CVL2000
FAMILY LAW

The European Law Students' Association

MALTA

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Topic I: Marriage

Form and Capacity

According to article 18(a) of the Marriage Act (Cap. 255 of the Laws of Malta), a marriage, to be valid, must be celebrated according to the form required in the place where it is celebrated, be it in Malta or abroad.

> **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.*

Take, for example, the fact that in Malta, seven weeks before the date of the marriage, the couple is to visit a police station to receive marriage banns to be placed on police notice boards. This is done for a number of reasons, namely, to allow anyone with objections to come forward, and for the purposes of separate patrimonies and the division of assets.

With regard to the capacity, the law of the domicile of each of the parties allows him or her to marry. Therefore, if a Maltese is marrying an Italy, she must be capable of marrying him according to the restrictions of marriage dealing with the capacity of the parties in Italy whilst he must be capable of marrying her in Malta. Irrespective of where the marriage takes place, both must fulfil the requisite criteria in their respective domicile. Therefore, in article 18 we find three conditions that must be satisfied cumulatively.

In Private International Law we have what are known as connecting factors. Take, for example, a man who dies with a Swiss account. Which succession regime applies regarding those assets? With regard to immovable property the law of the place in which the immovable is found. However, with regard to the money which law of succession is to apply? In this case it is the *lex domicilii,* that is the law of the place in which the deceased is domiciled.

The formalities (*vide* articles 7-17): Take, for example, the requirement that marriages are to be published. One may ask whether something private need be announced so publicly. The fact remains that the publication of marriage certificates is an important practice for a number of reasons, such as for people who wish to marry for a second time without having annulled or dissolved their first marriage. It must be

known because article 38 contains a special disposition which carries a criminal penalty. There exists a period of imprisonment for four years for the offence of bigamy, that is the offence of marrying twice. If a marriage is celebrated in France, the formalities of the law of France will apply, regardless of the nationalities of the participants. There are those formalities which precede a marriage and those of the marriage itself. Great stress is made on what we call the banns of marriage which were usually stuck on the notice board of the parish church. However, this must take place six weeks before the intended date of the marriage. The couple must deposit at the public registry, also six weeks prior, their birth certificates and a solemn declaration. The marriage itself will eventually be published.

In every marriage there is an official. If the marriage is civil, it is typically the registrar himself or an officer appointed for that purpose. If the marriage is religious, it is typically a priest. The marriage cannot be officiated without a certificate of the marriage banns. If the registrar refuses to issue the certificates, he has to notify the persons and give his reasons for doing so. Article 8(2) offers a remedy in such a case.

At least six days must have passed before the period of the banns comes to end, whilst the maximum is three months. The period of the banns may be shortened by the registrar is satisfied that such shortening is justified by the circumstances of the case.

The capacity (*vide* articles 3-7): This area deals with the time and/or age at which someone may contract legally. The capacity to marry is linked to the domicile of each of the parties. if one is marrying a female from Pakistan, is she appeal to marry according to the law of her domicile? Can one marry according to the law of *his* own domicile? Problems start when foreigners are involved. It may be that they can legally marry more than one person. The Director of the Public Registry must, especially in the case of mixed marriages, be able to prevent marriages from being legally recognised. Domicile is important also for income tax purposes. One carries one's domicile with them irrespective of where they are. Distinction must be made between one's domicile of origin and one's domicile of choice. The fact remains that one's domicile of choice must be proven and doing so is not easy. To that end, problems with regard to both succession and the issuing of marriage licenses may arise. If one is domiciled in Malta, it means that all of one's world income is taxed there. Hence, the notion of domicile cannot be understated. Another connecting factor is one's habitual residence, where the proving thereof has a far lower standard than that for one's domicile of choice. Reference ought to be made to the Child Abduction Act in this respect.

In order to marry, one must be 16 years of age to marry. The Court of Voluntary Jurisdiction, formerly the Second Hall of the Civil Court, is meant to deal with problems such as the keeping of secret wills, problems of interdiction and incapacitation, etc. One may ask the court to intervene should one wish to marry below the age of eighteen years. Article 4 is slightly problematic and prohibits marriages where one or both parties suffer from what is referred to as an *"infirmity of the mind, whether interdicted or not".*

Article 5, alternatively, deals with instances in which marriage is strictly prohibited. Article 5(3) again mentions the Court of Voluntary Jurisdiction, empowering it to dispense with the provisions of sub-articles (1)(c)-(d) should good cause be shown.

Article 6 voids any marriage between people bound by previous marriages, 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.

Recognition of Catholic Marriages

In the past it was necessary for people to dissolve their marriage civilly even after having received their annulments.

Topic II: Matrimonial Regimes

Introduction

When a couple enters into a marriage, they will have assets which they acquire throughout the term of marriage as well as liabilities. When one has this situation of acquisition sand liabilities within a marriage the issue of who administers it arises. What sort of administration do the spouses have? This is what is known as matrimonial regimes/administration. One needs a system. The Civil Code provides us with a system which has been traditional throughout known as the community of acquests, or the default regime as if the 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. Take, for example, a bride and groom in church, as soon as the pair give their consent and get officially married, from that precise moment a community of acquests, unless excluded by a public deed, will be established. We shall discuss further the workings and the problems that arise from these communities of acquests. This matter is especially important for matters of succession and the dissolution of marriages. Alternatively, one may need to bring an action in court against one's debtor, as one may need to sue not only the debtor but his wife, jointly and severally. At times this information may not be available, so the law states that there is a presumption that there is a community of acquests. If one has doubts about this one may carry out a search, perhaps even in the Public Registry, to see whether there exists a prenuptial agreement wherein future spouses agree to appear on such a contract choosing a particular matrimonial regime. At times, in this particular contract, the establishment and operation of communities of acquests may be entirely eliminated. There exists also the possibility of a different contract where the spouses decide to change the matrimonial regime during their marriage. However, note that here we are dealing with formal contracts which will be enrolled in the Public Registry for third parties to peruse. If this type of contract is a pre-nuptial all that is needed is the agreement of the future spouses and publication. Once the par marries the provisions found in this agreement will begin taking affect.

However, if during marriage they have the default regime they can decide to enter into a post-nuptial contract with the same requirements as before. However, the law seems to want to protect the spouses and does not rest solely on the will of the spouses. The draft deed as drawn up by the Notary Public must be authorised by the Family Court.

What happens is that a *rikors* is filed attaching the draft contract and requesting the court to approve it. The judge will go through it and see that the conditions are fair for both parties and would then approve it by signing and stamping it. Once the draft is authorised there is also a decree by the court and from the moment that the decree is issued the spouses then can go to the notary, sign the deed, and the deed will be published and enrolled, thus dissolving the community.

Alternatively, the couple may opt to have a separation of estates, that is to say that there won't be a sharing of acquisitions and/or liabilities. This is as opposed to the equal percentages with which things in the community are shared. There may be a time when a negligent spouse mismanages the assets and incurs liabilities, and this may be one of the reasons why during the marriage they resort to separating their estates. Therefore, whatever one earns will belong entirely to that spouse who earns it, likewise with regard to liabilities.

Finally, the third regime, in place since 1993, is hardly ever used but it exists from articles 1338 through 1345. This is known as a community of residue under separate administration. In order to have this regime in place before marriage or after one will need the future spouses to enter into a public deed establishing the community of residue under separate administration as their matrimonial regime. We find this system in the German law of marriage, the basis that the Maltese legislator adopted in 1993, as well as that of South Africa. Once operative, whatever each spouse acquires, or liabilities incurred remains his or hers as its administrator. Therefore, the management is vested entirely in that single individual. This operates as a separation of estates, but the difference lies in the fact that if the couple decides to separate at that point in time a valuation and an inventory of all the assets and liabilities of an individual spouse are listed, counted, and the same is done for the other, with a total being reached. The totals might not be equal and in the case of such a discrepancy, the spouse with more must share equally the discrepancy to equalise both balances. The net balance is then the amount that the two will share equally.

Further on, we will also explore paraphernal property as opposed to community property (*vide* articles 1334-1337). Paraphernal property is that property which belonged to each spouse before marriage which they would have brought into the marriage with them. Take, for example, a spouse who had bought an apartment before marriage. Since the property was bought before the community of acquests was established, it is classified as paraphernal property, that is to say that it is the entire property of that particular spouse for the reason that that property was acquired before marriage. Suppose when that spouse before marriage not only bought the flat but entered into a home loan, that liability belongs to him individually and entirely. It will get complicated when they marry because community money finds its way into payments of that loan. At times during separations there may be situations where compensation is calculated. But with regard to paraphernal property other types exist. Take, for example, a spouse who receives by title of donation im/movable property. In the law of donation, one would find that certain assets of a substantial value must be donated through writing. A contract of donation would serve as proof that the particular property is in fact paraphernal. There may be times when the donation is paid *brevi mano* without proof, leading to a situation in which during the separation the issue

would arise as to proof. It would already be a breach of the law that the donation would have been done in writing. Alternatively, those items received through a title of succession also classify as paraphernal property. Imagine a spouse inherited an investment which yields dividends, to whom does this return belong to? Although there is paraphernal property, unless there is some form of declaration by the testator excluding the other spouse of the enjoyment of that property, the return will belong to the community of acquests. In a donation the whole asset will belong to the individual who receives it, but should it generate a return the said return belongs to the community.

