrab il-fatt li l- konvenut, oltre li ammetta espressament fix-xhieda tieghu fuq citata, li martu hallset ghal xi benefikati fid-dar matrimonjali mill-flus parafernali taghha, ikkwantifika huwa stess din in-nefqa fic-cifra ta' bejn Lm3,000 u Lm4,000 (jew ewro 6,988.12 u ewro 9,317.50). '

"….din il-Qorti ma taqbilx mal-konkluzjoni tal-ewwel Qorti li l-attrici "*naqset milli tipprova sodisfacjentement li ghandha xi kreditu kontra l-komunjoni"* ghall-benefikati li ghamlet fid-dar matrimonjali. Huwa evidenti li l-ewwel Qorti naqset milli tikkonsidra l-qbil u ammissjoni tal-konvenut dwar il- benefikati li saru u l-valur taghhom. Ghalkemm huwa minnu li mill-provi ma jirrizultax sodisfacjentement li l-attrici **ghamlet il-benefikati kollha li hija tghid li saru mill-flus parafernali taghha, din il-Qorti tqis illi bl- ammissjoni tal-konvenut hemm provi bizzejjed li l-attrici hallset mill-flus li wirtet waqt iz-zwieg, ghal dawk il-benefikati li l-konvenut jaqbel li saru, u li nefqet is-somma li l-konvenut jaqbel li ntefqet ghal dawn il-benefikati.**

Peress li ma sar ebda appell mill-ordni ghall-bejgh tad-dar matrimonjali u l-ewwel Qorti ddecidiet li l-likwidazzjoni tal-komunjoni tal- akkwisti bejn il-partijiet ghandha ss**ir billi l-fond gia` matrimonjali tal- partijiet - li huwa l-uniku assi formanti l-komunjoni tal-akkwisti - jinbiegh u r-rikavat li jinqasam ugwalment bejn il-partijiet, din il-Qorti tordna wkoll li l-kreditu parafernali li ghandha l-attrici kontra l-komunjoni tal-akkwisti fl-imsemmija somma ta' ewro8,500 ghandha tithallas lill-attrici mir-rikavat tal-bejgh tad-dar matrimonjali u l-bilanc tar-rikavat jinqasam ugwalment bejn il-partijiet.**

<u>Case 22nd August 2016</u>

LL ta' 46 sena ttella' l-qorti minn martu u l-maħbub tagħha akkużat li tagħhom fastidju f' sitt inċidenti separati minn Lulju 'l hawn.L-akkużat u martu, ML , għadhom legalment miżżewġin, hekk kif il-qorti semgħet li minkejja li l-mara abbandunat id-dar matrimonjali, dejjem irrifjutat li l-koppja jibdew proċeduri ta' separazzjoni. Ir-raġel wieġeb mhux ħati għall-akkuża u fisser kif wara li kien ilu mingħajr impjieg għal tmien snin skopra li martu akkumulat dejn kbir u li hu, bħala żewġha f' għajnejn il-liġi, kellu jagħmel tajjeb għal dan id-dejn ukoll. Taħt pressjoni kbira, spjega lill-qorti kif waqa' fil-vizzju tax-xorb. Kien f' episodji meta jkun fis-sakra li L kien imur iħabbat id-dar fejn toqgħod martu u AA, il-maħbub tagħha. F' episodju minnhom is-Sibt li għadda waddbilha l-boroż taż-żibel mal-bieb. Id-difiża qalet ukoll li x-xahar li għadda l-maħbub tal-mara bagħat lil xi ħadd isawtu. L-akkużat ingħata l-ħelsien mill-arrest, wara li wiegħed lill-maġistrat li se jibda programm is-Sedqa u li mhux se jersaq lejn dar martu, fuq depożitu ta' mitejn u ħamsin ewro u garanzija personali ta' €5,000.

GC Vs VC, 16th March 2022

Dar matrimonjali proprjeta parafernali tal-mara. Allegazzjoni li zewgha nefaq hafna flus biex jirranga d-dar – mhux pruvat. Ordnat jizgombra.

- allegation the other way round - husband spent money - ordered to evict

JP vs MP, 3rd March 2022

Infieq ta' flus bhala beneficcju ghad-dar matrimonjali mhux pruvat

CARMEN SPITERI V JOSEPH SPITERI Court of Appeal, 2018

Court ordered the P to keep living in matrimonial home for a year before it is sold - Huwa evidenti li l-appellanti hawnhekk qed tfittex esklussivament l- interessi taghha ghaliex anke jekk hija ghandha tiehu s-somom reklamati minnha (li l-Qorti ma taqbilx maghha f'kull kaz u f'kull talba taghha) din tkun soluzzjoni altament ingusta fil-konfront tal-appellat li ghandu jkollu dritt ghal sehmu minghajr tnaqqis. Minhabba f'hekk ukoll il-Qorti ma hijiex se takkorda dritt ta' abitazzjoni *in aeternum* lill- appellanti anke minhabba l-fatt illi f'dan il-kaz ma hemmx tfal minorenni. Se testendi t-terminu impost mill-Ewwel Qorti ghal sena biex taghtiha aktar zmien tipprepara ruhha ghall-bejgh tad-dar.

QORTI TAL-APPELL,CHARLAYNE JOSEPHINE MINTOFF V. JASON GEORGE MINTOFF U LOUIS MINTOFF

Huwa ormai paċifiku fil-ġurisprudenza nostrana li l-azzjoni ta' spoll tista' tiġi ezerċitata anki meta l-ispoljant ikollu l-komproprjeta` tal-haġa li tagħha l-ispoljat ikun sofra l-ispoll.

Fil-kaz ta**' llum m'hemm ebda dubju illi l-attriċi kellha aċċess liberu għall-post u kienet tidħol u toħroġ fih kull x'hin** trid anki għaliex għalkemm hemm pendenti proċeduri ta' separazzjoni personali bejn l-attriċi u l-konvenut JGM, il-fond de q**uo għadu sa llum jifforma d-dar matrimonjali** tal-partijiet. Anke jekk fir-risposta ġuramentata tiegħu l-imharrek iressaq l-argument illi kienet proprju l-attriċi li allontanat ruħha mid-dar matrimonjali, dan l-argument ma jistax ireġi f'azzjoni bhal dik ta' llum. Fil-kuntest tat-talbiet attriċi dak illi l-Qorti hija msejjħa tistabbilixxi huwa jekk kienx hemm pussess mhux jekk kienx hemm residenza. (p.9)

•**Għalkemm il-konvenuti ma ressqu ebda provi u waqt illi fir-risposta tagħhom jiċħdu li kkommettew spoll**, fl-istess waqt, sabiex jiggustifikaw l-aġir taghħhom, permezz tal-eċċezzjoni numru hamsa (5) jeċċepixxu li "l-attriċi minn jeddha allontanat ruħha minn u abbandunat il-fond imsemmi fir-rikors maħluf u marret toqgħod fid dar tal-ġenituri tagħha xhur qabel dawn il-proċeduri". Għalkemm l-attriċi stess tikkonferma li marret tgħix fid-dar tal-ġenituri tagħha sabiex tassistihom, dan ma jagħtix lill-konvenuti jew min minnhom il-jedd illi jinbidlu s-serraturi tal-fond. Fil-kaz ta' llum jirriżulta ppruvat dan it-tieni element tal-azzjoni peress li fil-fehma tal-Qorti s-serraturi nbidlu fuq inkarigu tal-konvenuti jew min minnhom mingħajr l-għarfien u l-kunsens tal-attriċi. (p.10)

Skont il-liġi, sakemm tiġi pronunzjata s-separazzjoni personali tal-partijiet, iż-żewġ konjuġi għandhom dritt li jkollhom aċċess għal u li jirrisjedu fid-dar matrimonjali, irrispettivament mill-kwistjoni tat-titolu fuq l-istess fond, u dan sakemm ma jkunx hemm xi ordni tal-Qorti li xi ħadd

mill-partijiet għandu jgħix fid-dar matrimonjali ad esklużjoni tal-parti l-oħra. F'din il-kawża ma jirriżultax li ngħata xi ordni ta' dan it-tip fil-proċeduri ta' separazzjoni personali li l-partijiet għandhom pendenti quddiem il-Qorti, u għalhekk it-tnejn li huma għandhom dritt li jkollhom aċċess għal din id-dar. (p.11)

Għal dawn il-motivi il-Qorti taqta' u tiddeċiedi billi tiċħad l-appell tal-konvenuti u tilqa' l-appell inċidentali tal-attriċi, tordna lill-konvenuti jispurgaw l-ispoll kommess minnhom fuq il-bieb prinċipali tal-fond bl-isem xxx u jirripristinaw l-aċċess tal-attriċi għall-istess fond minnufih, u filwaqt li tawtorizza lil kull wieħed mill-konjuġi Mintoff sabiex jirtiraw kopja taċ-ċavetta depożitata fil-Qorti b'referenza ghall-esekuzzjoni tal-mandat ta' deskrizzjoni 38/2020, tikkundanna lill-konvenuti jirrimborsaw lill-attriċi l-ispejjeż li jistgħu talvolta jiġu inkorsi minnha sabiex tikseb ir-rilaxx taċ-ċwievet tal-garaxx.

UK POSITION 2018

Important case - ***White vs White*** - 26th October 2000 - we take as obvious that Community of acquests exists and people take half each =- but in the uk - a sizeable portion each but not necessarily half - this idea of splitting was looked at relatively recent by the British courts

White concerned financial remedy proceedings following divorce (or, as they were then known, 'ancillary relief proceedings'). At first instance Mrs White was awarded just over one-fifth of the total assets. She appealed against this award and the Court of Appeal allowed her appeal, increasing her share of the total assets to about two-fifths.
Mr White appealed against this order, and Mrs White cross-appealed, seeking an equal share in all the assets as Lord Nicholls pointed out in the course of his leading judgment in *White*, the legislation does not state explicitly what is to be the aim of the courts when exercising its powers. Implicitly, he said, the objective must be to achieve a fair outcome.
Lord Nicholls went on "…there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering paragraph (f) [of section 25(2)], relating to the parties' contributions … If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer."
He then set out the 'sharing principle':

"A practical consideration follows from this. Sometimes, having carried out the statutory exercise, the judge's conclusion involves a more or less equal division of the available assets. More often, this is not so. More often, having looked at all the circumstances, the judge's decision means that one party will receive a bigger share than the other. Before reaching a firm conclusion and making an order along these lines, a judge would always be well advised to check his tentative views

against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so."

Guide on Article 8 of the European Convention on Human Rights
Right to respect for private and family life, home and correspondence

"Home" is not limited to property of which the applicant is the owner or tenant. It may extend to long-term occupancy, on an annual basis, for long periods, of a house belonging to a relative (**Menteş and Others v. Turkey**, § 73). "Home" is not limited to those which are lawfully established (**Buckley v. the United Kingdom**, § 54) and may be claimed by a person living in a flat whose lease is not in his or her name (**Prokopovich v. Russia**, § 36) or registered as living elsewhere (**Yevgeniy Zakharov v. Russia,** § 32). It may apply to a council house occupied by the applicant as tenant, even if, under domestic law, the right of occupation had ended (**McCann v. the United Kingdom**, § 46), or to occupancy for several years (**Brežec v. Croatia**, § 36).
"Home" is not limited to traditional residences. It therefore includes, among other things, caravans and other unfixed abodes (**Chapman v. the United Kingdom** [GC], §§ 71-74; compare and contrast with **Hirtu and Others v. France,** § 65). It includes cabins or bungalows stationed on land, regardless of the question of the lawfulness of the occupation under domestic law (**Winterstein and Others v. France**, § 141; **Yordanova and Others v. Bulgaria**, § 103). Even though the link between a person and a place which she inhabits only occasionally might be weaker, Article 8 may also apply to second homes or holiday homes (**Demades v. Turkey**, §§ 32-34; **Fägerskiöld v. Sweden** (dec.); **Sagan v. Ukraine,** §§ 51-54) or to partially furnished residential premises (**Halabi v. France**, §§ 41-43).

MILHAU V. FRANCE (APPLICATION NO. 4944/11) 10 JULY 2014

The European Court of Human Rights held, unanimously, that there had been a violation of Article 1 of Protocol No. 1 (protection of property) of the European Convention on Human Rights.

The case concerned the arrangements by which a judge, in the context of a divorce, could choose to order the compulsory transfer of an individually-owed asset in payment of a compensatory financial provision.
In March 2009, in the context of divorce proceedings, the court of appeal upheld a decision to award the applicant's wife a compensatory financial provision, and the amount payable to her. It ruled that, in order to pay this award, the applicant was to renounce his property rights over a villa which belonged to him, the estimated value of which was equivalent to that of the compensatory financial provision.
The applicant had thus borne an individual and excessive burden. The courts had not taken into account the possibility that the applicant could pay this financial provision by another means and avoid recourse to the compulsory transfer of his villa.

Deprivation of property Failure to consider other means of paying compensatory award when making transfer of property order: violation
Facts – In 2001 the applicant's wife filed for divorce. In 2005 the court granted the divorce on grounds of fault by the applicant alone. The domestic courts noted that the termination of the marriage created a disparity in the former spouses' pecuniary circumstances, which had to be offset by the payment of a compensatory financial provision to the applicant's former wife. In spite of the applicant's substantial and varied property portfolio, the domestic courts held that this

compensatory award was to take the form of a villa which he owned separately. In appealing on points of law, the applicant submitted, in particular, that while Article 275 of the Civil Code authorised the judge to order that a property be relinquished, such a provision could only be implemented where it was impossible for the person liable for the compensatory financial award to fulfil that obligation in another way, failing which the right to property guaranteed by Article 1 of Protocol No. 1 would be breached.

Asylum Claims

There is no obligation on a State under Article 8 to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country. However, where a State decides to enact legislation conferring the right on certain categories of immigrants to be joined by their spouses, it must do so in a manner compatible with the principle of non-discrimination enshrined in Article 14.

The Court found a breach of Article 14 taken in conjunction with Article 8 in Hode and Abdi v. the United Kingdom because one applicant, the post-flight spouse of the other applicant, a recognised refugee, was not allowed to join him in the respondent State, whereas refugees married prior to the flight and immigrants with temporary residence status could be joined by their spouses.

The family reunification procedure needs to be flexible (for instance in relation to the use and admissibility of evidence for the existence of family ties), prompt and effective Tanda-Muzinga v. France; Mugenzi v. France.

Establishing matrimonial home for child abduction

CASE OF SEVERE v. AUSTRIA (Application no. 53661/15) 21 September 2017 **FINAL** 21/12/2017

The applicant, Michel Sévère, is a French national who was born in 1967 and lives in Rochefort (France). The case concerned the abduction of his sons by their mother from France to Austria.

Mr Sévère had twin sons with C.B., a French and Austrian national, in 2006. They lived together in Rochefort, France. Following a dispute in December 2008, C.B. left France for Vienna, taking their sons with her.