Eventually, we shall also consider other legislation such as articles 2 and 6, and Part III articles 10-12 of the Cohabitation Act (Cap. 614 of the Laws of Malta) and these shall be compared and contrasted with their alternate provisions in the Civil Code. On the basis of the registration of cohabitation agreements, the cohabitants acquire certain rights which belonged to the community of acquests. Take, for example, a registered cohabitant who decides to acquire an immovable property for the two to reside in. Once the property is acquired the law states that if it is a registered partnership and the property was acquired as if it was a matrimonial home, half of the property would belong to the cohabitant as though he or she had appeared on the deed themselves (the appearance of both is not required). The quasi-community that exists in cohabitation is far more limited than the traditional community of acquests established by marriage.

Finally, we shall also consider the Civil Unions Act (Cap. 530 of the Laws of Malta) wherein one will find nothing relating to regimes. What one would find instead are vague provisions, take, for example, article 4, which refer the reader to the Civil Code. Marriage brings about communities of acquests by default and so the same shall apply in the case of civil unions. Whether the legislator had in mind equating civil unions with cohabitants or spouses is debatable.

The Community of Acquests

Unless the community is to be cancelled, a marriage contract is required. The community of acquests is the default regime under law as it takes place automatically as soon as the couple get married. The legal situation that is in place today is rather recent. Up until 1993 the separation of estates existed only and where it concerned the default regime one did not have joint administration, i.e., spouses did not administer their assets and liabilities jointly. The 1993 amendments introduced the community of acquests as something jointly managed by spouses.

Prior to 1993 the administration of the community of acquests was vested by law in the husband who could do as he pleased without the need of his wife to appear on the contract. When the changes were introduced, a problem occurred as a number of husbands had immovable property unknown to the wife and could not sell them without her appearance on the deeds. In 1991 there was a first attempt to change the law with it being complete in 1993. In the white paper, the experts felt that the community had to be kept because at that point in time, socially, there was still a situation where women would work and leave their employment once they were married. The community recognised that the work women conducted in the household was equal to

employment. What was aimed at being removed was the privilege of the husband as the sole administrator. The legislator in 1993 introduced the rule that the administration of the community is vested in both spouses and any agreement between the spouses to remove such a rule would be null and void. At the time, in order for a spouse to appear on a contract that spouse was obliged to file an application and seek authorisation from the court. This has since changed alongside the social situation of the country.

Article 1316 of the Civil Code states as follows:

> **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.*

Article 1237(2) allows the future spouses to make a choice and opt for a system of management of their matrimonial property which excludes the default regime: separation of estates of community of residue under separate administration (CORSA):

> (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.*

If the future spouses do not exercise this choice and hence no formal deed is entered into prior to their marriage, then the community of acquests will apply as from the date of their marriage. By the very fact that the marriage was celebrated, the COA applies by operation of the law, hence, making the COA the default matrimonial regime.

Article 1316(2) refers to those marriages celebrated outside Malta, something given added importance due to Malta's status as:

> (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.*

Schengen State. For this provision to take effect the spouses must come to Malta with the intention of establishing themselves here. As soon as they set foot on the island, all property acquired in Malta will form part of their COA. When once changes their domicile local law applies to their marriage. This is the law which creates their COA in Malta.

Article 1317 gives spouses the possibility to change their regime, stating that:

> **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.*

If they had entered into a marriage contract before marriage excluding the COA or otherwise the regime can always be changed during marriage assuming the competent court gives its consent.

Legal Personality

Is the COA something with its own distinct legal personality just as a company or commercial partnership would? It is not, and as a result cannot be sued or enter into contracts in its own right. Legal capacity remains vested in both spouses jointly and severally and they would be sued or enter into agreements as the need should be. In the case of ***Clyde Meli v. Maurice Pace Decesare et*** (FH CC, 24th May 2002):

> *"Il-konvenuti qeghdin ighidu illi dan huwa legat ta' hwejjeg haddiehor li ma jiswiex ghax ma saritx l-istqarrija li jrid l-art. 696 tal-Kodici Civili. Ighidu hekk ghax huma tal-fehma — u dan huwa wkoll il-meritu tal-hames eccezzjoni taghhom — illi t-testatrici ma kellhiex in-nofs indivis ta' dan il-fond, ghax il-fond kien tal-komunjoni u ghalhekk hi kellha nofs indivis tal-komunjoni u mhux nofs indivis tal- beni fil-komunjoni.*
>
> *"Dan l-argument kien ikun tajjeb li kieku l-komunjoni ta' l-akkwisti kellha personalità taghha, maghmula mill-personalità tar-ragel u tal-mara; is-sitwazzjoni f'dak il-kas kienet tkun tixbah dik ta' azzjonist f'socjetà anonima, li ghandu sehem fis-socjetà izda mhux sehem fil-beni tas-socjetà, ghax sidt dawk il-beni tkun is-socjetà nfisha li, ghax ghandha personalità, tista' tkun suggett ta' drittijiet.*
>
> *"Il-komunjoni ta' l-akkwisti, izda, ma ghandhiex personalità maghmula mill-personalità tar-ragel u tal-mara. Is-sidien tal-beni tal-komunjoni huma r-ragel u l-mara, mhux il-komunjoni. Mela huwa minnu illi t-testatrici kellha nofs indivis tal- fond tal-komunjoni, il-legat ma hux ta' hwejjeg haddiehor, u r-raba' u l-hames eccezzjonijiet huma ghalhekk michuda".*

This was a case dealing with property and the action had to be brought against the spouses personally as the COA has no personality. A COA is essentially a fund consisting of assets and liabilities like any other acquired by the spouses and administered jointly thereby.

Commencement and Termination

With regard to the commencement and termination of the COA article 1319 states that:

> **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.*

Joint Administration

Before the 1993 amendments, article 1362 read as follows:

> **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.

At present, the rule is that of joint administration. The white paper for the 1993 amendments stated that:

> *"None of the sources consulted by the Commission for the Advancement of Women had adopted the same solution to the problem of harmonising the patrimonial rights and duties of the spouses with the fundamental right to equality whilst bearing in mind such important factors as practicality and stability.*
>
> *"The system of Community of Acquests in Maltese Law is being retained. One cannot ignore that, at present, the majority of women still do not work outside the home and are consequently economically dependent on their husband who is the principal wage earner. The system of community of acquests, consequently, gives recognition to the value of their contribution. It is their exclusion from the administrative aspects which is anachronistic".*

Now, both spouses administer the COA jointly. Each spouse is responsible for whatever that spouse those in the community both jointly and severally. If a creditor of the community is not paid, he can seek payment from both, and a hierarchy exists of what that creditor can seize.

Acts of Ordinary vs Extraordinary Administration

The law distinguishes between ordinary administration (*vide* article 1322(1)) and extraordinary administration (*vide* article 1322(2)). When we speak of joint administration, we mean that spouses must give their consent jointly in case of extraordinary acts of administration. Take, for example, a spouse who purchases groceries from the supermarket using the credit card issued by the couple's joint bank account. This would be an example of ordinary administration of the COA wherein only one of the spouses is required.

On the other hand, take, for example, a spouse who wishes to purchase a car and enters into a contract of hire purchase. What typically happens is that the sale is signed by the agent requires guarantees in the form of bills of exchange. The signing of a bill of exchange giving a guarantee that the payment of the instalment will be paid is an act of extraordinary administration and must be signed by both spouses as they are jointly and severally liable. The law provides an exhaustive list of acts of extraordinary administration.

Article 1322 reads as follows:

> **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.*

If the act of administration is simple and does not have a burden or liability on the community of acquests then the likelihood is that it is an act of ordinary administration. Take, for example, the purchasing of groceries. Although the law does not define what is ordinary and what is extraordinary, it does not provide us with a complete and exhaustive list of what it considers acts of extraordinary administration.

In the case of ***Cachia Carmela et v. Mifsud Bonnici Mario*** (Court of Appeal (Civili, Inferior), 2002) the plaintiff sued the spouse for non-payment and the defendant countered by arguing that the suit was void as the plaintiff failed to name the defendant's spouse as a co-defendant. The court examined the issue and held that the suit was valid as a telecoms account is an ordinary act of administration, stating that:

> *"Il-Partijiet qieghdin jaqblu li, in forza tal-emendi li saru fil-ligijiet civili taghna, b'sehh mill-1993, f'azzjonijiet dwar atti ta' amministrazzjoni straordinarja, dawn iridu jitmexxew u jigu diretti kontra l-konjugi meta hemm vigenti r-regim tal-komunjoni tal-akkwisti. Dan però ma kienx minn dejjem hekk billi qabel l-amministratur tal-komunjoni normalment kien ir-ragel wahdu, minghajr il-htiega tal-intervent tal-mara. Dan issa tbiddel. Madanakollu, 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. Dan il-fatt ghalhekk iqanqal il-punt dwar ir-rapprezentanza legali f'kaz ta' proceduri gudizzjarji kontrieh meta jkun ukoll*

> *jirrizulta, kif irrizulta f'dan il-kaz in ezami, illi originarjament kien ir-ragel wahdu li ftiehem dwar il-kirja, affettwa hlas tal-istess, u kkontratta mas-sid. Di più, fil-kaz in ezami jidher li l-intimat kien deher wahdu fuq att ta' konvenju mas-sid appellata u dan allura juri u jevidenzja bic-car li s-sid ma kinitx tenuta li u lanqas kellha raguni ghalfejn tmexxi l-azzjoni kontra l-konjugi Mifsud Bonnici konguntement".*

Article 1318 contains a general provision referring to the privilege that there should be joint administration, stating that:

> **1318.** *It shall not be lawful for the spouses to derogate from the provisions of this Code in so far as they relate to the community of acquests.*

In the case of ***Alfred and Alice konjugi Brown v. John Mifsud*** (CoA, 2/12/2005, Ref. 134/2001) Alfred Brown entered into a temporary emphyteusis and under the 1979 regulations when a temporary emphyteusis expires by fiction of law the temporary emphyteutical concession is transformed into lease. To that end, Brown continued to enjoy the property on lease. In the meantime, the agreement was pre-1993, i.e., Alfred Brown was the sole person vested with the administration of the community of acquests and he appeared alone on the deed.

What happened was that this tenant, who was married, over time failed to pay the rent and as arrears accumulated the landlord, John Mifsud, brought an action before the Rent Regulation Board asking for the Board to authorise the eviction of Alfred Brown, which it did, ordering him to move out of the apartment within three months. This judgement was made against the husband alone, not both spouses, as he had originally appeared on his own on the contract of emphyteusis. In this case the title was that of lease, and the apartment was also the matrimonial home of both spouses. When this order was made and there was no appeal, so it became effective after twenty days, the tenant brought an action against the landlord trying to attack the previous judgement and the right that a tenant has.

The tenant claimed that his wife could not be evicted from the matrimonial home which was under title of lease because she was not called into the action so there was no order against her, he claimed. When one looks at the pleas raised by the landlord, he claimed that this was not an act of extraordinary administration as the tenant claimed, i.e., the wife did not need to party to the suit. Was the lease and, in turn, the eviction an act of extraordinary administration? This was the issue raised in this second case. If one were to enter into a contract to grant one's property on a title of lease, if one is married and one is the landlord then one's spouse must appear on the deed, likewise if one were the tenant.

With regard to the consequence of the accumulation of arrears, the non-payment of the rent is not listed in article 1322(3) and therefore the court throughout this claim and upheld the order for eviction because the arrears are a consequence of the contract of lease and the non-payment of rent is not mentioned in the list. Furthermore, the

court reasoned that it was a valid contract in the past because it predated the 1993 amendments. The husband had the full administration of the community vested in him and he could enter into agreements alone. The landlord did not enter into the merits of whether the tenant was married or not. The payment of rent and the consequences thereof is not an act of extraordinary administration.

Mandate

If one of the spouses is abroad but an extraordinary act of administration needs to take place, the law envisages a practical exception where what usually happens is the drawing up of a power of attorney (mandate). For the purposes of this the mandate would have those powers given by one spouse to the other. In order to have a valid mandate between spouses (as opposed to a power of attorney between third parties), in view of the right of joint administration, the law requires that the power of attorney include declarations by the mandatory and the notary public who, before signing, state that they have duly explained the contents of this mandate and the consequences of this grant of power of attorney. The same wording is also declared by the mandator, who declares that as a mandator they fully know the consequences of the grant of this power of attorney and that these consequences have been duly to him/her by the notary who drafted the power of attorney. Without either of these declarations the deed would be null and void. Still, this is not a renunciation of or a derogation from the rule of joint administration with the mandatory acting on the instructions and in the interests of the mandator.

Article 1322(6)-(7) refers to the power of attorney (*mandatum*):

> (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.*

The law takes into account practical scenarios in which the signatures of both parties for an extraordinary act of administration might just not be possible. Under the law of mandate, a mandator can appoint someone to act on his behalf, that is, to be a mandatory. The mandator will be giving a power of attorney (*prokura*) to the mandatory. Anyone can give a power of attorney to third parties with the usual formalities between them. In a typical power of attorney, the powers are spelled out and the mandator signs this private writing with the mandatory signing under the words *"I accept"*. The lawyer would also sign the power of attorney and declare that he is

identifying the parties to the agreement and that he has witnessed the signatures. With regard to spouses, the spouse granted the mandate must make a declaration thereon stating that this power of attorney has been duly explained to me together with the consequences of the granting of such a power of attorney. Without this declaration coming from the mandator the agreement will be null.

Bank Accounts and Investments

Joint administration means a spouse has the right to know what the other spouse owns because it forms part of what they are administering jointly. There was a point in the past where the husband would go to the bank and request the bank to provide him with details of his spouse's accounts, which the bank would refuse to offer on the basis of confidentiality. This in spite of the community of acquests. To that effect, article 1322(4) states that:

> (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.*
>
> (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.*

Following this that no information can be given, this also consolidates the fact that when the bank pays that accountholder the law exempts it from verifying whether that account belongs to the community of acquests or whether it paraphernal. The bank's only obligation is to its accountholder. The bank has secrecy and shall pay the deposit back to the accountholder without the need to verify whether or not those monies belong to the community or not. The bank does verify that a deposit account belongs to the community of acquests is in the event of succession. There is a presumption that whatever the spouses owned belonged to the community of acquests. To that end, the notary will inform the bank that one of the spouses passed away and in the absence of a pre- or post-nuptial agreement the presumption shall apply, and the notary will advise the bank that, following searches, the particular deposit belongs one-half undivided share to the surviving spouse with the other half forming part of the inheritance passing on to the heirs. Even when the community of acquests is terminated voluntarily the same case of confidentiality will hold fast. The bank is exempted from the law of secrecy in the event of a lawsuit, however.

Furthermore, regarding the deposit of money, article 1322(1)(f) and (g) states thar:

> (f) *borrowing or lending of money, other than the deposit of money in an account with a bank.*

The spouses must enter into the contract of *mutuum* together for it to have legal effect. However, the deposit of money in an account with a bank is considered an ordinary act of administration in spite of the fact that it is technically 'lending' money to the bank.

Community of Acquests

The law lists those items which fall within the community of acquests in Article 1320:

> **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 pare****nts.*
>
> (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.*

This list is a strict and exhaustive one. The scenario in paragraph (c) envisages a scenario wherein the property belongs to the children, but the parents enjoy a practical usufruct over it. Take, for example, a parent who, as the result of certain issues with his siblings and in order to avoid liability, donates his sole property to his children by means of a typical contract of donation. In order to continue with the enjoyment of this property on the same contract of donation he and his children created a usufruct in favour of himself. He himself had no property of his own to speak of whilst his children enjoyed bare ownership. As a result of this usufruct the father is legally allowed to enjoy the fruits of this property. To that end, if the spouses are together any rents or returns derived from this property form part of the community of acquests.

Paragraph (d) refers to any property which is acquired with community monies generated during the marriage. This property which is financed by community money will form part of the community of acquests. The law emphasises the fact that this is the case even though the property is only bought by one of the spouses.

Paragraph (e) refers to instances such as those, as an example, in which a spouse passes away and the surviving spouse handles the succession, wherein the marriage took place with paraphernal property. During the marriage it was decided that the paraphernal house used as the matrimonial home would be sold and that the proceeds combined with their savings would be used to purchase a new property. Although the surviving spouse was the universal and sole heir in the will it was discovered that in his previous marriage the deceased spouse had a daughter who lived in another country. By law, the reserved portion must be left to the children and this daughter found about the assets in the inheritance. When calculating her reserved portion this provision had to be taken into account. In this case the new house was financed with the sale of the paraphernal property which belonged to the surviving spouse. This amount must be refunded to the surviving spouse when calculating the reserved portion to be left to the surviving daughter. Therefore, what belonged as paraphernal property has a value which can be refunded.