A number of proceedings ensued in both France and Austria. In France there were custody proceedings (in which it was decided that the parents were to have joint custody, with the children's main residence being with their father); and criminal proceedings against C.B. for child abduction (in which she was convicted and sentenced to one year's imprisonment). In Austria two criminal investigations were discontinued in 2009 and 2011: the first against Mr Sévère for sexual abuse of minors; and the second against C.B. for child abduction. Mr Sévère also brought proceedings in Austria for the return of his sons under the Hague Convention (on the Civil Aspects of International child Abduction). In those proceedings the Austrian courts carefully examined C.B.'s allegations of sexual abuse, but dismissed them as implausible and issued an order for the return of the children, which became final in October 2009. A few months later, in December, the authorities attempted to enforce this order, without success as neither C.B. nor the children were at their known addresses. Over the following five and a half years involving numerous actions lodged by both parties, intensive exchange with the French authorities, oral hearings and many decisions, the Austrian authorities tended more and more towards a reassessment of the children's return. They eventually decided in April 2015 against enforcement of the return order. They considered that, if returned to France, the children would very likely be further traumatised due to the separation from their mother (who was facing a prison sentence in the country), and that they had meanwhile adapted well to living in Austria. Relying on Article 8 (right to respect for private and family life) of the

European Convention on Human Rights, Mr Sévère complained that the Austrian authorities had not taken all the necessary measures to ensure his sons' swift return to France. In particular, he argued that they had not made sufficient attempts to locate the children and their mother and had not tried any other coercive measures.

Violation of Article 8 **Just satisfaction**: EUR 20,000 euros (EUR) (non-pecuniary damage) and EUR 12,956.40 (costs and expenses)

Domestic violence and Matrimonial home

CASE OF KALUCZA v. HUNGARY (Application no. 57693/10) - JUDGMENT STRASBOURG 24 April 2012 - FINAL *24/07/2012*

Hungary failed to protect woman from abusive partner despite repeated requests to have him evicted from their shared fla

a violation of Article 8 (right to respect for private life) of the European Convention on Human Rights.

The Court found that the Hungarian authorities had not taken sufficient measures for Ms Kalucza's effective protection from her former partner's violent behaviour, despite criminal complaints lodged against him for assault, repeated requests for a restraining order against him and civil proceedings to order his eviction from their flat.

She has requested the help of the authorities on numerous occasions, lodging criminal complaints for rape, assault and harassment.

Article 8 (private life)

The Court considered Ms Kalucza's claims concerning Gy.B.'s threat to her physical integrity in their shared flat, including the allegation that he had frequently attacked her, to be credible. There was therefore no doubt that Ms Kalucza's application fell within the sphere of private life under Article 8 of the Convention. The Hungarian authorities were therefore obliged under the Convention to take measures to protect Ms Kalucza from her former partner's violent behaviour in her home.

However, the Court was struck that it had taken the authorities more than one-and-half years to decide on Ms Kalucza's first request for a restraining order,

The Court therefore found that, even though Ms Kalucza had lodged criminal complaints against her partner for assault, had repeatedly requested restraining orders to be brought against him and had brought civil proceedings to order his eviction from the flat, the Hungarian authorities had not taken sufficient measures for her effective protection, in violation of Article 8.

Article 41 (just satisfaction)

The Court held that Hungary was to pay Ms Kalucza 5,150 euros (EUR) in respect of non pecuniary damage.

“Mill-provi hawn fuq imsemmija, l-Qorti tinsab konvinta illi l-konvenut kien kapaci ikun vjolenti u aggressiv b’mod fiziku mal-attrici. Fil-fatt, il- Qorti taghti piz probatorju lir-rapport mahluf tas-social worker Sarah Debono, f’liema rapport il-konvenut stess ammetta li gieli refa’ idejh fuq l-attrici u li huwa vjolenti, u barra minn hekk is-social worker stess ikkonfermat li rat marki vjola u homor fuq wicc l-attrici wara wiehed mill-argumenti varji li kellhom il-partijiet. Dawn il-provi flimkien mal-bqija tal-provi esebiti, ma ihallu l-ebda dubbju fil-Qorti illi l-konvenut kapaci ikun vjolenti u aggressiv fizikament. Għaldaqstant, ma jistax jinghad li da parti tal-konvenut kien hemm atti ta’ vjolenza singolari u izolati. Ghalkemm ma giet ipprezentata ebda sentenza kriminali fejn il-konvenut instab hati ta’ vjolenza fuq l-attrici, il-Qorti tinsab moralment konvinta li l-konvenut huwa persuna b’demmu spont, li kapaci ikun vjolenti fizikament jekk persuna tikkuntrarjah u tipprovokah.

Barra minn hekk, il-Qorti tispecifika li l-vjolenza domestika ma tihux biss forma fizika, izda anke emozzjonali u morali. Il-Qorti tara li l-vjolenza ipperpetrata fuq l-attrici kienet ukoll ta’ forma emozzjonali, u dan fid-dawl tar-report mahluf tas-social worker Sarah Debono. Ma huwiex daqstant facli sabiex wiehed jipprova l-abbuz emozzjonali fuq persuna, izda fil-kaz odjern il-Qorti ghandha rapport li jikkonferma tali abbuz, liema rapport sar min-nies li ighixu l-kaz in kwistjoni, fejn gie imnizzel li nhar l-24 ta’ Settembru 2012, f’telefonata mas-social worker, l-attrici instemghet anzjuza ferm u gie ikkonfermat illi “Ms Melak also started receiving psychological help, u li f’Ottubru/ Novembru 2012’ Ms Meilak was attending sessions with her psychologist at the time’. Tali prova ma thalli l-ebda dubbju fil-Qorti dwar l-estremita` ta’ abbuz li kienet qeghda ssofri minnu l-attrici matul iz-zwieg taghha mal-konvenut. (p.7)

CVIJETIC VS CROATIA 2004

The applicant was unable to have her former husband evicted from the flat which constituted her home, a violation of Articles 6 and 8 was found on account of the protracted enforcement proceedings. There was no need for a separate examination of Article 1 of Protocol No. 1.

•“As to the facts of the present case, the Court firstly notes that the flat in question was the applicant's home where she had lived before I.Š. moved in and thus prevented the applicant from living there. The Court notes further that I.Š. forcefully broke into the applicant's flat and was living there without any legal ground, as it was established by the domestic courts. In the present case the only avenue by which the applicant could have repossessed her flat was through judicial proceedings before a civil court, since the occupiers refused to comply with the court's judgment ordering their eviction.

•Although the Split Municipal Court recognised the applicant's right to live in her home and ordered eviction of I.Š., the judgment of that court was not enforced for a very long period of time as it has been established under the Court's assessments concerning violation of Article 6 § 1 of the Convention. The Court has found that the delays in carrying out the execution order were entirely attributable to the domestic authorities.

•The Court notes that due to the fact that the Split Municipal Court's judgment ordering the eviction of I.Š. was not executed for a prolonged period of time, the applicant was prevented from living in her home for a period of more than four years after the Convention entered into force in respect of Croatia.

J.D. AND A V. THE UNITED KINGDOM, 2019

Housing benefits withdrawal for person caring for disabled child and survivor of domestic violence

In the case of the second applicant the Court notes that the legitimate aim of the present scheme – to incentivise those with 'extra' bedrooms to leave their homes for smaller ones – was in conflict with the aim of Sanctuary Schemes, which was to enable those at serious risk of domestic violence to remain in their own homes safely, should they wish to do so.

104. Given those two legitimate but conflicting aims the Court considers that the impact of treating the second applicant, or others housed in Sanctuary Schemes, in the same way as any other Housing Benefit recipient affected by the impugned measure, was disproportionate in the sense of not corresponding to the legitimate aim of the measure. The Government have not provided any weighty reasons to justify the prioritisation of the aim of the present scheme over that of enabling victims of domestic violence who benefitted from protection in Sanctuary Schemes to remain in their own homes safely. In that context, the provision of DHP could not render proportionate the relationship between the means employed and the aim sought to be realised where it formed part of the scheme aimed at incentivising residents to leave their homes, as demonstrated by its identified disadvantages.

105. Accordingly, the imposition of Regulation B13 on this small and easily identifiable group has not been justified and is discriminatory. In coming to that conclusion, the Court also recalls that in the context of domestic violence it has found that States have a duty to protect the physical and psychological integrity of an individual from threats by other persons, including in situations where an individual's right to the enjoyment of his or home free of violent disturbance is at stake (see *Kalucza v. Hungary*, no. 57693/10, § 53, 24 April 2012).

A -vs- B, JUNE 2008 -

three children were born from the said marriage, namely C who has attained majority, and D and E who are seventeen and sixteen years of age, respectively.

That the marriage celebrated between the parties has irretrievably broken down and their matrimonial life is no longer possible as a result of the respondent's abusive and illegal behaviour, consisting in adultery, threats, excesses, cruelty, grievous injury and violence, both towards the applicant and towards the children.

The applicant is also asking the court to pronounce the separtion from D. She is also asking the court to 6) Order the respondent to vacate the matrimonial home, namely < address > , which the applicant holds by title of lease / sub-lease even prior to the marriage, and in respect of which the respondent has absolutely no legal title, if necessary even with the intervention and assistance of the police and court marshals, as the case may be, and consequently authorise the applicant to take the necessary measures to reside in the property together with her children to the exclusion of the respondent;

From the evidence brought before it, the Court definitely feels that the plaintiff has proved the allegations contained in her application and that her demands deserve to be acceded to. Plaintiff was thrown out of the matrimonial home by defendant despite the fact that the latter has no title to it

since it was let to plaintiff before she married defendant. It also appears that all furniture in the matrimonial home pertain to plaintiff who had bought it from her own proceeds from inheritance.

The parties have three children, but only the youngest, E, is still a minor. Therefore defendant is obliged to pay maintenance to plaintiff and the said minor. According to plaintiff he used to earn between five hundred Maltese Liri (Lm500), equivalent to one thousand, one hundred and sixty five Euro (€1,165), and one thousand Maltese Liri (Lm1,000), equivalent to two thousand, three hundred and thirty Euro (€2,330), a month when they were living together. Thus the Court will award maintenance amounting to four hundred Euro (€400) for plaintiff and two hundred and fifty Euro (€250) for the minor.

The court

3. Orders defendant to pay the plaintiff as maintenance as to the sum of four hundred Euro (€400) for plaintiff herself and two hundred and fifty Euro (€250) for the minor child E every month;

4. Orders that Sections 48 and 55 of the Civil Code shall apply to the defendant;

5. As to the fifth demand orders defendant to give back to plaintiff all moveable property in the matrimonial home belonging to her;

6. Orders defendant to vacate the property mentioned in the sixth demand, that is, Flat 6/28, 'Angelus Mansions', Howard Street, Sliema, in favour of the plaintiff within one month;

Domestic Violence and Gender Based Violence

There were a total of 513 cases of victims of domestic violence in 2022, data tabled in Parliament by Family Minister Michael Falzon showed. showed. The minister said that Aġenzija Appoġġ doesn't investigate reports, but rather offers support to victims who come forward.

From 2019 till 2021 there was a drastic increase in numbers as in 2019 there were 926 females and 223 males, in 2020 there were 1060 females and 230 males, in 2021 there were 924 females and 175 males.

The minister said that when a victim contacts the agency, a risk assessment is carried out and the victim is guided to file a report with the police, and a medical reports in cases where they would have injuries as a result of abuse.

The most common form of domestic violence started out as being "slight bodily harm with physical force", in 2010 but as the years have progressed, "psychological harm" has overtaken it as the prime form of abuse.

In Europe, 1 in 3 women experience physical and/or sexual violence by a current or previous partner. A Europe wide survey found that 15% of women in malta over the age of 15 have experienced physical and/or sexual violence at the hands of a current or former partner.

Domestic violence has now become the 3rd most reported crime after after theft. The most extreme form of violence against women and domestic violence is Femicide and we have seen that in the past 10 years in Malta, there have been 15 women killed by a current of former partner or family member.

Femicide: most femicides are committed by an intimate partner behind closed doors. It is usually committee by an intimate partner behind closed doors. Femicide can also be prevented -AS IT IS currently a leading cause of premature death for women globally.

After 4 years of sharing good practices, researched from Italy, Germany, Cyprus, Israel, Spain, Portugal and Malta decided to set up the first European Observatory on Femicide. It is hosted by the University of Malta in the Department of Gender Studies and coordinated by senior lecturer Marcelline Naudi.

The United Nations

Declaration on the Elimination of Violence against Women - 1993
World Conference on Women Being - 2000

In 1993, the UN GENERAL ASSEMBLY issued its declaration on the elimination of violence against women. This instrument places a duty on states to "exercise due diligence to prevent… acts of violence against women, whether these acts are perpetrated by the State or private persons."

In 1994, a special rapporteur on violence against women, its causes and consequences, was appointed to the UN commission on human rights, and in 1996 the special rapporteur produced a framework for model legislation on domestic violence. In addition, the Platform for Action which resulted from the fourth world conference on women held in 1995 in Beijing, Ponting detailed

recommendations on the measures that state should adopt in response to violence against women, including domestic violence.

THE ISTANBUL CONVENTION - ON gender-based violence - entered into force 1st August 2014. The Court's recognition of domestic violence as a constituting a form of gender-based discrimination is reflected in this instrument. Article 1 b of the convention states that one of its purposes is to "contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women."

This statement is reinforced by Article 4(2), which asserts that 'parties condemn all forms of discrimination against women and shall take, without delay, the necessary legislative and other measures to prevent it."

Domestic Violence as Torture

The UN CONVENTION AGAINST TORTURE defines torture as "an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person", for a purpose such as obtaining information or a confession, punishment, intimidation, or coercion, "or for any reason based on discrimination of any kind."

Article 54C, Criminal Code
2(e) 'torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions

In 1993, the United Nations issued the Declaration on the Elimination of Violence Against Women. The declaration states that "States should exercise due diligence to prevent, investigate and on accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or private persons". It sets forth ways in which governments should act to prevent violence, and to protect and defend women's rights. These measures form the standard of due diligence that states are obligated to live up to.

Legal concept of due diligence
The failure of a government to prohibit acts of violence against women, or to establish adequate legal protections against such acts, constitutes a failure of state protection. Acts of violence against women constitute torture when they are of the nature and severity envisaged by the concept of torture and the state has failed to provide effective protection.

The Maltese Position

Article 14 - Equal rights of men and women

The State shall promote the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights and for this purpose shall take appropriate measures to eliminate a forms of discrimination between the sexes by any person, organization or enterprise; the State shall in particular aim at ensuring that women workers enjoy equal rights and the same wages for the same work as men."

Article 36 of the Constitution - Protection from Inhuman treatment

•Article 36 of the Constitution adopted in 1964, and amended in 2014, includes the following provisions: (1) No person shall be subjected to inhuman or degrading punishment or treatment. (3) (a) No law shall provide for the imposition of collective Punishments.

Article 37 of the Civil Code - Personal Separation

37. (1) All suits for personal separation shall be brought before the appropriate section of the Civil Court as may be established by regulations made by the Minister:

Provided that prior to the commencement of proceedings, a demand may be made for determining the amount of an allowance for maintenance during the pendency of the proceedings and for the issue of a decree ordering the payment of such allowance or a demand for the court to determine by decree who of the spouses, if any, shall during the pendency of the proceedings continue to reside in the matrimonial home.

(2) The application containing the demand referred to in the proviso to sub-article (1) shall be duly appointed for hearing by the court and shall be served on the respondent together with the notice of such hearing:

Provided that where domestic violence is involved, the said application shall be appointed within four days and the court may, of its own motion before or after hearing the parties, issue a protection order under article 412C of the Criminal Code and, or a treatment order under article 412D of the same Code and the provisions of those articles shall *mutatis mutandis* apply to an order issued under this article as if it were an order issued under the corresponding article of the said Code:

Provided further that for the purposes of this article and of article 39, "domestic violence" shall have the same meaning assigned to it by article 2 of the Gender Based Violence and Domestic Violence Act.

Article 39 of the Civil Code - Protection and Treatment Orders in lawsuit for personal separation.

Where a law suit for personal separation has been filed by either spouse, or a law suit for access, and, or, care and custody of children has been filed, even when the parents are not married, and evidence of acts of domestic violence has been produced, the court may, either on an application of one of the parties or on its own motion in order to protect the safety of the parties involved or in the best interests of the child or children or of any other minor dependants of any of the spouses, issue a protection order under article 412C of the Criminal Code and, or a treatment order under article 412D of the same Code and the provisions of those articles shall mutatis mutandis apply to an order issued under this article as if it were an order issued under the corresponding article of the said Code.

Article 40 - Excesses,cruelty, etc.

Either of the spouses may demand separation on the grounds of excesses, cruelty, threats or grievous injury on the part of the other against the plaintiff, or against any of his or her children, or on the ground that the spouses cannot reasonably be expected to live together as the marriage has irretrievably broken down

Article 47 - Care of children

47. During the pendency of the action the court shall give such directions concerning the custody of the children as it may deem appropriate, and in so doing the paramount consideration shall be the welfare of the children:

Provided that in cases where there is evidence of domestic violence, the Court may limit or deny access to the children if such access would put the children or the other parent at risk.

Article 56A - Exclusion of custody.

The Court may, for grave reasons, at any time during the cause for separation, and or, divorce, or when the parties are separated and, or divorced, upon the demand of one of the parties, or of its own motion declare that the other party is not fit to have the custody of the minor children of the parties, and where the Court issues such a declaration, the party so declared, upon the death of the other party, shall not be entitled to assume the custody of the minor children without the authorisation of the Court:

Provided that evidence of domestic violence shall constitute a grave reason for the purposes of this article.

Article 978 - When consent is considered extorted by violence.

(1) Consent shall be deemed to be extorted by violence when the violence is such as to produce an impression on a reasonable person and to create in such person the fear of having his person or property unjustly exposed to serious injury.

(2) In such cases, the age, the sex and the condition of the person shall be taken into account. Where violence is practised on spouse, etc., of contracting party.

Article 979 - Where violence is practised on spouse, etc., of contracting party.

(1) Violence is a ground of nullity of a contract even where the threat is directed against the person or the property

of the spouse, or of a descendant or an ascendant of the contracting party.

(2) Where the threat is directed against the person or property of other persons, it shall be in the discretion of the court, according to the circumstances of the case, to void the contract or to affirm its validity.

Article 980 - Reverential fear

Mere reverential fear towards any one of the parents or other ascendants or towards one's spouse, shall not be sufficient to invalidate a contract, if no violence has been used

Article 251 - Criminal Code

251. (1) Whoever shall use violence, including moral and, or, psychological violence, and, or coercion, in order to compel an other person to do, suffer or omit anything or to diminish such other person's abilities or to isolate that person, or to restrict access to money, education or employment shall, on conviction, be liable to the punishment laid down in sub-article (1) of the last preceding article.

(2) Where the offender shall have attained his end, he shall be liable to the punishment laid down in sub-article (2) of the last preceding article.

(3) Whoever shall cause another to fear that violence will be used against him or his property or against the person or property of any of his ascendants, descendants, brothers or sisters or any person mentioned in article 222(1) shall be liable to the punishments prescribed in sub-article (1) decreased by one to two degrees:

Provided that where the offender shall have attained his end, he shall be liable to the punishment laid down in sub-article(2) decreased by one to two degrees.

Article 251B - Causing others to fear that violence will be used against them

251B. (1) A person whose course of conduct causes another to fear that violence will be used against him or his property or against the person or property of any of his ascendants, descendants, brothers or sisters or any person mentioned in article 222(1) shall be guilty of an offense if he knows or ought to know that his course of conduct will cause the other so to fear on oh of those occasions, and shall be liable to the punishment of imprisonment for a term from one to two years or to a fine (multa) of not less than four thousand and six hundred and fifty-eight euro and seventy-five cents (4658.75) and not more than eleven thousand and six hundred and forty-six euro and eighty-seven cents (11,646.87), or to both such fine and imprisonment.

(2) For the purpose of this article, the person whose course of conduct is in question ought to know that it will cause another person to fear that violence will be used against him on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion.

(3) It is a defence for a person charged with an offence under this article to show that:
(a) his course of conduct was pursued in the circumstances mentioned in article 251A(3)(a) or (b); or
(b) the pursuit of his course of conduct was reasonable for the protection of himself or another or for the protection of his or another's property.

Article 412C - Protection Orders

(1)Where a person (hereinafter in this article and in article 412D referred to as "the accused") has been charged or accused with an offence before the Court of Magistrates whether as a Court of inquiry or as a Court of criminal judicature, the Court may, either ex officio or at the request of any party to the proceedings, on reasonable grounds, for the purpose of providing for the safety of the injured person or of other individuals or for the keeping of the public peace or for the purpose of protecting the injured person or other individuals from harassment or other conduct which will cause a fear of violence, issue a protection order against the accused.

(2) Where a protection order is requested by any party to the proceedings, such request shall be appointed for hearing to determine whether there is sufficient prima facie evidence for it to be issued by the Court within seven days from when such request is made.

(3) Before issuing a protection order, the Court shall take into account:
(a) the need to ensure that the injured person or other individual specified in the order is protected from injury or molestation; and
(b) the welfare of any children or any dependants who may be affected by the order; and

(c) the accommodation needs of all persons who may be affected by the order, in particular of the injured person, his children and his other dependants; and
(d) any hardship that may be caused to the accused or to any other person as a result of making the order; and
(e) the accused's willingness or otherwise to submit to such treatment as the Court may deem appropriate; and
(f) any other matter that, in the circumstances of the case, the Court considers relevant:

Provided that particular attention shall be given to the matters in paragraphs (a), (b) and (e)

Article 412D - Treatment Orders

(1) Together with or separately from a protection order under article 412C, and provided the court is satisfied that proper arrangements have been made or can be made for treatment, the court may make an order (hereinafter in this article referred to as a **"treatment order"**) requiring a person to submit to treatment subject to the conditions which the court may deem appropriate to lay down in the order: Provided that where any person is convicted with an offence, a treatment order by the court may be made with or without the consent of the convicted person and in the case of a person accused with an offence, a treatment order may only be made with the consent of the accused. Cap. 446.
(2) The treatment may be of any of the kinds specified in article 7(5) of the Probation Act
(3) The provisions of article 412C(9) and (10) shall apply to an order under this article.
(4) If at any time during the period that the order is in force it is proved to the satisfaction of the court that the person has failed to comply with any of the requirements or conditions of the order, the court may impose on such person a fine (ammenda) not exceeding one thousand and one hundred and sixty-four euro and sixty-nine cents (1164.69)

Act XXIV.2019

Article 540A - Duty of Police on receipt of report, information or complain

(1) Upon the receipt of any report, information or complaint by the Executive Police requiring proceedings to be taken against a person from a person or persons indicated in article 12(a) of the Victims of Crime Act, a professional, trained by the designated agency in accordance with the Gender Based Violence and Domestic Violence Act, shall immediately conduct an assessment of the risk of the injured person or of any other individual, as the case may be:
Provided that a Police officer shall also initiate an investigation, during which investigation there shall be heard, amongst others, the alleged offender, as the case may be:

Provided that a Police officer shall also initiate an investigation, during which investigation there shall be heard, amongst others, the alleged offender, as the case may be:
Provided also that if an assessment has been conducted by a professional trained in accordance with the Gender-Based Violence and Domestic Violence Act within the twenty-four hour period immediately preceding the receipt of the report, information, or complaint by the Executive Police, there shall be no need to conduct that assessment after such receipt:
Provided also that if in the cases mentioned under sub-article(1) the alleged offender is to be taken before the court by arrest, and if he remains arrested until his arraignment in court, the dispositions of this article shall not apply

(2) Where, following such investigation, and after the due consideration of the results of the assessment, it becomes apparent that any person is at a serious risk of harm, the Executive Police shall immediately apply to a Magistrate requesting the issue of a temporary protection order stating the grounds for the request and giving the Magistrate all such information that will enable the Magistrate to decide upon the request:
Provided that said application shall be made by not later than twelve hours from when the Executive Police receive such report, information, or complaint

(3) Before deciding whether to issue the temporary protection order, the Magistrate may require the police officer, the professional, or the person making the report or complaint giving the information, to confirm on oath the information supplied by him and the temporary protection order shall be issued once the Magistrate is satisfied that sufficient grounds for the issuing of the order exist:

Provided that such a decision shall be taken within eight hours of receipt of the application:

Provided also that said agency shall, immediately after the assessment is carried out according to sub-article (1), provide sheltered accommodation to the alleged victim, according to article 19(3)(d) of the Gender-Based Violence and Domestic Violence Act as needed.

(4) In cases of utmost urgency, the request for the issue of the temporary protection order and the order may be communicated even by electronic means:

Provided that, as soon as practicable, the original temporary protection order shall be delivered for record purposes.

(5) Sub-articles (3), (7), (8), (11) and (12) of article 412C shall apply *mutatis mutandis* to a temporary protection order issued under this article, and for the purposes of this article, "temporary protection order" shall have the same meaning assigned to "protection order" under article 412C.

(6) A temporary protection order issued under this article shall remain in force:
(a) up to a maximum of thirty days from the issue of the temporary protection order; or
(b) until the first sitting against the alleged offender, whichever is the earlier:
Provided that the Police shall institute criminal proceedings against the alleged offender by not later than thirty days from the issue of the temporary protection order.

(7) A temporary protection order issued under this article can be revoked or extended for a further period by the Magistrate who issued the order, on just cause being shown:

Provided that it can also be extended by the Court during its first sitting, if a request is made to issue a protection order under article 412C.

(8) A temporary protection order issued under this article shall lapse upon:
(a) the determination that no criminal proceedings shall be instituted against the alleged offender; or
(b) the lapse of thirty days from the issue of the temporary protection order; or
(c) the hearing of the first sitting against the alleged offender; or
(d) the issue of a protection order under article 412C:

Provided that in the case of paragraph (a), the Executive Police shall immediately inform the Magistrate of this decision, and request the revocation of the temporary protection order.

Article 543 - Cases in which Police may proceed ex officio

It shall be lawful for the Police to institute proceedings even without the complaint of the private party in any of the following cases

(e) in the case of any offence involving domestic violence:
Provided that for the purposes of this paragraph "domestic violence" shall have the same meaning assigned to it by article 2 of the Gender-Based Violence and Domestic Violence Act:

Provided further that it shall be lawful, after proceedings have commenced before the court in virtue of this article for an offence mentioned in this paragraph, for an alleged victim of an offence involving domestic violence to request the court to stay proceedings against the alleged perpetrator, and when such a request is made the court may decide and direct the continuation of proceedings against the alleged perpetrator, giving particular consideration to the best interests of the complainant, any minors involved, and any other relevant third parties, and shall cause such request and decision to be registered in the records of the case.

Subsidiary Legislation - 12.20

Article 4.(1) Any party wishing to proceed to initiate a suit for personal separation or divorce against the other spouse shall first demand authority to proceed from the Civil Court (Family Division), the Court of Magistrates (Gozo) (Superior Jurisdiction)(Family Division) as the case may be, each of such courts hereinafter in this regulation called the "Court", by filing a letter, inthe case of personal separation, or by filing an application, in the case of divorce, as the case may be, to that effect in the registry ofthe Court addressed to the Registrar, stating the name and address both of the person filing the letter as well as that of the other spouse, and requesting the Court to authorise him or her to proceed. Such letter shall be signed and filed by the party personally or by an advocate or legal procurator on behalf of such party.

(3) Before granting such leave the Court shall summon the parties to appear before a mediator, either appointed by it or with the mutual consent of the parties, and where the Court deems it expedient so to do, either of its own motion, or at the request of the mediator, or of either of the spouses, may appoint a children’s advocate to represent the interests of any minor children of the parties:

Provided that where the letter referred to in this regulation is accompanied by evidence substantiating a claim of domestic violence,the Court shall summon the parties to appear before it to determine whether appearing before a mediator is in the best interest of both parties.

Article 8. Where, in the course of mediation proceedings, the mediator becomes aware of, or has reason to suspect, the occurrence of domestic violence, the mediator shall immediately inform the Judge in writing to that effect.

ISTANBUL CONVENTION

The Council Of Europe's first legally binding Convention on Preventing and Combating Violence against Women and Domestic, known as the Istanbul Convention, came into force on the 1st August 2014.

Malta signed the Convention in May 2012, and passed a law to ratify it in June 2014. An inter-ministerial committee has worked on the changes that need to be made locally, in legislation, policy and service provision to enable to fully meet its obligations.

The convention is now part of Maltese law and in March 2019, Malta signed and ratified the Optional Protocol to the Convention on the Elimination of All forms of Discrimination against Women. This provides a redress mechanism for the Investigation of complaints against State parties to the Convention, and expectation to implement such subsequent recommendations.

Rumor vs Italy, 2014

Ronagh J.A. Mc Quigg - European Journal Of INTERNATIONAL LAW -

Clare's Law

The efficacy of Clare's Law in domestic violence law in England and Wales - in 2011 - high profile murder of Clare Wood led to the introduction of the national domestic violence disclosure scheme (Clare's Law) in England and Wales.

Clare's Law, often known officially as a **Domestic Violence Disclosure Scheme** or similar, designates several ways for police officers to disclose a person's history of abusive behaviour to those who may be at risk from such behaviour. It is intended to reduce intimate partner violence. Clare's Law is named after Clare Wood, a woman murdered in England by a former domestic partner who police knew to be dangerous.
Clare's Law has two main elements: a 'right to ask', which allows members of the public, including a domestic partner, to request information from the police about a potential abuser; and a 'right to know', which, in certain circumstances, permits police to disclose such information to the public on their own initiative.

OPUZ VS TURKEY, 2009

The Issue of domestic violence, which can take various forms raging from physical to physiological violence or verbal abuse… it is a problem which concerns all member States and which does not always surface since it often takes place within personal relationships or closed circuits and it is not only women who are affected. The European Court of Human rights acknowledges that men can also be victims of domestic violence and indeed, that children too, are often casualties of the phenomenon, whether directly or indirectly."

KONTROVA VS SLOVAKIA, 2007

On 2 November 2002, the applicant filed a criminal complaint against her husband for assaulting her and beating her with an electric cable. She consequently modified the complaint such that her husband's alleged actions were treated as a minor offence which was called for no further action. In 2002, her husband shot dead their son and daughter.