Article 1321(1) is the presumption at law that whatever spouses have in their position belongs to the community, unless proven otherwise:

> **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.*

If proof is brought that any item in the possession of the spouses is paraphernal in nature, then the property does not form part of the community of acquests. The legislator also introduced sub-article (2) to this provision. Take, for example, an individual who ordered and paid for furniture before the marriage which was later

delivered after the marriage had taken place. This provision caters for such a situation, such that the furniture would not form part of the community of acquests in spite of the fact that it was delivered after the marriage took place.

In an act of administration for the alienation of immovable property, the spouse who was not a party to the agreement can either request the spouse to bring the alienated property back into the community of acquests or seek to be refunded the value of the item lost because of the transaction that the other spouse had entered into. With regard to acts of extraordinary administration the list is an exhaustive one. If the transaction at hand is not described or mentioned in the list, then it is an ordinary act of administration.

In the case of ***Elmo Insurance Services Ltd noe v. Pace Edwin et*** (FH CC, 03/10/2003, Ref. 122/1998) Judge Philip Sciberras defined the sub-articles of 1322:

> *"Il-precitat Artikolu 1322 jipprovdi ghas-sitwazzjoni dipendenti minn natura ta' l-amministrazzjoni ta' l-akkwisti. F' kaz li din tkun biss wahda ordinarja l-jedd li wiehed iharrek jew jigi mharrek tispetta lil kull wahda mill-mizzewgin (subinciz 1). Invece fejn l-amministrazzjoni tkun wahda straordinarja l-jedd appena imsemmi jmissu liz-zewg mizzewgin flimkien (subinciz 2). Is-subinciz (3) imbaghad jelenka dawk l-atti li huma expressis dikjarati bhala ta' indoli straordinarji. Huma biss dawk l-atti elenkati mis-subparagrafi (a) sa (m) li ghandhom jitqiesu ta' natura straordinarja u ghalhekk ghandhom jinghataw interpretazzjoni restrittiva".*

Refusal/Absence of Consent

Article 1323 contemplates a situation where a spouse refuses to grant the necessary consent for an act of extraordinary administration, and states as follows:

> **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.*

Here, there is an act of extraordinary administration to which a spouse does not consent. The remedy is for the spouse offering the consent to ask the court to authorise the particular transaction. Reference is made to article 6A of the Civil Code which states that:

> **6A.** (1) *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.*

This provision is limited as it only gives the spouse the ability to seek authorisation where the extraordinary act concerns and is necessary for the interests of the family. Proof must be brought to this effect. In procedure under article 6A the judge usually summons the parties for a hearing wherein he acts as a mediator and tries to reason out the situation and establish that the transaction is truly in the interests of the family. Then, if no agreement is reached, the judge can act as an arbiter, coming up with a decision. In order for the judge to do so there must be the joint consent of both parties. Sub-article (3) makes it clear that there is no appeal in such cases. This section seems to explain what is referred to as those matters of '*fundamental importance to the family'.*

Another scenario is where the consent of one of the spouses cannot be acquired by reason of absence or other impediments:

> (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.*

When the court gives this authorisation, it is not a general, all-encompassing authorisation, but a specific authorisation for that particular act of extraordinary administration.

With regard to enrolment in the Public Registry, sub-article (3) states that:

> (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.*

When property is transferred and only one spouse appears on the contract that spouse has to bear the responsibility and the relationship with regard to third spouses, assuming there is court authorisation and the necessary justification.

In situations where a spouse is prejudicing the community of acquests through negligence, mismanagement, and the other spouse has the remedy of referring the matter to a court of law and if the court finds that there is maladministration or negligence, the judge will interdict that particular spouse from administering or continuing to administer the community of acquests. Article 1325 provides the following:

> **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.*
>
> (4) *Without prejudice to any order made in terms of sub-article (1) of this article, in the case of the interdiction or incapacitation of one of the spouses and until such interdiction or incapacitation ceases, such spouse shall be excluded from the administration of the acquests and in any such case the administration of the acquests shall vest solely in the spouse not so excluded.*

This provision must be analysed in light of the particular wording used. In this case, the competent court would be the family court in its voluntary jurisdiction. An application would be filed by a spouse bringing to the attention of the judge the behaviour of the other spouse. The matter could stretch throughout the community of acquests, that is to say the incompetence or mismanagement could be general, or it could be affecting a particular area of the community. Take, for example, someone with a gambling habit who spends the assets of the community and incurs debts or has entered into several unsuccessful business ventures. The court can decide either to issue an interdiction which is general or limitedly. The request could therefore be for a general or limited exclusion from the administration of the community. Proof before this exclusion is granted is to be presented by the spouse making the accusation. The interdiction will continue until the interdicted spouse convinces the court that the mismanagement or negligence will no longer take place and that the prejudices to the community no longer exist at which point, he will be reinstated as an administrator of the community.

Administration of Trade, Business, or Profession by One of the Spouses

Article 1324 states as follows:

> **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.*

The legislator kept in mind that it would be very tough for any extraordinary act to require the consent of both spouses. If one is involved in a business or a profession one routinely makes decisions and signs documents quickly and one cannot wait for the spouse to sign and express their own consent. Therefore, the legislator introduced article 1324. If one is a lawyer and decides to advertise and sell a piece of furniture without the consent of the other spouse, does this example amount to an act of extraordinary administration? Is this transaction within one's profession as a lawyer? If that piece of furniture was an heirloom, and one gave it away at a cheap price without

the knowledge of the other spouse when it is community property, would it be an act of extraordinary administration? Therefore, does article 1324 apply?

This example is illustrative of the particular wording of the law. This particular sale would not constitute an act of trade irrespective of whether or not the seller is a trader. It in itself is not a *'normal act of management of a trade, business, or profession'* for a lawyer, but it may be for an antiques dealer. That said, a division must be clearly made between that property which belongs to the vendor personally and that which belongs to his business or profession. Therefore, this provision is a subjective one and is dependent on the particular trade, profession, or business of the person concerned. If the transaction is the normal act of a trader or professional, one must be aware of what the normal acts of the particular person are to be able to establish what is normal. If one is signing a contract of sale for an immovable which originates from the going concern one spouse may sign on one's own so long as it is proven that it is a normal act of management or trade.

Several consequences arise as a result. When business goes well article 1324 often goes dormant and it is only when things goes wrong that challenges and problems arise. There may be a situation where a spouse outrightly goes behind the back of another spouse and enters into acts of extraordinary administration. Would this transaction be valid or null and void? The law offers a remedy when the spouse acts behind the back of another spouse. Article 1326 provides as follows:

> **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.*
>
> (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.*

The phrase *'may be annulled'* indicates that the act is valid until such time that it is annulled. In a particular case the judge distinguishes between the actual nullity and relative nullity. Over here, in the beginning, we find what is considered as relative nullity. The action vis-à-vis third parties took place and the only action which can be brought by the spouse which did not consent is limited to acts which involve the alienation or constitution of a real or personal right. For the time being the act is valid until the other spouse contests it. The law mentions three instances when the spouse is expected to act in sub-article (2). If the object is sold the transaction cannot be annulled, but the law does allow for the reversion of a gratuitous transaction. The spouse has a remedy to be either reintegrated with the object or, if it cannot be reintegrated with the community, one has to establish the value of the item which has to be recovered by the spouse which did not consent. There is then a credit in favour of that other spouse. The remedies included in articles 1326(1) distinguish between those transactions which can annulled and those which can't.

The law envisages three situations and time limits when this action can be brought by the non-consenting spouse, being three years from whichever of these is the earliest:

1. The date when he is made aware of the act,
2. The date of registration where such act is registerable,
3. The date of termination of the community.

Since we are dealing with the alienation or the constitution of real rights, the registration refers to the enrolment of the transaction in the Public Registry. The problem is that the three-year period begins running when the notary enters this registration in the public registry. Upon discovery, the spouse can serve the judicial letter requesting the annulment and the time will be shortened to three months, pursuant to sub-article (3). The judicial act is not served on the spouse who did not act with consent, but on the spouse who had not given it, giving them a three-month period within which to act. If the spouse who did not consent does not act within three months, it is as though they had consented.

If the spouse acquiesces through inaction, sub-article (4) protects the spouse by offering an alternative remedy. If it is possible to substitute the item lost, then it is a remedy. If not, there is compensation.

George Cauchi v. Arnold Farrugia (FH CC, Judge Joseph R. Micallef, 12/05/2005): A spouse and a third party were involved in a transaction. The spouse borrowed money *brevi manu*, *viz*., an unwritten contract of *mutuum*, without informing his wife. Although there is no contract to prove the contract's existence, at some point the spouse paid back some of the money borrowed and stopped paying any more. The lender wanted to recover his money as well as interest. So that the matter would not be time-barred the creditor brought an action against this borrower. Immediately, plaintiff filed a written application requesting the liquidation of the loan, interests, and costs. When the application was served on the debtor spouse to avoid paying, he raised the following plea: the loan was null and void because a loan is one of those acts listed as an extraordinary act of administration requiring the consent of the other spouse.