The European Court of Human Rights held that there had been a violation of Article 2 (right to life) of the European Convention on Human Rights, concerning the authorities' failure to protect the applicant's children's lives. It observed that the situation in the applicant's family had been known to the local police given the criminal complaint of November 2002 and the emergency phone calls of December 2002. In response, under the applicable law, the police had been obliged to: register the applicant's criminal complaint; launch a criminal investigation and criminal proceedings against the applicant's husband immediately; keep a proper record of the emergency calls and advise the next shift of the situation; and, take action concerning the allegation that the applicant's husband had a shotgun and had threatened to use it. However, one of the officers involved had even assisted the applicant and her husband in modifying her criminal complaint of November 2002 so that it could be treated as a minor offence calling for no further action.

In conclusion, as the domestic courts had established and the Slovakian Government had acknowledged, the police had failed in its obligations and the direct consequence of those failures had been the death of the applicant's children.

E.S and others VS Slovakia, 2009

The applicant left her husband and lodged a terminal compliant against him for ill-treating her and her children. + also sexually abusing one of their daughters. He was convicted of violence and sexual abuse. However her request for him to be ordered to leave the home was dismissed. Hence, the applicant was forced to move away, having to change schools of 2 of the children.

They complained that the authorities failed to protect them, adequately, from domestic violence. The court held that Slovakia had failed to provide the first applicant and her children with the immediate protection required against her husbands violence, in violation o Article 3 (prohibition of inhuman or degrading treatment) and Article 8 (right to private and family life) of the convention.

Opus vs Turkey 2009

The applicant and her mother were assaulted and threatened over many years by applicants husband. He left them both with life threatening injuries. No prosecution was brought against him, as he had harassed them to withdraw their complaints. He then went on to stab the applicant and was fined 385eu. The wife and mother filed many complaints to which the husband was questioned and then released.upon the women trying to move away, the husband shot dead his mother in law, arguing that his honour had been at stake. He was convicted and sent to life imprisonemnt, where he was released pending his appeal, where his wife claimed that he continued to harass her.

The court held that Article 2 had been violated (right to life) with regards to the mother in law's death and Article 3(prohibition of inhuman or degrading treatment)

It found that Turkey had failed to set up and implement a system for punishing domestic violence and protecting its victims. The court also said that for the first time there was also the violation of Article 14(prohibition of discrimination). The violence suffered by the applicant and her mother could be regarded as gender based.

Volodina vs. Russia, 2019

In the case of **Volodina v. Russia** (application no. 41261/17) the European Court of Human Rights held, unanimously, that there had been:
•**a violation of Article 3 (prohibition of inhuman or degrading treatment)** of the European Convention on Human Rights, and
•**a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 3** of the European Convention.
The case concerned the applicant's complaint that the Russian authorities had failed to protect her from repeated domestic violence, including assaults, kidnapping, stalking and threats. She also alleged that the current legal regime in Russia was inadequate for dealing with such violence and discriminatory against women.
The Court found that the applicant had been both physically and psychologically ill-treated by her former partner and that the authorities had failed to comply with their obligations under the Convention to protect her from his abuse.
It noted in particular that domestic violence was not recognised in Russian law and that there was no such thing as restraining or protection orders. Those failings clearly demonstrated that the authorities were reluctant to acknowledge the gravity of the problem of domestic violence in Russia and its discriminatory effect on women.

BUTURUGA VS ROMANIA, 2020

The case concerned allegations of domestic violence and of violation of the confidentiality of electronic correspondence by the former husband of the applicant, Ms Buturugă, who complained of shortcomings in the system for protecting victims of this type of violence.
In the case of Buturugă v. Romania (application no. 56867/15) the European Court of Human Rights held, unanimously, that there had been:
•**a violation of Article 3 (prohibition of inhuman or degrading treatment)** and **Article 8 (right to respect for private and family life and for correspondence)** of the European Convention on Human Rights on account of the State's failure to fulfil its positive obligations under those provisions.
The Court found in particular that the national authorities had not addressed the criminal investigation as raising the specific issue of domestic violence, and that they had thereby failed to provide an appropriate response to the seriousness of the facts complained of by Ms Buturugă. The investigation into the acts of violence had been defective, and no consideration had been given to the merits of the complaint regarding violation of the confidentially of correspondence, which was closely linked to the complaint of violence.
On that occasion the Court pointed out that cyberbullying was currently recognised as an aspect of violence against women and girls, and that it could take on a variety of forms, including cyber breaches of privacy, intrusion into the victim's computer and the capture, sharing and manipulation of data and images, including private data.

•"domestic violence" means all acts or omissions including verbal, physical, sexual, psychological or economic violence causing physical and, or moral harm or suffering, including threats of such acts or omissions, coercion, or arbitrary deprivation of liberty, that occur within the family or domestic unit, whether or not the perpetrator shares or has shared the same residence with the victim, and shall include children who are witnesses of violence within the family or domestic unit ;

•

•"family or domestic unit" includes:

•(a) current or former spouses, civil union partners or cohabitants;

•(b) persons living in the same household as the offender or who had lived with the offender within a period of three years preceding the offence;

•(c) persons whose marriage has been dissolved or declared null;

•(d) an ascendant or descendant;

•(e) other adults sharing the same household;

•(f) persons in an informal relationship, who are or were dating;

•(g) persons who are, or have been, formally or informally engaged with a view to get married or enter into a civil union;

•(h) persons who are related to each other either by consanguinity or affinity up to the third degree inclusively;

•(i) persons having or having had a child in common;

“gender-based violence" means all acts or omissions that are
directed against a person because of their gender, that result
in, or are likely to result in, physical, sexual, psychological or economic harm or suffering, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life

Article 21.

For the avoidance of any doubt, it is hereby declared that, by means of a Note Verbale presented on the 21st May of 2012, Malta reserved the right not to apply:

(a) article 30(2) of the Convention and to continue to apply its current legislation in so far as State compensation is concerned; and

(b) article 44(1)(e) of the Convention and to establish jurisdiction when the offence is committed by a person holding permanent residence in terms of article 7 of the Immigration Act.

Article 22.

(1) The Convention, as reproduced in the Schedule to this Act, shall be, and shall be enforceable as, part of the Laws of Malta.

(2) Where any ordinary law is inconsistent with rights set out in the Convention, the latter shall prevail, and such ordinary law shall, to the extent of the inconsistency, be void:

Provided that where any ordinary law confers a higher degree of protection and, or further rights than those set out

in the Convention, that ordinary law shall apply.

Purposes of the law

•The purposes of this Convention are to:
•a protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence;
•b contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women;
•c design a comprehensive framework, policies and measures for the protection of and assistance to all victims of violence against women and domestic violence;
•d promote international co-operation with a view to eliminating violence against women and domestic violence;
•e provide support and assistance to organisations and law enforcement agencies to effectively co-operate in order to adopt an integrated approach to eliminating violence against women and domestic violence

Definitions in the Convention

•Violence against women" is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life;
•
•b "domestic violence" shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim;
•
•d "gender-based violence against women" shall mean violence that is directed against a woman because she is a woman or that affects women disproportionately

"domestic violence" means all acts or omissions including verbal, physical, sexual, psychological or economic violence causing physical and, or moral harm or suffering, including threats of such acts or omissions, coercion, or arbitrary deprivation of liberty, that occur within the family or domestic unit, whether or not the perpetrator shares or has shared the same residence with the victim, and shall include children who are witnesses of violence within the family or domestic unit

"domestic violence" shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim;

"gender-based violence" means all acts or omissions that are directed against a person because of their gender, that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life

Violence against women" is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life;
"gender-based violence against women" shall mean violence that is directed against a woman because she is a woman or that affects women disproportionately

Article 5 – State obligations and due diligence

•1. Parties shall refrain from engaging in any Act of violence against women and ensure that State authorities, officials, agents, institutions and other actors acting on behalf of the State act in conformity with this obligation.
•2. Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors.

Chapter IV – Protection and support Article 18 – General obligations

•1. Parties shall take the necessary legislative or other measures to protect all victims from any further acts of violence.
•2. Parties shall take the necessary legislative or other measures, in accordance with internal law, to ensure that there are appropriate mechanisms to provide for effective co-operation between all relevant state agencies, including the judiciary, public prosecutors, law enforcement agencies, local and regional authorities as well as non-governmental organisations and other relevant organisations and entities, in protecting and supporting victims and witnesses of all forms of violence covered by the scope of this Convention, including by referring to general and specialist support services as detailed in Articles 20 and 22 of this Convention.
•3. Parties shall ensure that measures taken pursuant to this chapter shall:
•- be based on a gendered understanding of violence against women and domestic violence and shall focus on the human rights and safety of the victim;
•- be based on an integrated approach which takes into account the relationship between victims, perpetrators, children and their wider social environment;
•- aim at avoiding secondary victimisation;
•- aim at the empowerment and economic independence of women victims of violence;
•- allow, where appropriate, for a range of protection and support services to be located on the same premises;
•- address the specific needs of vulnerable persons, including child victims, and be made available to them.
•
•4. The provision of services shall not depend on the victim's willingness to press charges or testify against any perpetrator.

Article 26 – Protection and support for child witnesses

•1. Parties shall take the necessary legislative or other measures to ensure that in the provision of protection and support services to victims, due account is taken of the rights and needs of child witnesses of all forms of violence covered by the scope of this Convention

•2. Measures taken pursuant to this Article shall include age-appropriate psychosocial counselling for child witnesses of all forms of violence covered by the scope of this Convention and shall give due regard to the best interests of the child.

Article 46 – Aggravating circumstances

Parties shall take the necessary legislative or other measures to ensure that the following circumstances, insofar as they do not already form part of the constituent elements of the offence, may, in conformity with the relevant provisions of internal law, be taken into consideration as aggravating circumstances in the determination of the sentence in relation to the offences established in accordance with this Convention:

a the offence was committed against a former or current spouse or partner as recognised by internal law,

by a member of the family, a person cohabiting with the victim, or a person having abused her or his authority;

b the offence, or related offences, were committed repeatedly;

c the offence was committed against a person made vulnerable by particular circumstances;

d the offence was committed against or in the presence of a child;

e the offence was committed by two or more people acting together;

f the offence was preceded or accompanied by extreme levels of violence;

g the offence was committed with the use or threat of a weapon;

h the offence resulted in severe physical or psychological harm for the victim;

i the perpetrator had previously been convicted of offences of a similar nature.

Claire Pisani v. Avukat Generali illum Avukat tal-Istat; Kummissarju tal-Pulizija, 2020

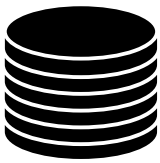
L-incidenti ripetuti li ta lok ghalihom Joseph Pisani huma prova cara li baqa' jippersisti fl-agir tieghu qiesu xejn mhu xejn. Dan minkejja l-fatt li suppost ir-rikorrent kellha ordni ta' protezzjoni favur taghha. L-Istat kien fid-dmir li jiehu l-passi li huma mehtiega sabiex ir-rikorrenti tkun protetta minnu u ma tkomplix tghix f'hajja ta' biża' u dwejjaq. L-appendici mehmuż man- nota ta' sottomissjonijiet tar-rikorrenti (fol. 759-764) jaghti stampa cara minn x'hiex ir-rikorrenti qieghed ikollha tghaddi minnu. Soluzzjoni li wara dawn is-snin kollha evidentement ghadha ma nstabitx. Biżżejjed li wkoll waqt li jkunu ghaddejjin il-pro?eduri kriminali, l-incidenti ta' *harassment* baqghu ghaddejjin. Dan apparti dawk il-proceduri fil-Qrati li qeghdin idumu wisq u li jkomplu jpoggu tbatija fuq il-vittma.

il-Qorti taqbel ma' dak li ntqal fis-sentenza li r- rikorrenti tat prova li "sofriet trawmi psikologici ta' certu severita', mhux biss minhabba l-agir ta' zewgha, imma minhabba l-fatt li zewgha baqa' jagixxi b'impunita' minkejja l-ordnijiet mahruga kontrih", u li n- nuqqasijiet tal-pulizija "…. Kumulattivament jammontaw ghall-ksur tal-obbligazzjonijiet pozittivi tal-istat li jassigura r-rispett tal-hajja privata u tal-familja tar-rikorrenti

PUBLIC INQUIRY

A public inquiry was set up to determine whether the State had failed Bernice Cassar, killed as a result of domestic abuse; and to examine deficiencies in domestic violence laws and their implementation. '*The recommendations aimed at strengthening the current mechanisms in the fight against domestic violence are being implemented and will be supported even more'*.114 The government must launch a fair inquiry if a suspicious or violent death occurs, according to the European Convention of Human Rights (hereinafter, 'ECHR').(PRESS RELEASE by the MINISTRY for JUSTICE and the MINISTRY for HOME AFFAIRS, SECURITY, REFORMS and EQUALITY' (*www.gov.mt*23 February 2023)

Judge Valenzia leading the inquiry, stated that there was no need for such a public inquiry with regard to the deficiencies in domestic violence regulation because there has been, over the years, multiple pushes towards bettering the system. The GRIEVIO report was one of the documents used to compile this document. In fact, multiple points mentioned as system deficiencies were only repetitions of flaws and their recommendations stated three years prior. (Secretariat of the monitoring mechanism of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence Council of Europe, 'GREVIO Baseline Evaluation Report Malta' (GREVIO 2020).)



MAINTENANCE

Definition of Maintenance - Article 19
•**19.** ***(1)*** *Maintenance shall include food, clothing, health and habitation.*
•***(2)*** *In regard to children and other descendants, it shall also include the expenses necessary for health and education.*

- The law says - imp to know - there is a difference between maintenance for a spouse and maintenance for children

- To a spouse - is for the spouse, as one of the obligations incumbent on spouses as a result of marriage ; contract is that they must maintain one another IT IS A SEPARATE THING from maintaining your children.

OBV BUT NOT SO OBVIOUS - You can not not give maintenance to your children if your wife cheats on you

Normally maintenance is paid on a monthly basis, every month, money is received by the mother for the children. It is every month. Normally, you have **2 payments** - what are those 2 ?
2 different kinds of payment - REMEMBER. - 2 payments;
1. One is a capital amount and
2. The other a percentage or a fraction of health and education - 200eu and half of health and education.

The capital amount is used for food, clothing and habitation

The other 2, education and health, those are split equally between the parents, normally 50/50, but not necessarily - if CAQQNU and his wife get separated, it could change from 50/50 for example but is 75/25

- Maintenance *pendente lite* - interim orders - in order. To provide interim relief maintenance is given pendent lite

Lump Sum Payments

Lump sum payments
•**54 (5)** Notwithstanding any other provision of this Code, on separation being pronounced, the court may if it deems it appropriate in the circumstances, order the spouse liable to supply maintenance to pay to the other spouse, in lieu of the whole or part of such maintenance, a lump sum, which the court deems sufficient in order to make the spouse to whom maintenance is due financially independent or less dependent of the other spouse, as the case may be.

- These lump sums are encouraged for the maintenance of the spouse as there is independence but is discouraged when it comes to children. This is because to avoid misuse of the funds.

Repayment of maintenance

•22. (1) Where maintenance has been furnished, no action will lie for the repayment of such part thereof as may have been furnished after the cessation of the cause for which maintenance was due.

•(2) Nor can the person to whom maintenance was due claim from the person liable, upon the latter becoming able to supply such maintenance, the amount thereof in respect of the time during which the person liable for maintenance did not furnish it for want of means.

-A 22 If you pay maintenance, either to a spouse or to your children and it transpires that it was not actually due, it can not be received back the law states - A22 VERY IMP - the difference is the "cessation of the cause" - this is when the cause existed to begin with - ex- maintenance needs to be payed as child is in education, has turned 18 but still in school - if the children are living with the mother, the mother may forget to mention that the children is not longer studying, the father is unaware of this - and continues paying and pays extra 1k EUROs - HE HAS BEEN duped but through the application of this article, technically speaking he can not ask for it back

Maintenance in kind - Article 23

•23. (1) The person bound to supply maintenance may not, without just cause, be compelled to pay a maintenance allowance if he offers to take and maintain into his own house the person entitled to maintenance.

•**(2)** Where maintenance is to be furnished out of the house of the person liable thereto, he may, on good cause being shown, supply such maintenance in kind instead of paying an allowance in money.

- Maintenance in kind — A23 - maintenance in kind means that the person bound to supply - if maintenance is due to a child and someone offers to keep the child, instead of paying maintenance - BUT HAS NEVER HAPPENED
EVEN THOUGH THE law tells us that maintenance in kind exists but will not happen ever.

Hence the main articles to know are A3 and 3b

Duty to Contribute towards the needs of the family

•*3. Both spouses are bound, each in proportion to his or her means and of his or her ability to work whether in the home or outside the home as the interest of the family requires, to maintain each other and to contribute towards the needs of the family.*

- This Article recognises house work as work - it recognises house work as work - in jurisprudence it is insulting low - hence so any compensation one asks for may be given but it is insultingly low -

Duty of spouse towards children

•**3B. (1)** Marriage imposes on both spouses the obligation **to look after, maintain, instruct and educate the children of the marriage taking into account the abilities, natural inclinations and aspirations of the children**. [See Article 7]

•**(2)** The obligation of the parents to provide maintenance according to sub-article (1) also includes the obligation to **continue to provide adequate maintenance to children**, according to their means, and where it is not reasonably possible for the children, or any of them, to maintain themselves adequately, who:

•**(a)** are students who are participating in **full-time education**, training or learning and are under the age of **twenty-three**; or

•**(b)** have a **disability**, as defined in the Equal Opportunities (Persons with Disability) Act, whether such disability is physical or mental.

•**(3)** The obligations provided in sub-article (1) also bind a person acting in **loco parentis** with regard to another person's child, by reason of the marriage of such person to a parent of that child, where the other parent of that child, shall have, at any time before or during the marriage, died or was declared as an absentee according to Title VII of Book First of this Code, or is unknown:

Provided that the provisions of this sub-article shall be without prejudice to the obligations of the natural parents

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Article VERY IMP - A3b - Till when maintenance is due - ? Maintenance acc to the law is due till the age of 18 and maximum of 23 -

Age 18 - Why ? They would have attained majority - a presumption that 18 is the age at which majority is achieved hence in the eyes of the law your are now an adult - hence emancipated into the world

Age 23 - Why ? Still studying - increased if studying **FULL TIME** - KEY WORD - imp to say it in an exam - that is when it applies - ultimately, malta has no natural resources - hence humans are malta's resources and in order to send and have more people to study, maintenance goes up till 23.

If you study beyond 23 age, you do not get maintenance - 23 is the ABSOLUTE MAXIMUM - your maintenance stops = EVEN IF YOU DO A PHD - no maintenance

Amount of maintenance

A20 - Amount - The Law does not tell you

Maintenance shall be due in proportion to the WANT - and needs - in malta it is a discretional issue - A case by case issue and depends on how much money the maintenance debtor earns and how much money the maintenance debtor requires

•20. (1) Maintenance shall be due in proportion to the want of the person claiming it and the means of the person liable thereto.

•Other jurisdictions may perform the exercise of quantification of maintenance in different ways. In Germany, for instance, parties are able to get a clearer picture of the amount which is likely to be due thanks to the Dusseldorfer Tabelle.

- In Germany - they have the Dusseldorf table - which is an equation more so like.

- In Malta, we do not have anything of the sort and the bare minimum of maintenance is 200eu and half of health and education - the 200eu IS NOT MENTIONED IN THE LAW, IT IS A CUSTOM, widespread custom.

A B nee' C pro et noe vs E B (137/2008RGM) 30 May 2013: *Il-Qorti qed tiehu in konsiderazzjoni il-kontribut giornalier li l-attrici taghti a beneficcju tal-minuri f'dak kollu li ghandu bzonn inkluz tisjir, hasil ta' hwejjeg, tindif tad-dar u dak kollu li minuri ta' erbatax-il (14) sena jkollu bzonn fid-dar tieghu. Dan naturalment jillimita il-hin disponibbli ghall- attrici dwar xoghol barra mid-dar. Dan ser jittiehed in konsiderazzjoni fil-likwidazzjoni tal-ammont li l-missier ghandu jhallas bhala manteniment ghall-minuri.*

Obligation for maintenance

•54 (2) The amount of maintenance referred to in sub-article (1), and the maintenance due to children in the event of separation, shall be determined having regard to the means of the spouses, their ability to work and their needs, and regard shall also be had to all the other circumstances of the spouses and of the children, including the following:

•(a) the needs of the children, after considering all their circumstances

•**(b)** any disability, as defined in the Equal Opportunities (Persons with Disability) Act, whether such disability is physical or mental;

•**(c)** circumstances of illness which are of such seriousness and gravity as to compromise the ability of the spouses or of the children to maintain themselves;

•**(d)** whether the ability of the party to whom maintenance is due to have earnings of whatever nature was diminished by reason of that party having, during the marriage, taken care of the household, the other party and the upbringing of the children of the marriage;

•**(e)** every income or benefit which the spouses, or any of them, receive according to law, other than social assistance that is not contributory which is paid to them under the Social Security Act:

•Provided that for the purposes of this paragraph the disability pension payable in terms of article 27 of the Social Security Act shall be taken into consideration;

•**(f)** the accommodation requirements of the spouses and of the children;

•**(g)** the amount which would have been due to each of the parties as a benefit, including, but not limited to, a benefit under a pension scheme, which by reason of the separation, that party will forfeit the opportunity or possibility of acquiring.

If there is someone who is owed maintenance, for ex a spouse says I do not want to work anymore, and my spouse will maintain me - but if he person is still able to exercise a trade, profession, you have to do so and can not expect to be subsidies by your sPUSE - courts RARELY ENCOURAGE maintenance between spouses, it is almost unheard of - the only real occasion is if they have given up their career to take care of children, have not or are not able to work and have reached pensionable age.

Fruits of a moveable or immovable = rent - fruit of immovable property - hence if you are renting out a property, and have to pay maintenance, it is taken into consideration

- In order to see what ones means and needs. are., there needs to be evidence, you have to. See our means. Through a pay slip and show what your needs are by putting up a table similar to the PPT

When does the obligation to pay maintenance Cease/stop ?

Cessation of duty to supply maintenance

•6. The duty of one spouse to maintain the other shall cease if the latter, **having left the matrimonial home,** without **reasonable cause** refuses to return thereto.

When obligation to supply maintenance ceases

•**27. (1)** The obligation of any person to supply maintenance to another shall cease if the person in whose favour such obligation is established, **shall contract marriage**, notwithstanding the opposition of the person liable as aforesaid, provided such opposition be made on good grounds, and the demand from the release from such obligation be made by the person objecting within the time of six months following the celebration of the marriage.

•**(2)** Such opposition shall only be operative if it is made by means of a judicial act to be served on each of the parties intending to contract the marriage, and filed in the registry of the civil court, in the island in which the person objecting, or either of the said parties, resides.

•Good grounds of opposition to marriage

•***28.*** *For the purposes of the last preceding article, the want of the necessary means of subsistence, having regard to the position of the party to whom the opposition refers, or the bad character of the other party, shall be deemed to be a good ground of opposition to the proposed marriage.*

Age;18 or 23 + upon death of the child (extra marks for mentioning the death of the child) +.

If the wife remarries, the obligation to pay maintenance still holds = but the obligation to get maintenance for herself is passed on to her new guy, not you - for your children you still need to pay

Grounds on which parents may refuse maintenance to children

•32. Besides the ground referred to in article 27, parents or other ascendants may refuse maintenance to children or other descendants on any of the grounds on which an ascendant may disinherit a descendant.

Grounds on which a descendant may be disinherited.

•**623 (a)** if the descendant has without reason **refused maintenance** to the testator;
•**(b)** if, where the testator has become insane, the descendant has **abandoned** him without in any manner providing for his care;
•**(c)** if, where the descendant could **release the testator from prison**, he has without reasonable ground failed to do so;
•**(d**) if the descendant has **struck the testator**, or has otherwise been guilty of cruelty towards him;
•**(e)** if the descendant has been guilty of **grievous injury** against the testator;
•**(f)** if the **descendant is a prostitute** without the connivance of the testator;
•**(g)** in any case in which the testator, by reason of the marriage of the descendant, shall have been, under the provisions of articles 27 to 29, declared **free from the obligation of supplying maintenance** to such descendant.

Consequences for spouse giving cause to separation

•48. (1) The spouse who shall have given cause to the separation on any of the grounds referred to in articles 38 and 41, shall forfeit -
[...]
•(d) the right to compel, under any circumstances, the other spouse to supply maintenance to him or her in virtue of the obligation arising from marriage

•Adultery
•**38.** Either of the spouses may demand separation on the ground of adultery on the part of the other spouse.

AB vs CB (90/2006 NC) CCFS - 27 October 2011: Illi ghalhekk il-Qorti hi tal-fehema li l-attrici ma rnexxielhiex tipprova sodisfacentment li matul il-konvivenza matrimonjali l-konvenut wettaq adulterju; izda, mill-banda l-ohra, il-Qorti tosserva li hemm provi sufficjenti li juru li l-konvenut kellu hbiberija specjali u ngurjuza mal-imsemmija Y W, liema hbiberija kienet sors ta' mrar u dwejjaq kontinwu ghall-attrici martu. Izda l-konvenut ma mpurtahx minn dan, u di fatti kompla b' din il-hbiberija tieghu ma' din il-mara, minkejja l-oggezzjoni kontinwa ta' martu. Dan il-komportament tal-konvenut fil-konfront ta' martu, ezercitat fuq tul ta' zmien, jikkostitwixxi kemm 'sevizzi' kif ukoll 'ngurja gravi' fil-konfront taghha fit-termini tal-artikolu 40 tal-kapitlu 16, u jikkostitwixxu l-kawza principali tas-separazzjoni personali. Inoltre, irrizulta li fil-mori tal-kawza, il-konvenut kellu relazzjoni adulteruza ma' mara Marokkina, li minnha twieled tifel.

Maria Dolores sive Doris Scicluna vs G Scicluna: L-adulterju minn dejjem gie meqjus bhala l-kawzali l-aktar gravi li ghaliha l-ligi tawtorizza sseparazzjoni personali [...] Huwa ormai pacifiku fid-dottrina u fil-gurisprudenza li l-adulterju jista' jkun pruvat per mezz ta' indizzji u prezunzjonijiet, purche' dawn ikunu gravi, precizi u konkordanti, b'mod li ma jhallu ebda dubju f'min ghandu jiggudika [...] Il-Qorti hija moralment konvinta sal-grad rikjest mill-ligi li l-intimat irrenda ruhu hati ta' adulterju.

•Desertion

•**41.** Either of the spouses may also demand separation if, for two years or more, he or she shall have been deserted by the other, without good grounds.

•**See: Antonio Xuereb vs. Maria Xuereb** (Appeal - 14.12.1953) l-abbandun tal-konjugi jista' jaghti lok ghas-separazzjoni personali, mhux bizzejjed li jkun hemm allontanament materjali mid-dar konjugali, imma jehtieg illi dak l-allontanament ikun minghajr gusta' kawza, u illi jipprologa ruhu minghajr gusta kawza ghal sentejn jew izjed.

WHEN MAINTENANCE CAN BE REVISED ?

When person supplying maintenance becomes unable to continue to do so

•21. (1) Where the person supplying maintenance becomes unable to continue to supply such maintenance, in whole or in part, he may demand that he be released from his obligation, or that the amount of maintenance be reduced, as the case may be.

•(2) The same shall apply where the indigence of the person receiving maintenance shall cease, wholly or in part.

SUPERVENING CHANGES

•**54. (9)** Where there is a **supervening change** in the means of the spouse liable to supply maintenance or the needs of the other spouse, the court may, on the demand of either spouse, order that such maintenance be varied or stopped as the case may be. Where however, a lump sum or an assignment of property has been paid or made in total satisfaction of the obligation of a spouse to supply maintenance to the other spouse, all liability of the former to supply maintenance to the latter shall cease. Where instead, the lump sum or assignment of property has been paid or made only in partial satisfaction of the said obligation, the court shall, when ordering such lump sum payment or assignment of property, determine at the same time the portion of the maintenance satisfied thereby and any supervening change shall in that case be only in respect of the part not so satisfied and in the same proportion thereto.

John Debono vs. C Debono llum Xerri (Appeal – 24 April 2015): fejn jinghad hekk: "Ghandu jinghad illi fir-rigward tal-manteniment illi jkun gie miftiehem bejn il-mizzewgin permezz ta' kuntratt f'separazzjoni konsenswali, il-Qrati taghna sa minn zmien Sir Adriano Dingli (Vol 9 pagna 463) dejjem irritenew illi manteniment iffissat minn kuntratt ta' separazzjoni ma jistax jigi varjat, differentement minn dak iffissat mill-Qorti.

AB vs CB (219/2011 RGM) CCFS - 28 May 2015: Fic-cirkostanzi partikolari ta' dan il-kaz u tenut kont il-gurisprudenza u l-ligi applikabbli, li jehtieg jigi investit ma hux jekk l-attur kellux riduzzjoni fid-dhul tieghu miz-zmien li gie ppublikat il-kuntratt ta' separazzjoni konsenswali izda biss li jigi investigat jekk id-dhul attwali tal-attur jippermettielux li jonora l-obbligu minnu assunt fuq il-kuntratt ta' separazzjoni konsenswali li jhallas il-quantum pattwit lill-konvenuta.

Enforcing the obligation to pay maintenance

Contraventions affecting public order

•338. Every person is guilty of a contravention against public order, who –

•(z) when so ordered by a court or so bound by contract fails to give to a person the sum fixed by that court or laid down in the contract as maintenance for that person, within fifteen days from the day on which, according to such order or contract, such sum should be paid:

•Provided that, notwithstanding any other provision of this Code, the criminal action for an offence under this paragraph is barred by the lapse of six months:

•Provided further that where the offender is a recidivist in a contravention under this paragraph the offender shall be liable to the punishment of detention not exceeding three months or a fine (multa) not exceeding two hundred euro or imprisonment for a term not exceeding two months;

Health and education

Mary Carmen sive Marlene Sciberras vs Anthony Muscat (25/2010 MS), SCT - 22 December 2010: Dwar il-prova tal-pagament, huwa risaput ukoll li 'la prova del pagamento e' a peso del convenuto che lo allega'. L-Onorabbli Qorti ta' l-Appell fil-kawza Cassar vs Agius deciza fis-7 ta' Lulju, 1924, qalet li l-piz tal-prova tal-pagament hu fuq il-konvenut li jallegah u jekk ikun hemm xi dubju, dak id-dubju ghandu jigi risolut favur l-attur.