When the plea was notified to the creditor, he insisted that the other spouse who had not given the consent be called into the action and made party to it, therefore giving her 20 days within which to file her pleas. She pleaded that she did not know about the loans existence and as such she did not give her required consent. The court, in its judgement, agreed with the debtor that a loan falls within the list of acts of extraordinary administration requiring the consent of the other spouse, but did not agree with the plea that the transaction was null and void. The court declared that the debtor spouse was not a trader, businessman, or professional and could therefore not rely on the protection found in article 1324. Having established that it was an act of extraordinary administration the court examined the remedies. It held that the transaction was not null and void and that it existed at law. As seen in article 1326 the transaction of loan *brevi manu* is not included so in actual fact the action which was given did not apply to the spouse which did not give her consent in this particular case. It would have been different had there been a contract of loan and the husband constituted a real right on the immovable property. The spouse cannot bring an action to annul the extraordinary act which was a loan, and the transaction was not null and void in the eyes of the court, which referred to the other remedy whereby the spouse who gave the asset away has to reintegrate it within the portfolio of the community or compensate for it. By borrowing from a third party, that loan has created a burden on the community of acquests. Taking this figure into consideration, in the relationship

between the spouses themselves the third-party creditor must be paid and so when the community is liquidated from the share of the debtor spouse compensation has to be paid to the other spouse who had not given consent. This judgement also highlights what is tacit approval and the difference between actual nullity and relative nullity.

When the timeframes or the remedy or the transaction does not concern immovable property or a movable property transferred under gratuitous title there is therefore this remedy for the spouse who had not given consent to either recover the item or, in failure of which, the right to compensation from the share of the other spouse or from his paraphernal property if his share is insufficient.

Article 1327 refers to those debts chargeable to the community and states as follows:

> **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.*

When one examines this list, it is noted that there is a sort of ranking of obligations which can be charged against the assets of the community of acquests first as a result of their nature. When there are not enough funds in the community both spouses will have to contribute through their paraphernal property. If a spouse's paraphernal property it has been noted that the income belongs to the community. In a situation where these debts concern any of the paraphernal property from which the fruits are borne those debts will be charged against the assets of the community in spite of the fact that the fruit-bearing asset is paraphernal in nature. Paragraph (f) refers to situations in which a spouse owes money as the result of a civil suit against the said spouse. There is, however, an exception: there was a case in which an individual in

the advertising business wanted to organise a safari-race in the middle of the Saudi desert and engaged several service providers to that end, one of which was an advertising company which paid money to the organiser and spent its own money to advertise it. It resulted that the project was fraudulent, and the debtors brought a lawsuit against him and against his wife. The wife brought the typical plea that this was a venture of her husband's, not hers. Her defence was under article 1327(f) as she did not commit a wilful defence, it was her husband who misappropriated the project's funds. The court released her from any liability for the offence that her husband committed.

Article 1327 is of extreme importance because when the spouses are faced with a claim from a creditor, one would need to see what the facts are vis-a-vis that brief and carry out an exercise to see whether those facts fit in with the debts described in any of the paragraphs mentioned in Article 1327.

J&E Grixti Ltd v. Jesmond Sant and Rita Sant (January 2007 Judge Phillip Sciberras) – this case concerned J&E selling some form of merchandise. Sant managed a mini market called Safe & Smile. The small claims tribunal was asked to recognise that the creditor owed this amount of money originating to the mini market.

Jesmond Sant did not pay, and thus, his wife Rita was called into the lawsuit. The wife pleaded that she had nothing to do with the transaction, and incidentally, by the time the lawsuit was filed, the couple was undergoing separation proceedings. In awarding the creditor his right to be paid, the small claims tribunal recalled that if it was true that Jesmond Sant did not keep his wife in the loop, then she could challenge to annul that transaction.

However, in this case the wife discovered there was this debt when she received a letter from the Small Claims Tribunal. Article 1326 and Article 1327(d) required the signatures of both spouses and was referred to for the case of the wife, but the conclusion was that the husband was guilty, and the wife was not.

J&E filed an appeal, as it only got a remedy against the husband since the wife was released from any responsibility from the first judgement. The Court of Appeal stated that Article 1326 and Article 1327 are irrelevant and were discarded. On the other hand, Article 1324 was recognised, keeping in mind that in this particular scenario, Sant could enter into transactions on his own because he was a trader, and the nature of this debt was the sale of merchandise.

The consequence of Article 1324 was that it was a debt burdening the CoA so a certain amount of responsibility should be borne by both spouses. The spouse who did not participate in the business is also liable. The court stated that Sant, the trader, had to pay the debts to the creditor from his half undivided share of CoA and if it is not enough then he had to liquidate any assets from his paraphernal property. The Court of Appeal stated that the wife was only liable to pay from her half undivided share of CoA and creditors could not cease her paraphernal property in this case.

Article 1328 provides for a hierarchy of creditors, so to speak, stating that:

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

For paraphernal property, if there are two or more creditors, the creditors of the CoA will be paid first followed by the creditors of the paraphernal debt. The exception is that one might have a paraphernal debt before marriage and constituted the necessary security and brought it into the marriage. In this case, the rule that the creditors of CoA will have preferential will fall and the paraphernal creditors will come and be paid before the other creditors.

Article 1329, on those obligations separately contracted by either spouse, states:

> **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.*

Article 1330 deals with instances 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.*

It goes on to make reference to Article 1324. The rule here is that if both spouses are responsible for the debt and if they do not have sufficient funds in the CoA to pay their debts, then the creditor has the right to liquidate the CoA of the spouses. Following this, the creditor may seek to be satisfied and be paid against the particular debt of the spouse who had contracted with him.

Terminating Communities of Acquests

Article 1332(1) refers to judicial separation. One must distinguish between consensual and judicial separation. Both situations require the authorisation of the courts. It is possible for the spouses who decide for several reasons to separate to reach an amicable agreement with the assistance of their respective lawyers and approach a notary public to draw up a separation contract before proceeding to mediation (one cannot obtain any separation unless one goes through mediation in the Family Court). The Registrar by court decree will appoint this mediator who meets the parties and is obliged to ask them to see whether they can reconcile. Once he establishes that this is impossible, he will read to them the contract prepared by their lawyers and vetted by the publishing notary. The mediator will then draw up a report to the judge and recommend the draft contract. The judge will consider the conditions and if he raises no objections, he will authorise the contract's publication. The notary is the only person to withdraw the draft from the court registry and the parties will appear on the contract which the notary will duly publish and enrol in the Public Registry.

> **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.*

Judicial separation is the actual litigation if the parties do not agree on any matters relating to, *inter alia*, the matrimonial home, maintenance, custody, visitation rights and expense, the liquidation of the community of acquests. For a consensual separation there is usually the termination and liquidation of the COA whilst in a judicial separation the court will examine everything and its judgement pronounce the couple separated, pronounce its decision relating to conditions, and terminate the COA 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 the property will be acknowledged as the rightful owner, and what remains is presumed to form part of the COA. Here, the parties did not agree on how to terminate the COA and proceeded with personal separation (*vide* article 1332(1)(e)).

There may be other causes bringing about separation, and as such the termination of the community of acquests. One such cause is the incapacitation or interdiction of one of the spouses. Suppose one of the spouses became sick and lacked the mental capacity to understand what a contract is, i.e., his civil capacity is prejudiced. The law distinguishes between two types of incapacitations recognises by the courts: interdiction and incapacitation. The former is the full mental incapacity of the person. What usually happens in either case is that an application is filed in the Civil Court Voluntary Section by either the children or the spouse which brings to the attention of the court that the particular spouse has psychological problems and is incapable of taking care of his own affairs. Usually, a psychiatrist is consulted who will draw up a report, taking the oath thereon, and this report is usually attached to the application as proof to the court that the individual concerned does not have the necessary mental capacity to conduct civil activities. If the court has any doubt, it will appoint its own psychiatrist. When a person is interdicted, the court will appoint a curator to take care of the affairs of the interdicted or incapacitated person. when an interdiction is pronounced by a court decree a notice in the Government Gazette is published and every year a list of all such interdicted persons for the year is published therein.

The difference between interdiction and incapacitation is that in the former it is a full incapacity, that is, the individual who is interdicted cannot appear on deeds on his own. With regard to incapacitation, it is a degree less than the former because in an interdiction the curator will carry out all civil acts required of or that would have been carried out by the interdicted person with every transaction having to be authorised by the court. Incapacitation means the person is unable to perform the civil acts alone but requires help. Therefore, the curator, rather than carrying out the acts alone, will purely assist the incapacitated person. interdiction and incapacitation can therefore lead to judicial separation and bring about the liquidation of the COA.