Garnishees

•Property not subject to attachment
•**381. (1)** It shall not be lawful to issue a garnishee order upon -
•(a) any salary, or wages (including bonus, allowances, overtime and other emoluments);

Salary or wages not subject to attachment.

•**382. (1)** In the case of any salary, wage benefit, pension or allowance mentioned in article 381(1) (a) and (b) except for any benefit, pension, allowance or assistance mentioned in the Social Security Act, when the same exceed six hundred and ninety-eight euro and eighty one cents (698.81) per month or such amount as may from time to time be established by order made by the Minister responsible for justice, the issue of a garnishee order shall be applicable on that part in excess of the amount aforestated:

•Provided that if the debtor, upon an application shows to the satisfaction of the court that he needs such excess or part thereof for his maintenance or for the maintenance of his family, the court shall revoke the garnishee order with respect to the excess or such part thereof, whereupon the said order shall be deemed to be and to have been without effect to the extent to which it had been revoked:

•Provided further that this article shall not apply to the pay of an officer or man of the regular force of Malta.

•(2) The court may, at any time, vary the order given under subarticle (1), on a demand by application of the creditor or the debtor, if there be any change in the material circumstances of the debtor.

- Maintenance is a Civil Obligation and it will always remain due and so, going to jail will not exclude you from paying Maintenance. They need to spend some few months in jail and pay Maintenance that did not pay. As a Civil Obligation, it will remain there. You will not go to jail because you have not paid Maintenance. You have served your time. If you do not pay subsequent months, you end up in jail again and the amount will keep on accruing. This is when a Garnishee Order comes in. The only way to Maintenance when having a Garnishee Order is through cash or Revolut.

- Garnishee Order is having your accounts frozen, regulated by article 381. This is not something we need to get into the exam. All you need to know is that the police report, article 338z of the Criminal Code and a garnishee order under Article 381 are needed in cases of criminal proceedings.

Stephen Vella Vs Adriana Vella, 2013 IIMP CASE

The P who was married to D and they had 2 children. Later on he realised that the daughter, Erica, is not his and in fact the wife had an affair with a certain Mario Borg, whilst they were married. The p and d later separated and kept on paying maintenance for both children. The P wanted a refund of the maintenance he paid to the D with regards to the daughter which was not his. The Court upon hearing the D's argument which said that since there was doubt if it was his daughter, and the P still agreed to pay maintenance, it is an element of a contract and since pacta sound servanda, the P should still pay and should not order and ask for a refund of what he paid. However the court did not agree and stated that since the causa in the contract was now missing since he was not the father, then he is bound to receive the refund that he paid, as he paid that sum as he was deemed to be the father in the eyes of the law due to their marriage, but now he is released of such obligation.

L-Artikolu 3B tal-Kodici Civili jipprovdi:-

"Iz-zwieg jimponi fuq il-mizzewgin l-obbligu li jiehdu hsieb, imantnu, jghallmu u jedukaw lill-ulied li jigu miz-zwieg skond il-hila, xehtiet naturali u aspirazzjonijiet tal-ulied.".

Mill-atti hu evidenti li ghalkemm kien jezisti suspett li l- minuri Erica Decoda ma kenitx bint l-attur, ma kienx hemm certezza. Fil-kuntratt ta' separazzjoni jinghad li l- partijiet ghandhom zewgt itfal minuri (klawzola (ii)]. Mill- kuntratt hu evidenti li l-minuri kienet ikkunsidrata li hi bint l- attur, tant hu hekk li klawzola numru tnejn (2) titratta dwar it-tfal, fosthom li decizjonijiet dwar sahha u edukazzjoni ghandhom jittiehdu mill-konjugi flimkien u dritt ta' access ghall-attur. Il-qorti m'ghandix dubju li l-attur obbliga ruhu u fil-fatt hallas il-manteniment u spejjez relatati ma' Erica Decoda, ghas-semplici raguni li kien registrat bhala missierha. Kien biss bis-sentenza li nghatat fil-15 ta' Novembru 2011 fil-kawza 187/2009 li l-attur gie mehlus mill-obbligu li jkompli jhallas il-manteniment ghall-minuri. Sentenza li ghaddiet in gudikat gialadarba ma sarx appell minnha (fol. 28).

Il-fedelta' hu obbligu principali taz-zwieg. Pero' f'dan il-kaz l-event dannuz ghall-attur ma kienx l-adulterju per se imma 'l fatt li l-konvenuta kellha tifla barra miz-zwieg.

M'hemmx prova li l-attur kien qieghed isostni li t-tifla m'hijiex bintu, ghalkemm kien jezisti d-dubju. Jibqa' 'l fatt li f'dak l-istadju ma kienx hemm kwistjoni bejn il-partijiet dwar il-paternita' tat-tifla, tant li l-attur assuma l-obbligu li jmantniha, wettaq tali obbligu u kien ghamel ukoll zmien jezercita l-access. L- Artikolu 1718 tal-Kodici Civili jipprovdi: "It-transazzjoni hija kuntratt li bih il-partijiet, b'xi haga li jaghtu, iwieghdu, jew izommu, jaghtu tmiem ghal kawza mibdija, jew jevitaw kawza li tkun sejra ssir".

Ghalkemm il- konvenuta qalet li meta sar il-kuntratt ma kenitx in mala fede (eccezzjoni numru 5), xorta ghandha r- responsabbilta' li tirrizarcixxi lill-attur ghad-danni li sofra b'rizultat tal-fatt li kellha tarbija fiz-zwieg. Irridu niftakru li skond il-ligi, tarbija mwielda minn mara mizzewwga, fic-certifikat tat-twelid taghha jrid jitnizzel isem zewgha bhala

missier it-tarbija (Artikolu 280 tal-Kodici Civili). Ghalhekk l- attur kellu dmir li jmantni lill-minuri. L-attur spicca jmantni wild li kellha martu barra miz-zwieg. Skond l-Artikolu 1031 tal-Kodici Civili, "kull wiehed iwiegeb ghall-hsara li tigri bi htija tieghu". M'hemmx dubju li tezisti ness ta' kawzalita' bejn id-dannu li sofra l-attur u l-agir irresponsabbli ta' martu li kellha tifla barra miz-zwieg.

Mario Micallef vs Sandra Micallef Gravina deciza fl-4 ta' Ottubru 2011[6] fejn il-qorti applikat l-Artikolu 1147 tal-Kodici Civili u kkundannat lill-konvenuta thallas lura lill-attur il-manteniment li kien hallas sad-data li fih inghatat sentenza fejn gie ddikjarat li l-minuri ma kenitx wild naturali tieghu. L-Artikolu 1147 tal-Kodici Civili jipprovdi:-

"kull hlas jissoponi dejn, u dak li jithallas bla ma jkollu jinghata, jista' jintalab lura".

Fis-sentenza hawn fuq citata l-qorti osservat li l-attur kien hallas il-manteniment ghaliex hekk kien obbligat jaghmel wara ordni tal-qorti; "L-attur ma setax jehles minn din l- obbligazzjoni hlief wara pronunzjament tal-Qorti li tiddikjara li l-wild [A] ma kienitx bintu ergo l-hlas li sar qua manteniment, gie perecepit mill-konvenuta bla causa originarja tar-rapport li jwassal ghall-obbligu tal-hlas tal- manteniment". Ragunament li fil-fehma ta' din il-qorti japplika wkoll ghal dan il-kaz, ghalkemm il-manteniment thallas b'effett tas-separazzjoni konsenswali li kkonkludew il-partijiet. L-attur kien qieghed iwettaq l-obbligu tieghu li jmantni lill-minuri gialadarba l-ligi stess tqiesu bhala l- missier naturali. Pero' wara li nghatat is-sentenza li biha gie determinat li Erica Decoda hi bint Mario Borg, il- konsegwenza naturali hi li qatt ma kienet tezisti obbligazzjoni pekunjarja li l-attur imantni lill-minuri. Mela l- obbligazzjoni li jmantniha u li assuma fil-kuntratt ta' separazzjoni, kienet bla causa. F'dan ir-rigward ma jistax jigi argumentat li meta l-attur hallas il-manteniment kien ghadu meqjus bhala l-missier naturali tat-tifla, ghaliex ladarba s-sentenza tal-qorti ddikjarat li l-missier naturali hu haddiehor, dak l-istat, li jiswa erga omnes, jmur lura ghall-gurnata tat-twelid ta' Erica Decoda. Ladarba gie deciz li l-attur m'huwiex il-missier naturali tat-tifla, dan l- istat japplika mid-data tat-twelid, u ma jaghmilx sens, diversament, li l-attur ikun meqjus biss li m'huwiex il-missier naturali mid-data tas-sentenza. 'Il fatt li ma jezisti ebda obbligu ta' manteniment johrog mis-semplici fatt li m'huwiex missierha.

AB vs CD, 2007

P and D were both married but separated by public deed of separation. They had 2 children from their marriage.

The parties, both German nationals, got married on the 4th October 1996; and they have two children, Maximillian and F, born on the 26th October 1995 and on the 6th January 2000, respectively. The parties have been living in Malta ever since, in their matrimonial home in Marsascala Tas-Silg.

the plaintiff was obliged to pay the defendant a monthly maintenance of six hundred Maltese pounds (Lm600) for every minor that was born, subject to an increase as stipulated in the said contract;

The Plaintiff is alleging that the D misplaced the funds he gave her for maintenance and used them for personal matters.

Care and Custody

This part of the judgment concerns the parties' two minor children: E born on the 26th October 1996 and F born on the 6th January 2000.

In the separation deed the parties agreed on "joint custody and authority" of both parents in the sense, that whilst day to day decisions are taken by their mother, important decisions concerning the children's welfare, education, health and issues of a similar nature, are to be taken by both parents jointly. The parties also agreed that the daily care of the minor children is to be primarily entrusted to their mother, with the father having extensive access rights regulated in detail in the deed.[14]

However, subsequent to the deed it became evident that joint custody was not working well since the parties have failed to agree on most issues concerning their children, and this to the detriment of the children. Thus both are requesting the Court to revoke the joint custody and to grant exclusive custody to either of the parties, and in the case of plaintiff also with the help of a tutor if necessary.

In her report the social worker observed that the father "is living in the United States with his partner Pauntea Morshedi and has been doing so for the last five [5] years" whilst the children have continued to live with their mother to this very day. Though the children love both parents and enjoy being in their company; however since "both minors expressed strongly their wish to live with their mother, and have access to their father ..." the social worker concluded that care and custody be given solely to the mother, with adequate right of access to the father. She observes that the mother "seems to be a warm and caring mother and it is surely in the best interest of the children to be brought up by her, and for the boys to have ample access with their father" whilst excluding the plaintiff's request to have sole custody or shared by a tutor as not being in the boys interests.[15]

This Court, after having examined the evidence in this respect, as well as having heard the two boys in chamber with a view to ascertaining their wishes, agrees with the conclusion that the mother is to be granted sole care and custody of the two minor children, with adequate access to the father.

This conclusion is chiefly based on the following considerations:

[1] that unfortunately the parties have been in constant disagreement over important matters, such as education, to the extent that they both admit that joint custody was not working well, and court intervention was being sought on most issues. This situation is certainly not in the interests of the children who must surely be negatively affected by this warring situation manifestly existing between their parents.

[2] that the father is cohabiting with another woman, in the United States, which fact has not been denied by him, and has been confirmed by his partner Pauntea Morshedi who in her affidavit drawn

on the 26th February 2007, states that she has been in a romantic situation with plaintiff for the past

five years, living and working together. In fact in his affidavit he refers to his "new family" and complains that defendant is refusing to send the children abroad to meet his "new family".

On the other hand the mother, a professional in IT Communications continued to take good care of the children catering for all their daily needs even though this meant a decrease in her possibility of going abroad often with the consequent loss of favourable job opportunities.

The Social Worker describes defendant as a warm and caring mother. This is also confirmed by witnesses; as well as by the undeniable fact that, notwithstanding the hardships she has gone through due to the breakdown of

the marriage, and the constant litigation with plaintiff, she continued to take care of their two children; refusing also to work abroad or go abroad for long periods since at the moment she is impeded from leaving the Island with the children.

Moreover, the children has expressed their wish to this Court to remain living with the mother even if this should entail that they live in Germany. They are adamant in this respect. Their strong attachment to their mother is understandable since they have been in her effective care since they were born; and also considering that their father has not managed to come to Malta to visit them since October 2005.

On the strength of the above, the Court is convinced that it is in the best interests of the children to be in the sole and exclusive care and custody of the mother, whilst the access rights of the father as detailed in the separation deed are to be respected.

Finally, on the matter of costs, the Court is of the opinion that, since this case arose in part from an ambiguous clause [paragraph [v] of clause 2[d] which has been agreed to by both parties, then it is just that defendant be made to bear part of the costs.

Decide

On the strength of the above the Court decides the action by, confirming that the defendant has received in maintenance a total of twenty five thousand, five hundred and sixty Maltese Liri [Lm25,560] till the 1st August 2004; and rejecting all plaintiff's other requests; the defendant is to bear one fourth [1/4] of the costs relating to request numbers (1) (2) (5) (6), whilst the rest is to be borne by plaintiff.

declaring that plaintiff has not paid maintenance for defendant and their children from the 1st August 2004, in violation of the separation deed afore-mentioned;

[5] accedes to the defendant's seventh request, and, whilst revoking joint custody, grants to defendant sole and exclusive care custody of the two minor children E and F; with rights of access for the father as agreed by the parties in the separation deed.

The right of care and custody includes the right of defendant to travel abroad with the children, provided that at least one week prior to going abroad, a note is presented in the registry of this Court containing details of the date of departure and the place of destination with all the necessary information enabling the plaintiff to know the exact whereabouts of the children and their place of residence; in which case the plaintiff's access rights may have to be modified to suit the new situation, primarily in the interests of the children.

Nicholas Farrugia v. Christabel Zerafa, Court of Appeal 2021

In this case the plaintiff father of the child he had with the D, instituted the case with regards to the payment of maintenance and care and custody. The D appealed based solely on the maintenance issue, whereby the first court decide that she should pay 150eu per month as maintenance. The court of appeal, coming up with a decision unlike before, disagreed with the first court and stated that the D should not pay any maintenance due to the conditions he is in. However, this was decided upon the condition that if her situation gets better, she will pay maintenance. The D's condition is that she is mentally unwell, with a lot of relapses. Her psychiatrist Dr. Joe Cassar was also called into the case to testify her condition. Due to her medication which controlled bipolar and ADHD, she used to sleeper 20 hours. This made her unable to work. Her previous employer stated that she is a good person but not in position to be employed. the. Court reasoned that since the P is able to maintain himself and the son, he will have to keep on doing so on his own for the time being up until the situation of the D gets better. The D's father was at one time paying her prison fees after she was sent to prison for not paying maintenance. The court stated how usually, the obligation to pay maintenance passes on to the family members, however the court kept in mind that the D's father was a pensioner and also had 5 children in all. This is a one of a kind case, whereby the obligation to pay maintenance is completely halted, due to the state of the D. keeping in mind that the used to earn social benefits amounting to 100eu a week and an additional bonus of 3eu per week, this would not be fair on the D to fork out money for maintenance.

'*she remains very vulnerable and is unfit for gainful employment'*.

dwar il-kundizzjoni medika tagħha, it-trattament mediku preżenti u l-fatt li m'hijiex tajba sabiex issib impieg.

Quoting the first court - "Din il-Qorti in principju taqbel illi kull genitur, anke jekk ma jkunx fdat bil-kura u kustodja tal-minuri, ghandu jerfa' r-responsabbilitajiet tieghu u jikkontribwixxi ghall-alimenti ta' uliedu. Donnu pero', l-attur qed jaghti l-impressjoni li l-konvenuta b'kull intenzjoni li ma thallasx manteniment, qed tuza' l-iskuza tal-problemi mentali taghha sabiex tipprova tezonera lilha nnifisha minn tali hlas.

Id-dizokkupazzjoni tal-konvenuta ma tidhirx bhala wahda kolpuza. Ippruvat tahdem, pero' minhabba il-pilloli u l-fatt li jgibu certu apatija fuqha li trid tikkontrolla l-irqad taghha, gabha f'sitwazzjoni fejn ma tistax tahdem b'hinijiet fissi. Simon Mamo, li kien l-imghallem taghha

jiddeskriviha bhala tifla tajba, li kellha l-problemi taghha u kienet tbati bil-burdati. Il-konvenuta tghid ukoll li kienet tahdem fl-accounts ukoll.

li tul dawn il-proċeduri l- manteniment għal binha dejjem tħallas minn missierha li huwa pensjonant sabiex hi ma terġax tispiċċa l-ħabs.

s. Missierha jippermettilha wkoll li tgħix ġo appartament proprjeta` tiegħu mingħajr ma tħallas kera,

Tgħid li tifhem u tapprezza li l-ewwel Qorti kellha quddiem għajnejha l-interess suprem tal- minuri iżda m'hemm xejn fl-atti li jindika li l-missier għandu bżonn għajnuna finanzjarja sabiex ikun jista' jibqa' jgħajjex lill-minuri u '*lanqas ma wieħed jistenna li persuna tispiċċa rinfaċċjata b'sitwazzjoni fejn jew tispiċċa bla saqaf fuq rasha, jew il-ħabs, fuq ordni tal-Qorti.'*

13. M'hemmx dubju li in prinċipju kull ġenitur għandu l-obbligu li jerfa' r-responsabbilitajiet tiegħu fil-konfront ta' wliedu, inkluż billi jmantnihom finanzjarjament. Jeżistu mbagħad każijiet fejn minħabba raġunijiet ta' mard ta' wieħed mill-ġenituri, hemm bżonn konsiderazzjonijiet speċjali.

Fiċ-ċirkostanzi għalhekk ma jirriżultax possibbli li bħalissa l- appellanti ssib impjieg sabiex tikkontribwixxi s-somma ta' €300 kull erba' ġimgħat bħala manteniment għal binha minuri Benjamin.

21. Skont l-Art. 20(1) tal-Kodiċi Ċivili, manteniment jingħata skont il- bżonn ta' min jitolbu u l-mezzi ta' min għandu jagħtih. Filwaqt li Art. 20(3) tal-Kodiċi Ċivili jipprovdi:

"(2) Meta jinqiesu l-mezzi ta' min hu obbligat għall-manteniment, għandu jingħadd biss il-qligh tiegħu mix-xogħol tal-professjoni, arti jew sengħa, is-salarju jew il-pensjoni tiegħu mogħtija mill-Gvern jew minn ħaddieħor, u tal-utili tal-beni, sew mobbli kemm immobbli u kull dħul li jinħoloq taħt trust".

22. Il-fatt waħdu li ġenitur ma jaħdimx ma jfissirx li awtomatikament m'għandux obbligu li jmantni lil uliedu.

23. Fil-każ ta' miżżewġin (il-kontendenti mhux miżżewġin) l-Art. 54 tal- Kodiċi Ċivili jipprovdi kif għandu jiġi stabbilit il-manteniment għat-tfal, u dan billi fost affarijiet oħra jitqies:

"(e) kull qligħ jew benefiċċju li l-miżżewġin, jew min minnhom, jirċievu skont il-liġi, minbarra kull għajnuna soċjali li mhix kontributorja li tkun qed titħallas lilhom taħt l-Att dwar is-Sigurtà Soċjali:Kap. 318.

Iżda, għall-fini ta' dan il-paragrafu, għandha titqies il-pensjoni għad- diżabilità taħt l-artikolu 27 tal-Att dwaris-Sigurtà Soċjali".

Fil-parti dispożittiva tas-sentenza appellata tat-8 ta' Ottubru, 2019, jingħad li l-manteniment dovut hu ta' €150 kull erba' ġimgħat *"..... għall- perjodu ta' sena sakemm il-konvenuta għandha ssib impieg fiss, fejn għalhekk l-istess ammont għandu jiġi rivedut għal €300"*. Il-Qorti ma taqbilx ma' dik il-parti tas-sentenza, peress li jirriżulta li l-konvenuta ma taħdimx u matul is-sena 2020 il-kundizzjoni medika tagħha ma tjibitx imma ħżienet. Il-provi juru li fil-preżent il-konvenuta m'hijiex f'kundizzjoni medika li ssib impjieg.

Mill-provi jirriżulta li l-uniku dħul li għandha l-appellanti hi l- assistenza soċjali fis-somma ta' €107.49 fil-ġimgħa, ċioe` €430 kull erba' ġimgħat. Evidenti li l-konvenuta qiegħda tingħata appoġġ

finanzjarju mingħand il-ġenituri sabiex tkun tista' tgħix. Għajnuna li hi ġustifikata meta tqis li m'għandhiex impjieg u skont id-dokumenti preżentati fil-mori tal-appell bħalissa m'hijiex f'kundizzjoni li taħdem. Pero` dik l-għajnuna m'hijiex qligħ skont il-liġi sabiex il-Qorti tiddetermina x'mezzi għandha l- persuna obbligata li tagħti manteniment.

. Il-Qorti żżid li m'għandhiex dubju li l-għajnuna finanzjarja li l- konvenuta tirċievi mingħand il-Gvern m'hijiex biżżejjed biex persuna jkollha ħajja diċenti fil-ġurnata tallum. Evidenti li kieku ma kinitx għall- għajnuna finanzjarja li jagħtiha missierha, li pprovdilha wkoll l- akkomodazzjoni, ma kinitx tkampa. Mill-atti jirriżulta li l-konvenuta diġa' weħlet piena karċerarja għaliex ma' ħallsitx manteniment.

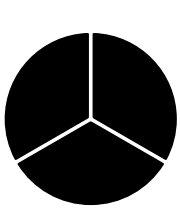
Xehed li huwa għandu ħames ulied oħra appartil-appellanti.[11] Għalkemmjinftiehemlidawnhumalkollmaġiorenni u għalhekk m'għadux imantnihom, jibqa' l-fatt li hu u martu pensjonati u diġa' qed jippermettu lill-appellanti tgħix ġo fond proprjeta` tagħhom mingħajr ma tħallas kera sabiex jgħinuha. Hu ċar li l-konvenuta hi piż finanzjarju fuq il-ġenituri tagħha.

Kull ġenitur għandu dmir li jmantni lil uliedu. Madankollu s- sitwazzjoni attwali tal-appellanti ma tippermettix li tħallas għal manteniment. Dan ma jfissirx li ser tibqa' ma tħallasx jekk fil-futur jirriżulta li għandha qligħ li jippermettilha li tagħti l-kontribut tagħha. Il-Qorti fehmet li bħalissa l-missier qiegħed ikollu jġorr fuq spallejh ir-responsabbilta` kollha għall-manteniment tat-tifel. Dan hu piż fuqu. Madankollu ma jidhirx li bħalissa hemm għażla oħra, apparti li m'hemmx provi li juru li l- attur m'huwiex finanzjarjament f'qagħda li jipprovdi għal dak li għandu bżonn ibnu.

30. Huwa minnu li l-Artikolu 7(2) tal-Kodiċi Ċivili jipprovdi li meta m'hemmx ġenituri jew jekk dawn ma jkollhomx mezzi biżżejjed, id-dmir tal-manteniment u tal-edukazzjoni tal-ulied jaqa' fuq l-axxendenti l-oħra. Apparti li n-nanniet m'humiex parti fil-kawża, f'dan il-każ m'hemmx prova li l-attur m'huwiex finanzjarjament kapaċi li jagħmel tajjeb għall- manteniment tat-tifel.

Għal dawn il-motivi tħassar dik il-parti tas-sentenza tat-8 ta' Ottubru, 2019, li laqgħet it-tieni u t-tielet talba tal-attur u tiċħad it-tieni u t-tielet talbiet tar-rikors maħluf. Bla preġudizzju għad-drittijiet tal-attur f'każ li l- qligħ attwali tal-konvenuta jiżdied u jkun tali li jippermettilha tagħti kontribut għall-manteniment ta' binha.

THE LAW OF PARTITION



CO-OWNERSHIP A489-495B

Article 496 - Each co-owner may demand partition of common property.

496. *(1)* ***No person can be compelled to remain in the community of property*** *with others, and* ***each of the co-owners*** *may, at any time, notwithstanding any agreement to the contrary, d****emand a partition,*** *provided such partition has not been prohibited or suspended by a will under the provisions of article 906.*

(2) Nevertheless, an agreement to the effect that property shall continue to be held in common for a fixed period not exceeding five years is valid; and any agreement for a longer period, is null in so far as it exceeds five years.

(3) Any such agreement may be renewed.

- when dealing with partition of common property the civil code gives the procedure when one wants to leave the co-ownership situation =- you can ahve partition which is made on a voluntary basis, by the co-owners and if there is a disagreement a number of procedures take place

- Presumption is that co-ownership enjoys equal share - he presumption is that the undivided shares are equal unless disputed, equal rights

- Co-ownership = indivisibility - so a legal advice to a bank = suppose there was an individual who passed away but had a number of deposits at the bank - you have been engaged by the heirs to write an advice of the bank for the release of those funds

- Example—a dead person - he had so many bank accounts and that account at the bank is presumed to belong to community of acquests and half of the deposits, belong to the widow as her undivided share, (indivisibility) of the deposit, since it is AB INTESTATO - the remanning undivided share belongs to the dead, and the undivided half, 1/4 of the account belongs to surviving spouse - always saying that it is undivided and mentioning the exact portion - passing on from co-iwnerhsip to partition - holder of the accounts and pay -according to their shares -

- We are stating that COA at that stage although the other spouse is still alive, is being terminated with the death of the spouse and since there is this request to the bank to pay the amount according to the individual shares to the spouse widow and co-heir, and other co-heirs, the children, we have to liquidate the COMMUNITY OF ACQUESTS -

- UNTIL THE COA HAS BEEN LIQUIDATED, one can not say that he/she is a co-heir - it can be terminated but not liquidated.

Indivisibility = owner of everything, including your share - but can not divide into what belongs to you personally.

Co-ownership scenario between the parties; A couple who chose to purchase the property together - they become undivided share -and there is the presumption of equality of undivided shares - depending on the amounts of funds injected - the creation and establishment of co-ownership by voluntary on the parties.

It can be through law - interstate succession - a person ends up being a co-owner as he has inherited.

Distinguish between the terms ***PROVISO*** and ***PRO INDIVISO***

Pro indiviso - You can have an undivided share, in a property in a thing or in a right - ex royalties with others - example; right to receive royalties -

Example - When talking off co-ownership and partition, we have t keep in mind rights - which could be in lease - when you are advising your clients in a consensual separation, usually if the matrimonial home is under title of lease - and it is in their names, during the negotiations for that consensual separation you would need to even partition that right - as they can not live together anymore - so the title fo lease will have to go anyone f them according to what they agreed or they relinquish to the title - personal right - the right of lease

The situation before 2016 was that;

- we had a situation which goes back to roman times - whatever you do with your share, there is the liberty to enjoy your share but whatever you do with that share you need the consent to inform he others and also the consent of the other co-owners - if you are going to dispose of it, or lease it out - undivided whole thing - A situation where in latin - IN REM ENIM PARI AUTJUREM CAUSA … - he who vetoes is in the stronger position - this was the situation before the 2016 amendments - heirs vetoing amendments

- To bring an acton you need the majority pdf co-owners and 51+ except 1 decide to sell the property and they found a prospective buyer and they actually - if you have a majority, one is dissenting and the one is not agreeing - they proceed - as they can - as every e has a right to alienate , to dispose of his percentage - so majority decides to enter into a promise of sale agreement to bind the protective purchaser to purchase the property. This could not happen before amendments of 2016 as you needed **unanimity.**

New amendments:

With the new amendments - 495A - it is possible to enter into a promise of sale agreement - bound the purchasers and the sellers with a price - the other dissenting co-owners did not agree on the price - what happens is that you have the right to enter into a promise of sale agreement to bind the buyer. The sale will go through as long as a judgement is acquired under **495A** - so what is the next step after singing the PROMISE OF SALE ?

The 5 co-owners entered into the agreement would file a ***rikors*** - ASKING THE COURT TO approve THAT SALE AT THAT PRICE AND TO DECLARE THAT WITH THAT SALE THE dissenting CO-OWNER **WOULD NOT** BE prejudiced. The next step would be that this application would be served on or notified to the other co-owner who did not sign or approve the of sale and he would have 20 days to reply - most probably he will defend himself by saying that the price is too low and will say that I am going to be prejudiced in terms of A495A.

So the court then will hear the evidence on both sides and the court will appoint a court expert to inspect the property and to come up with an estimate a value of that property, so the architect would be advising the court how much the property is worth - if the court establishes that that co-owner will not be prejudiced, then it will approve the sale and the co-owners the majority can proceed with the final deed.

What about the undivided share of the dissident co-owner ?

If the others acquired approval to sell their share, the purchaser would still need to acquire the missing percentage - in this procedure when the application is made and presented to court, the co-owners would first ask a declaration that they will not be prejudicing the dissident and thirdly they will ask the court to appoint a court appointed curator, from the list of advocates eligible to be curators and the court will authorise the notary to proceed with the publication of the deed at a particular date - so if the dissenting co-owner does not appear to be transferring his share, the curator will appear instead of him and on his behalf — so the person buying would acquire the property as a whole - without being a co-owner with the dissenting party.

495A- not applicable to spouses between each other

Article 495 - Each co-owner has full ownership of his share.

495. (1) Each **co-owner has the full ownership** of his share and of the profits or fruits thereof.

(2) He may freely alienate, assign, or hypothecate such share, and may also, subject to the provisions of article 912, substitute for himself another person in the enjoyment thereof, unless personal rights are concerned:

Provided that the effect of any alienation or hypothecation shall be restricted to that portion which may come to the co-owner on a partition.

(3) Where the **heirs in an inheritance** continue to **hold in common,** property deriving from the succession for more than three years and no action has been instituted before a court or other tribunal for the partition of the property within three years from the opening of the succession and the portions of the heirs in the said inheritance are the same in respect of all the assets of the inheritance, each co-owner shall be deemed to be co-owner of each and every item of property so held in common:

Provided that this sub-article shall not apply:

- (*a*) when property held in common is subject to any right of habitation, use or of usufruct, for such time during which such right is in force; or
- (*b*) when the property held in common consists of property which of its very kind has of necessity to be kept indivisible; or
- (*c*) when persons who are holding the property deriving from the succession in common agree otherwise:

Provided further that the period of three years referred to in this sub-article shall commence to run together with, and shall be deemed as one with, the period of three years referred to in article 495A(1).