This article continues in sub-article (2) by setting out a procedure by who can ask the court for the judicial separation of property:

> (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.*

Take, for example, a couple in a consensual personal separation negotiating the termination of their affairs and community. First, a lawyer would identify what is in the portfolio. The presumption at law is that unless there is a pre- or post-nuptial agreement there is the presumption at law that, unless contested, the community of acquests is in effect. Thus, from the date of marriage, whatever the spouses acquire and whatever liabilities they incur is assumed to form part of their community. As such, an inventory is drawn up. The lawyer will then look at the bank accounts and investments of the spouses taking into account the dates on which the investments were made, and the funds deposited. Problems arise with regard to paraphernal property which was sold to improve the spouse's situation.

Take, for example, a spouse who acquired immovable property prior to entering into the marriage who, after marriage partially finances the acquisition of new immovable property with funds originating from the sale of the paraphernal immovable property which had briefly served as the couple's matrimonial home, with the remainder of the funds required being provided by a home loan debt facility. The loan, since acquired during the marriage, belongs to the community of acquests. With regard to the new immovable property, it stands to reason that whatever acquired during marriage belongs to the community of acquests. Therefore, unless there is friction between the spouses no problems arise. However, such friction has arisen in this scenario and during the personal separation the matrimonial home is contested. The sale of the immovable paraphernal property means that the funds originating therefrom are subject to refund. According to article 1333:

> **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.*

Therefore, according to this provision, whatever is being liquidated in terms of the COA the shares of the parties are fifty-fifty. If they sold the immovable property and obtained a good price for it, the rule is that it must be divided into halves, assuming no paraphernal property or other circumstances were involved. In this case it might be that the second spouse would need to refund the other with the value of the immovable property that belonged to him and was paraphernal. From the portion that one receives it might be that one spouse has to compensate the other the value of paraphernal property that had been lost or property that was part of the COA and alienated or transferred without the consent of the other spouse.

Article 55 of the Civil Code is a relatively new one which provides for situations in which the parties did not achieve a consensual separation and proceeded with a judicial separation, during the course of the presumably long litigation the COA might be prejudiced by spouses incurring debts or carrying out business. As such, when the spouses are in the midst of this litigation one spouse might feel prejudiced because, although the case is ongoing, there is nothing to stop a spouse from prejudicing the administration of the community. Article 55 can be exercised only if the parties have proceeded to judicial separation and cannot be requested by a spouse during the first

mediation phase because the lawsuit would not have commenced, instead, parties would be attempting to negotiate an amicable agreement. During the lawsuit an application would be filed, and a request made to ask the court to terminate the community of acquests in spite of the fact that the case is still ongoing. In so doing the other spouse is not prejudiced.

> **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.*

When one has the application of article 55 it means that it will operate from the date that the judgement of this request will be pronounced. This judgement is independent from the ongoing lawsuit because the court will declare the community of acquests as terminated but will not liquidate it. From the date of the judgement the parties would acquire, although still married, a complete separation of estates, effective of the date of the judgement. The assets and liabilities would not be liquidated, but the community of acquests will cease to exist. In the principal lawsuit the court will, however, liquidate the COA.

In the case of ***Evelyn Spiteri v. Anthony Spiteri*** (FH CC, 27/05/1963) the Court stated that:

> *"Min jitlob is-seperazzjoni ghandu …*

Although there was no article 55 at the time, the Court reasoned that a separate claim to liquidate the community was already in mind.

In the case of ***MSH v. RNH*** (Civil Court (Family Section), Rik. 211/20, 6/07/2022) the couple married in 2000 and had two children. They had been separated *de facto* and had already commenced the necessary separation lawsuit. The application referred to article 55 and the applicant pointed out to the court

> *"Whereas the marriage between the parties suffered irretrievable breakdown, and therefore marital life between parties was no longer possible.*
>
> *"Whereas further to mediation proceedings, plaintiff has been authorized to proceed with a personal separation lawsuit, bearing the names and reference number quoted above.*
>
> *"Whereas the parties are de facto separated, and the defendant resides in Scotland with their children in a property belonging to the said parties, whilst the applicant resides in Malta.*
>
> *"Whereas the applicant would like and is to this effect requesting the termination of the Community of Acquests*

> *existing between the parties in terms of Article 55 of Chapter 16 of the Laws of Malta.*
>
> *"Whereas such request will in no manner prejudice the interests of the parties who may plan their respective lives ahead, independently.*
>
> *"Whereas moreover, there no longer exists any scope for the marriage of the parties to remain being regulated by the Community of Acquests given that there are pending personal separation proceedings".*

Therefore, they requested that the court order by means of a separate judgement the termination of the community of acquests. Up to the time when the court terminates the community third parties might consider that they have a remedy against both spouses. From the date that the community is terminated each party will be acting on his or her own. There is therefore a particular date from where to reason that before that date any creditor of the community can seek redress against any of them. Creditors of the spouses before the date of termination continue to enjoy those rights and the judgement terminating the community will only apply to third parties as from the date of the judgement onwards.

Paraphernal Property and the Separation of Estates

It has been mentioned that each spouse can maintain their own personal paraphernal property acquired both before and during the marriage. These assets or liabilities might either have been brought into the marriage or inherited or donated therein. Donations might have been done to assist a particular married spouse. The rules of donation would apply because if something goes wrong and the spouse who received the donation needs to recover it, donations must be made in writing if of a certain amount or value. The assets or liabilities coming from the donation or inheritance also fall within the personal property of the individual spouse. The law describes paraphernal property in articles 1334-1337. Article 1334 states as follows:

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

Article 1334 refers to the other two marital regimes, i.e., the community of acquests or CORSA, not the separation of estates. However, a clarification was made by the legislator when it added a second sentence and made it clear that where the property of the spouses is held under the system of separate property all property is paraphernal. In all regimes we find paraphernal property. In the system of separation of property, the property there, unless dotal, is considered paraphernal and as such is owned entirely by the individual spouse. With regard to the other two types of regimes, one will find applicable all the rules regulating these regimes, but also, in the portfolio of the individual spouses, property which can be defined as paraphernal. One has to be careful because when one speaks of paraphernal property it is not to be confused with the regime of the separation of estates.

The law under sub-article (2) provides that the administration of paraphernal property is to be done entirely by the individual spouse who owns it. The law also provides that although there might be the separation of property there can always be co-ownership by acquiring together as any other individual may partner with another to be parties in a contract to acquire an immovable property. In the other regimes there is too no obstacle for them to be co-owners. The other provisions deal with what happens if the owner of the paraphernal property allows the other spouse to manage such paraphernal property. The law states that any returns of paraphernal property can be availed of by the other spouse.

Article 1337 states that:

> **1337.** *Where a spouse has enjoyed the property of the other spouse in spite of opposition, he shall be answerable for all fruit existing and consumed.*

The Community of Residue Under Separate Administration (CORSA)

CORSA was introduced by Act XXI of 1993 but in spite of its age this regime is relatively unknown to the general public and even to legal practitioners. If one compares the Maltese law with the source from where this type of regime was acquired, namely the German and South African systems, it is worth asking why it remains so popular in its countries of origin but not here. The title of this regime may initially seem paradoxical, how can it be both a community and separate estates? In truth, this community has features from both. In order to have the CORSA one needs, if it is before marriage, a pre-nuptial contract where the future spouses will declare that once they marry the default regime shall not apply but that CORSA shall regulate their marriage instead. However, the parties may appear on a deed and switch to this regime during the marriage if they please. If, when the spouses marry, the default regime came in automatically and they were unhappy with the community of acquests, before signing they need the authorisation of the court so the notary will usually file the draft contract in court and the judge duly will examine and authorise it, assuming the spouses are already married. The problem in Malta is that we consider pre-nuptial

contracts as taboo. In truth, it is prudent to plan the administration of one's assets and liabilities, especially before marrying.
Article 1338 states that:

> **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.*

This makes applicable the list that falls under the community of acquests and whatever is acquired under these paragraphs shall also fall under the assets which form part of the CORSA. When one compares this definition and how it works, to put it simply, one can say that from the moment CORSA takes effect and regulates the assets and liabilities of the particular marriage, one has a hybrid system where the spouses begin as if they are under the regime of separate estates, i.e., whatever one spouse acquires and whatever liabilities that spouse incurs will belong to the spouse entirely. Together, apart from these separate assets and liabilities, the spouses have their own paraphernal property. Each spouse therefore acts on his or her own. One might say that each spouse is under the regime of separation of property and, until termination, that would be the case.

The residual component of this system originates if one of the spouses dies or if the regime is terminated and liquidated through personal separation. Take, for example, one who wishes to create an inventory. In the case of CORSA one would create two columns, one for the property of each spouse. At the end, the value of each column would be tallied. If one tally is higher than the other and an imbalance arises, then the residue must be calculated. In this exercise of equalisation, the spouse with the higher tally must compensate the total reached by the spouse with the lesser amounts such that the two are equal. With regard to CORSA, there is a provision dealing with a remedy if one of the spouses attempts to hide assets from the other in order to defraud them in article 1144. There are also timeframes when something is done by another spouse and must be annulled by the other upon discovery.

Vide the Cohabitation Act which makes reference to cohabitations that are registered at the Public Registry, in which case the notion of community of acquests also applies limitedly to cohabitation in the sense that if one of the cohabitants, following a registration, buys on his own an immovable property to be used as the residence of the cohabitants, then, 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 both of them just as if there was a community of acquests. Specifically, *vide* articles 10-12 of the Act.

Topic III: Family Court Procedure

The mediation letter is not sent to the other party but to the Registrar of the Court. The first step which is procedurally necessary both from a domestic point of view as well as from an international one, insofar as Brussels II is concerned, is the letter of mediation. Take, for example, a wife who lives in England married to a husband in Malta. In England they do not have mediation but begin a case immediately. In Malta, however, they must pass through mediation first. If the wife files for separation in England on the 2nd and the husband filed for mediation on the 1st, which case began first? The wife's case or the husband's mediation? For the purposes of private international law, the fact that the Maltese procedure starts with mediation means that that is when the case starts. It would be unfair if people who started a case in Malta were put at a disadvantage where jurisdiction is concerned because they have to pass through mediation first. In cases of domestic violence mediation can be waived, so long as it can be proven.

The first thing that a mediator is obliged by law to do is to ask the parties whether or not reconciliation is possible. If the husband were to say yes whilst the wife was to say no, in spite of the fact that the primary intention of mediation is reconciliation, it is not the job of the mediator to try and force reconciliation. At that point in time, the role is that of trying to assist the spouses to come to an out of court settlement. If mediation is going to work, and very often it does not, it would only work if not part of a court procedure, at least in terms of reconciliation. The law does not specify a set period for mediation. A judge may give a decree limiting the number of sittings, but the law itself does not. 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. Children can be represented by a child advocate who is technically able to be present. In practice, this does not happen.

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. Without prejudice means that what is being sent is not binding and cannot be used in litigation this is a line in the sand which lawyers do not cross. Very often the contents of a letter sent without prejudice are an attempt to reach an agreement. What is said in mediation is also considered to be without prejudice as it is both non-binding and cannot be used in court. Moreover, the mediator cannot be brought up to testify under any circumstances. Not even a reaction can be referred to in court.

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.

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. Authorisation is necessary not only to begin the lawsuit, but also to finalise the separation agreement. It is somewhat dangerous that judicial authorisation is required for the approval of a contract because it may not be given due to judges' personal opinions. Unfortunately, who the judge is can make a difference.

A judicial assistant is somebody who is there to assist the judge, with the law stating that *"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"* and that *"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 court can appoint a judicial assistant to receive certain evidence. Take, for example, parties who agreed on everything except for bank accounts because the wife never interfered with her husband's business and does not know what is in them. At that point in time, it is possible to ask the court to allow for the production of bank documents to break a deadlock or to receive evidence which would otherwise only be accessible in court. This is done under oath and what is exhibited is considered to be evidence and is therefore not without prejudice.

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. After mediation has failed, there are two months from the closing thereof to proceed with a lawsuit, and one can only do this if one receives authorisation from the court. What happens is that mediation fails, is closed, and that one receives a court order authorising them to proceed giving them two months within which to do so. If the parties do not come to an agreement during mediation, they can ask the court for those two months to be extended.

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. These are also referred to as orders *pendente lite*, and it is often the case that during the course of proceedings one party petitions the court for assistance. It is possible to request provisional orders for, for example, maintenance, access, custody, who shall live in the matrimonial home, etc. These provide relief in the short term.

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. 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. Unfortunately, this must be taken with a pinch of salt as, despite being a very good procedure which, if used, would shorten litigation, unfortunately, for whatever reason, judges have never applied this law. In practice, written proceedings and the pre-trial stage does not take place. Instead of testifying *viva voce* one would testify in writing.

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. 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. 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.

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. Opening submissions rarely take place in practice.
If one has a contract of separation, it is possible for it to be varied. This is because one can have a contract of separation when one's wife is pregnant or has just given birth. Maintenance can go all the way to the age of 23, meaning some elements of this contract could last for twenty-two years, making variation both possible and likely.

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. If a spouse decides that they do not wish to participate in mediation, what happens in practice is that there will most likely be another attempt. The mediator could and probably should offer another appointment and only if that does not happen would be close it. However, there is another consequence to it such that not participating in mediation can be taken into account by the court. In practice, this would be viewed negatively by the court such that blame can be placed on the person for failure to attend mediation, forcing litigation, therefore forcing costs which should be borne by the absent party.

Topic IV: Maintenance

Maintenance is an amount of money paid every month to cover living expenses. There is a difference between maintenance for a spouse and maintenance for children. The maintenance given to a spouse is for them specifically because one of the obligations incumbents on spouses as the result of marriage is that they must maintain one another. It is a separate thing from maintaining their children. Maintenance is normally paid on a monthly basis and is received by the mother for the children. Normally there are two payments, one is a capital amount and the other is a percentage of health and education. The capital amount is an amount which is used for food, clothing, and habitation. Apart from this, education and healthcare are split equally between the parents, normally. This does not need to be the case, however. There is also the possibility of the payment of a lump sum and this is encouraged for the separation of spouses as it provides a clean break, but not for children.

Maintenance in kind means that *"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".* This does not happen in practice.

Article 3 states:

> **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 housework as work but in jurisprudence compensation for housework is often insultingly low.

If one pays maintenance and it transpires that it was not actually due, article 22 dictates that it cannot be returned:

> **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.*

Vide the case of Stephen ***Vella v. Adriana Vella*** (574/2012, Court of Appeal (Inferior Jurisdiction), 15.11.2013). Take, for example, maintenance which needs to be paid because the child has turned 18 but is still pursuing education and, if the children are living with the mother, the mother may forget to mention that the child is no longer studying. The father is unaware and continues paying through his standing order until he learns that his child is not actually pursuing higher education. Through the application of this article, however, technically speaking he cannot ask for the funds back.

Article 3B determines until when maintenance is due:

> **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 of the child and shall in any case be without prejudice to the provisions of article 149.*

Maintenance is due until the age of 18 as it is the age at which majority is achieved, meaning in the eyes of the law one is now an adult. In the past, it was also presumed that at age 18 one was emancipated. Act XI of 2014 made it that one can continue receiving maintenance if one continues studying full-time. Therefore, to encourage more people to study, for those that do maintenance continues until 23, which is the absolute maximum.

The case of ***Valencia v. Valencia*** is the most recent judgement on maintenance when the child has a disability and is very controversial because in it the child had spina bifida which meant that he was in a wheelchair at all times and was unable to work, having complications in his kidneys which prevented him from working in the heat. His father objected to paying maintenance to the child despite this condition and when the child needed a new wheelchair he objected too. What happened was that the court said that yes, the law says that in case of disability one needs to pay maintenance and that it does not mention an age, and the reason is that normally it is paid until it is necessary until the child can effectively pay for themselves, which may or may not happen. What happened in this judgement is that the court said that the child needed to work, giving him maintenance for one year only. The court placed the burden on the child. What transpired is that COVID struck as soon as the year expired.

Maintenance pendente lite is also covered in article 25:

> **25.** (1) *Upon a claim for maintenance, it shall be lawful for the court, pendente lite, to order the defendant to pay to the plaintiff an interim allowance in such amount as is necessary for bare subsistence, provided the defendant be evidently one of the persons who, if possessed of sufficient means, would according to law be liable to supply maintenance to the plaintiff.*

> (2) *Where in any such case the claim for maintenance is disallowed, the defendant shall be entitled to claim, from the plaintiff himself, or from the person bound to supply maintenance, to such plaintiff, the reimbursement of any amount he may have paid, together with interest thereon.*

Of note is the term *"for bare subsistence"*, that is, what one needs to survive. These words came into effect in 1873 and have not changed since.

With respect to the amount of maintenance, the law does not give a specific amount. Instead, article 20(1) states *"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 *Düsseldorfer Tabelle*. In Malta it is a discretional issue, i.e., a case-by-case issue and it depends on how much money the maintenance debtor earns and how much money the maintenance creditor requires.