Article 495A - Where co-owners fail to agree in respect of a sale of a thing held in common.

495A. (1) Except in cases of condominium or necessary community of property, **where co-ownership has lasted for more than three years** and none of the owners has instituted an action before a court or other tribunal for the partition of the property held in common, and **the co-owners fail to agree with regard** to the sale of any particular property, the court shall **if it is satisfied that none of the dissident co-owners are seriously prejudiced thereby,** authorise the sale in accordance with the wish of the majority of co- owners regard being had to the value of the shares held by each co- owner.

(2) The request to the court shall be made by application which shall be accompanied by a declaration of the owners who agree to the sale as well as a prospectus showing the number and value of the shares held by each of them as well as the terms and conditions under which the sale is to take place. The application shall also indicate the date on which the co-ownership arose and the circumstances thereof.

(3) The application shall be served on the co-owners who do not agree with the sale as well as on curators to be appointed by the court to represent such of the co-owners who are unknown or who cannot be traced. The registrar shall cause a copy of the application to be published in the Gazette and in one daily newspaper.

(4) A declaration that any co-owner is not known or cannot be traced shall be confirmed on oath by one of the applicants.

(5) The other co-owners as well as the curators may within twenty days from service upon them of the application, or in the case of a co-owner who has not been served with the application within twenty days from the last publication referred to in sub- article (3), oppose the sale stating the serious prejudice that they or the co-owners represented by them may suffer because of the sale.

(6) In assessing whether there will be serious prejudice to any of the co-owners, the court shall take into consideration all relevant factors including the value of the property and the price of the sale, and may for this purpose order that the property be appraised in accordance with the provisions of article 306 of the Code of Organization and Civil Procedure.

(7) The court shall determine the application, and where it determines that the sale is to take place, it shall determine the price or other consideration for the sale and it shall further -

- (*a*) determine the time, date and place, when and where the transfer is to take place;
- (*b*) where the sale is to be effected by a public deed, appoint a notary to publish the deed;
- (*c*) appoint a curator, even among the co-owners themselves, to represent any of the co-owners who fail to appear on the notarial deed or other instrument of transfer
- (8) The court may, on an application by any party interested, change the date, time or place where the transfer is to take place.

(9) If more than one co-owner opposes the transfer or where the court rejects the application in terms of sub-article (7), the court may, notwithstanding the other provisions of this article, order the sale by licitation of the property in accordance with the provisions of articles 521 and 522.

Article 495B - Transitory provision in respect of articles 495 and 495A and obligation to register under the Land Registration Act.

495B. (1) The period of three years stipulated in articles 495(3) and 495A(1) shall apply in respect of all co-owned property to which the said sub-articles apply which on or after the 1st April 2016 shall have been held in common by the co-owners thereof for a period of at least three years.

(2) The periods of ten years previously provided for in articles 495(3) and 495A(1) (prior to their amendment) and of five years previously provided for in article 495B (prior to its substitution) respectively and as in force prior to the 1st April 2016 shall no longer apply as from the 1st April 2016.

(3) Immovable property transferred on the basis of a court decision given under article 494(1) and not being situated within a land registration area for the purposes of the Land Registration Act shall, notwithstanding the provisions of any other law, be deemed to constitute a land registration area for the purposes of the said Act and it shall be registered in the Land Registry by the Notary who publishes the deed of transfer at the expense of the transferee.

JOSEPHINE GRECH PRO ET NOMINE VS GEORGE JOSEPH PARNIS - Judgement - IMP -FIRST HALL

In this case the P instituted an action on Article 495A of the Civil code after they wanted to sell the property, and all the other co-owner siblings agreed on the sale of the property since they had already an interested buyer. However the defendant did not want to sell and he said that his rights would be seriously prejudiced if the sale goes trough. However the court said that if the sale goes through his rights will not be seriously prejudiced and allowed the sale to go through after considering that all the elements in Article 495A are met. It was also noted how the defendant had stated that "if they want war there will be war" u "over my dead body". The defendant also wanted to buy the property himself for a price which was much lower than the plaintiffs agreed with the third party who was ready to buy the property at the calculated price which the court found to be fair.

Conditions which were compliant with A495A:

1. "Il-kontendenti ilhom fi stat ta' komunjoni għal aktar minn għaxar (10) snin"

2. Ħadd mill-kontendenti ma beda azzjoni quddiem xi qorti jew tribunal ieħor għall-qsim tal-proprjetà li hija miżmuma minnhom in komun;

Il-prezz miftiehem għall-bejgħ tal-proprjetà hawn fuq imsemmija jirrifletti l-valur tas-suq u dana kif jirriżulta mir-rapport tal-Perit Alan Saliba t

On article 495A

Illi l-iskop ta' an l-artikolu tal-liġi kien intiz biex jiffacilita' t-trasferiment ta' propjeta intera meta jkun hemm propjetarji ta' minoranza ta' ishma li ghal ragni jew ohra ma jridux jew majstghux jersqu ghat-trasferiment tal-intier tal-propjeta' in komun. Dan hu fil-fattt forma ta' trasferiment forest li ghalih il-ligi poggi parametri cari sabiex ma jsirx abbuz, sfruttament jew fi kliem il-ligi 'pregudizzu serju' ghad-drittijiet tal-minoranza.

lli l-liġi tpoġġi cerṭu kundizzjonijiet fuq min jipprevalixxi ruhu minn din iid-disposizzjoni tal-ligi. Dawn huma;

1. Stat ta' komunjoni għal aktar minn għaxar snin li ma tkunx wieħed ta' indivizjoni forzata jew ġej minn stat ta' kondominju; jew għal tliet snin fil-każ ta' wirt li jiġi fis-seħħ wara l-1 ta' April, 2016;

2. Li ma hemmx azzjoni għad-diviżjoni *in corso*;

3. Nuqqas ta' ftehim dwar il-bejgħ.

lli f' din l-azzjoni r-rikorrenti għandhom il-maġġoranza assoluta (7/8) tal-ishma fil-fond de quo li ilhom għal iktar minn għaxar snin indivizi, joè minn meta miet il-missier il-kontendenti Carmelo Parnis fil-11 ta' Novembru, 1980.

Illi ma jirrizultax li bejn il-kontendenti hemm xi kawza ghad-divizjoni għaddejja.

lli jinkombi fuq il-Qorti li tivveriffika hi jekk mill-assjem tar-rizultanzi hux sodisfacentament ippruvat illi l-bejgh mhux ser jirreka pregudizzju gravi lis-sid minoritarju. Infatti is-sub 6 tal - 495A, jimponi fuq il-Qorti il-materja l-obbligu li tqis kull fattur relevanta, inkluz il-valur tal-propjeta' u l-prezz tal-bejgh u tista' tordnali ssir stima…"|

Illi fis-sena 2004 il-leġislatur żied l-artikolu 495A mal-Kodiċi Ċivili bil-għan li jiffaċilita l-bejgħ ta' proprjetà miżmuma in komun għal iżjed minn għaxar snin permezz ta' proċedura orħos, u iktar spedituża, minn dik ta' kawża għal liċitazzjoni. Dan fl-interess kemm tal-komproprjetarji nfushom, kif ukoll fl-interess pubbliku li l-proprjetà ma titħalliex vojta b'detriment għal min irid isib negozju jew akkomodazzjoni residenzjali, b'dannu kbir għall-ekonomija tal-pajjiż. Dan barra l-għadd kbir ta' kawżi kważi interminabbli aktarx frott ta' pika jew nuqqas ta' bon sens. L-amministrazzjoni tal-ġustizzja fiż-żminijiet kontemporanji ma timmirax għal rettitudni perfetta fl-applikazzjoni tal-liġi għall-fatti veri. Filwaqt li dan jibqa' l-għan tal-proċedura ċivili, dan irid jiġi bbilanċjat minn għanijiet oħrajn li l-ġustizzja trid tilħaq, bħaż-żmien li jittieħed biex tinqata' kawża, li jrid ikun raġonevoli – u dan huwa jedd fundamentali tal-bniedem – l-aċċess ta' kulħadd għall-ġustizzja – li ma jistax isir jekk l-ispejjeż ikunu kbar iżżejjed għal-litigant inkella għat-*taxpayer* li jiffinanzja l-apparat

White vs white

Illi l-artikolu 495A tal-Kap. 16 huwa eżemplari eċċellenti ta' dan il-kompromess. Proprjetà li titħalla mhux maqsuma għal iktar minn għaxar snin[6], li huwa diġà perjodu twil ħafna, tista' tinbiegħ mill-komproprjetarji li jkollhom il-maġġoranza tal-ishma b'kundizzjoni waħda suprema: li l-komproprjetarji dissidenti ma jkunux gravement ippreġudikati. Għalhekk mhux biżżejjed li jiġu ppreġudikati, imma jinħtieġ li jkunu gravement ippreġudikati. Hawn il-leġislatur qed jagħmilha ċara li anke jekk il-kundizzjonijiet tal-bejgħ ma jkunux ottimali, jew l-aħjar li jistgħu jinġiebu fis-suq, xorta waħda l-bejgħ irid isir; il-linja trid tinqata' u tinqata' malajr. Altrimenti jiġi mminat l-iskop kollu tal-preċitat artikolu 495A tal-Kap 12.

Decide

Għalhekk il-Qorti taqta' u tiddeċiedi billi tilqa' t-talbiet attriċi fis-sens li:

1. **Tapprova, tawtorizza u tordna l-bejgħ tal-intier tal-fond bin-numru mitejn tmienja u erbgħin (248) qabel mitejn tmienja u tmenin (288), Triq Manuel Dimech, Sliema bl-arja libera u bid-drittijiet u l-pertinenzi kollha tiegħu lill-imsemmija Charlene Buttigieg u dana versu l-prezz u taħt il-pattijiet u kundizzjonijiet kollha elenkati fil-konvenju ffirmat quddiem in-Nutar Philip Lanfranco nhar l-10 ta' Diċembru, 2015, kollox ai termini tal-artikolu 495A tal-Kap. 16 tal-Liġijiet ta' Malta;**

2. **Taħtar lin-Nutar Philip Lanfranco, li rrediġa l-konvenju, sabiex fi żmien xahar mil-lum jippubblika l-att finali ta' bejgħ u għal dan il-għan jistabbilixxi data, ħin u post;**

3. **Taħtar lil Dr Michael Spiteri bħala kuratur deputat sabiex jirrappreżenta lil min mill-komproprjetarji, b'mod partikolari l-intimat, jonqos milli jidher għall-pubblikazzjoni tal-att finali ta' bejgħ.**

Court Of Appeal - COA - 27th oct 2017 -

Upheld first court decision and stated

Ir-rekwiziti biex il- orti til a' t-talbiet ghall bejgh huma ukoll elenkati fis- sentenza fl-ismijiet Dottor Victor Bugeja et v. Dottor Benjamin Valenzia et deciza ukoll mill-Prim'Awla fit-2 ta' Gu ju 2016.

Din il-Qorti kellha l-okkazjoni biex tanalizza dan l-artikolu fis-sentenza taghha fl-ismijiet Richard Vella Laurenti v. John Vella Laurenti (27 ta' Jannar 2017) u qalet hekk: "Meta l-ligi fl-artikolu msemmi ssemmi l- kelma pregudizzju tinftiehem li dan irid ikun gravi – b'tali mod li l-bejgh eventwali tal-propjeta` in kwistjoni jkun biex wiehed juza terminu bl- ingliz; "manifestly unfair" ghad-dissident. ktar 'il u im il-Qorti qalet ukoll; "Din il-Qorti zzid tghid li biex tiddeciedi li ma taderixxix ghat-talba ghall-bejgh mhux bizzejjed li l-konvenut jesebixxi stimi li juri differenza fil-valur tal-propjeta` li finalment jekk tinqasam bejn il-kopropjetarji tkun relattivament zghira. L-iskop tal-artikolu 495A m'huwiex biex jigi assigurat bi precizjoni l-valur tal-propjeta` fis-suq – xi haga finalment soggettiva sia pure bil-beneficcju tal-perizja teknika – izda li tassikura bejgh bi prezz gust (li jkun assikurat ghaliex miftiehem fil-konvenju) li ma jilledi lill-ebda propjetarju.

. Fis-sentenza tal-Qorti tal-Appell (Sede Inferjuri) fl- ismijiet Lawrence Hili v. Louis Hayman moghtija fl-10 ta' Ja ar 2003, intqal li "f'kawza ta' divizjoni ... normalment tezisti l-prattika li l-ispejjez tal-kawza jigu sopportati bejn il-kontendenti fil-proporzjon tal-interess rispettiv taghhom".

White vs White, 2000

Mr and Mrs White purchased Balgrove Farm after they were married and had 3 children. Mrs White was the primary carer for the children, while Mr White predominately worked on the farm. However, Mrs White also undertook a number of duties to aid in the running of the farm.

Mrs White petitioned for divorce in 1994. As the children were grown up and not living at home, it was deemed for them to have a clean break divorce within the financial remedies. Prior to the outcome of this case, courts would usually disperse finances based on what were classed as reasonable needs. In these instances, the financially weaker spouse would be awarded a settlement based on what they needed for their housing needs. In the case of White v White, the financially weaker spouse was Mrs White.

The total marital pot was worth £3.5 million. In the first instance, Mrs White was awarded £980,000 which was only 1/5 of the marital pot. The judge decided she would be awarded a payment of £800,000 and the rest of the award would be made up from her assets. Further, she was required to transfer all jointly owned assets to Mr. White.

Mrs White was not content with the settlement as she wanted enough money to be able to purchase another farm. Both Mr and Mrs White had come from farming backgrounds before they were married and both wanted to carry on farming as it was what they knew as their income. However, the court decided it was not a reasonable requirement for Mrs White to be awarded the funds to enable her to buy another farm as it would mean separating Balgrove Farm, impinging Mr. White's reasonable requirement to continue farming.

Court of Appeal

Mrs White appealed the initial decision arguing that had she been treated as a business partner she would have been entitled to a much larger award because of her considerable contribution towards the running of the farm.

The Court of Appeal agreed and classed Mrs White as a business partner, meaning she was awarded an extra £700,000 in addition to the £980,000. As a result, she would take home approximately 2/5 of the marital pot. Furthermore, the Court of Appeal stated it was not fair for Mrs White to transfer the property to Mr. White.

However, neither party was satisfied with this outcome. Mr.White wanted the original decision restored while Mrs. White appealed for an equal share of all the matrimonial assets.

House of Lords

The House of Lords made the landmark decision arguing women should be treated equally in divorce cases. Lord Nicholls argued, we treat women equally within marriage so similarly we should with divorce. For the case of Mr and Mrs White, Lord Nicholls argued an equal split because fairness for the pair outweighed each parties needs which is why the reasonable needs system did not work for them. He continued by stating couples should be treated equally in divorce, even

though it is not specifically stated in legislation. He uses the phrase ‘yardstick of equality’ stating this is what should be used to generate a fair outcome for couples in divorce.

However, Lord Nicholls further stated that while we should aim to treat men and women equally in divorce, equality should not always be presumed for a couple, and equality should only be departed from if there is good reason to.

This was a significant step in treating women equally within divorce, especially as it accurately reflects modern family life. Whilst it creates equality, it also ensures