DÜSSELDORFER TABELLE

A. Kindesunterhalt

	Nettoeinkommen des Barunterhaltspflichtigen (Anm. 3, 4)	Altersstufen in Jahren (§ 1612 a Abs. 1 BGB)				Prozent-satz	Bedarfskontroll-betrag (Anm. 6)
		0 – 5	6 – 11	12 – 17	ab 18		
	Alle Beträge in Euro						
1.	bis 1.500	317	364	426	488	100	800/1000
2.	1.501 - 1.900	333	383	448	513	105	1.100
3.	1.901 - 2.300	349	401	469	537	110	1.200
4.	2.301 - 2.700	365	419	490	562	115	1.300
5.	2.701 - 3.100	381	437	512	586	120	1.400
6.	3.101 - 3.500	406	466	546	625	128	1.500
7.	3.501 - 3.900	432	496	580	664	136	1.600
8.	3.901 - 4.300	457	525	614	703	144	1.700
9.	4.301 - 4.700	482	554	648	742	152	1.800
10.	4.701 - 5.100	508	583	682	781	160	1.900
	ab 5.101	nach den Umständen des Falles					

In Malta the bare minimum amount of maintenance is €200 plus half of health and education. The €200 is not mentioned in the law but is a widespread jurisprudential custom. Article 20 continues:

> (2) *In examining whether the claimant can otherwise provide for his own maintenance, regard shall also be had to his ability to exercise some profession, art, or trade.*
>
> (3) *In estimating the means of the person bound to supply maintenance, regard shall only be had to his earnings from the exercise of any profession, art, or trade, to his salary or pension payable by the Government or any other*

> *person, and to the fruits of any movable or immovable property and any income accruing under a trust.*
> (4) *A person who cannot implement his obligation to supply maintenance otherwise than by taking the claimant into his house, shall not be deemed to possess sufficient means to supply maintenance, except where the claimant is an ascendant or a descendant*.
>
> (5) *In estimating the means of the person claiming maintenance regard shall also be had to the value of any movable or immovable property possessed by him as well as to any beneficial interest under a trust.*

Courts generally discourage maintenance between spouses, and it is very rare. It is given in cases where spouses have given up their careers to take care of their children, cannot exercise an art, skill, or profession, or have reached pensionable age. Fruits of an immovable or a movable would be considered part of the persons income and is taken into consideration.

The obligation to pay maintenance ceases when the child dies. If the wife remarries, the obligation to maintain one's children remains one's own.

Maintenance can be revised when the person supplying maintenance becomes unable to do so. It can also be raised, however. Maintenance is paid according to the means and the needs and children's needs develop as they grow older. The law allows for there to be a revision of maintenance but obviously this is not the only reason. The typical example was COVID during which a lot of people lost their livelihoods. If one loses their employment through no fault of their own, they cannot be punished for it. Article 21 states:

> **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.*

If maintenance objectively speaking cannot be paid under any circumstances, it will be forgiven for a short period of time. The case of Christabelle Zerafa concerned a mother suffering from a serious mental condition who had a child and for the first time ever the Court of Appeal waived the obligation to pay maintenance to a child. Article 54(9) on supervening changes states:

> **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.

Topic IV: Personal Separation

In a divorce the marriage ends, whilst separation does not end the marriage, but ends the effects thereof, including the obligation of cohabitation. The fact that two live together when they are married is not a choice, but an obligation imposed by law alongside maintenance. The first step to obtaining a separation is mediation. It is untrue that one can stop someone from getting separated. If someone initiates a separation against one, it will take place. If there is agreement it is done by contract, if not it is done in court:

> **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.*
>
> **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.*
>
> **59.** (1) *Personal separation may, subject to the authority of the court by means of a decree in accordance with article 35, be affected 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.

In practice, parties are no longer admonished. When domestic violence is a factor in the separation mediation can be skipped. The court is also given the authority to impose treatment or protection orders.

The main reasons for separation are adultery and desertion:

> **38.** *Either of the spouses may demand separation on the ground of adultery on the part of the other spouse.*
>
> **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.*

Desertion is not simply one of the partners leaving the matrimonial home. In order for there to be desertion two years or home need to have passed. Other grounds are 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.*

Irretrievable breakdown is a residual provision for couples who no longer wish to be together without being able to justify it. Reconciliation is possible since separation does not formally dissolve the marriage:

> **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.*

Reconciliation is a combination of the intention of ending the separation and living together, and actually living together. The death of either spouse, naturally, extinguishes separation:

> **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.*

However, if the heirs wish to do so, the community of acquests can continue to be dissolved. With respect to the grounds on which both spouses may demand separation not to bar action by either of them, article 44 states:

> **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.*

Perhaps the most important article on separation, article 48 concerns the consequences of breaching the marriage contract:

> **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;*

If one is either adulterous towards or deserts one's partner, they lose the rights to inherit them. Sub-article (c) states:

> *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.*

As a rule, anything which is acquired in marriage is jointly owned and each spouse has half. This is an exception as a punishment, as it were, to the spouse who caused the separation. Take, for example, one's wife who cheated on one on the 1st of January and one bought a car from one's salary on the 31st of December, that car belongs to the community of acquests. If, however, one both one's car on the 2nd of January from one's own salary, i.e., chiefly through one's industry, that car is ones alone. Sub-article (d) includes:

> *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.*

The adulterous spouse loses the right to receive maintenance form themselves. Article 48 says that it applies in the case of adultery or desertion. Article 51, however, is an exception to the rule that says that:

> **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.*
>
> **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.*

One of the *pendente lite* orders a court can give is who lives in the matrimonial home for the duration of the separation, with article 46 stating:

> **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.*

Pendente lite childcare is covered in article 47 which states:

> **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.*

The court can determine who has care and custody of the children during the proceedings themselves. Custody in Malta is not like custody in the US. In the former, custody and residence are two different things. Custody is a decision-making right and whoever holds has the authority to take decisions on behalf of the child, e.g., where the child goes to school, which hospital the child is treated at, whether the child can or cannot go abroad, etc. One can have residence and there is joint custody with the other parent, and in Malta more often than not custody is joint. Custody can be lost for

grave reasons. The one reason which the law gives as being grave enough is domestic violence. However, there can be others besides including alcohol and substance abuse, etc. Domestic violence is inherited, so to speak, such that if there was domestic violence against the wife in the presence of the children it is considered to be against them too.

Separations are very much an equation. Aside from calculating the maintenance owed there is the question of liquidating the community of acquests. Article 55

> **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.*

Everything acquired from the moment of marriage afterwards is jointly owned irrespective of who bought it and forms part of the community of acquests. Debts, however, are also shared as part of the community. There are two exceptions to the community, namely inheritance and donation. Anything owned before marriage is also part of the community. Take, for example, a property bought before marriage which is liquidated during the marriage. The proceeds technically form part of the community as they were acquired during marriage. The spouse who owned the property will then be given a credit against the community. Another interim order is that a party can request the liquidation of the community *pendente lite.* Under a CORSA matrimonial regime the couple lives as though their assets were separated. When, however, they come to liquidate the administration, they split what has accumulated jointly. This is extremely rare, however.

Topic V: The Matrimonial Home

The components of a breakdown with a couple ends up with the allocation of maintenance, property regimes, care and custody, and the matrimonial home. These are the four legal elements which always need to be resolved, with the exception of care and custody if there are no children. Article 3A of the Civil Code states that:

> **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.*

The idea is that the couple together decide where the matrimonial home is going to be. The overriding interest of the family itself is one of the reasons for choosing the matrimonial home, as though the family where a person. Vis-à-vis ownership, the idea is that once a dwelling is identified, it becomes protected. If a couple decides that one's paraphernal flat is the matrimonial home, one can no longer use it as one did before, such as renting it out or selling it. Once it becomes the matrimonial home the spouse must agree to such changes. If one wants to alienate inter vivos ones right over the matrimonial home one needs the consent of one's spouse. Where this consent is withheld unreasonably the court can be petitioned to override it, or if there is a judicial sale by auction by a creditor the creditor can sue for what they are owed through the sale of the matrimonial home. If one sells the matrimonial home without the other spouse being involved the transfer can be annulled.

Article 6, on the cessation of duty to supply maintenance, states that:

> **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.*

The matrimonial home is so protected that if one leaves it without reasonable cause then the person who owes one maintenance need not pay it. An example of a reasonable cause for leaving is to flee domestic violence. An example of an unreasonable cause for leaving the matrimonial home is to pursue an extramarital affair. To do this one must send a legal letter informing them that maintenance would no longer be supplied, to which the aggrieved party must reply describing their reasonable cause.

Article 6A states that:

> **6A.** (1) *In case of any disagreement either spouse may 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.*

This would allow couples to use the courts in lieu of counselling but has never been used.

The Court may decide that only one party should enjoy the matrimonial home, and it could even be the paraphernal property of the other spouse. If there is fault attributable, part of this separation of the matrimonial home can be used to offset this.

Article 37 states:

> 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.

Pendente lite, the parties would petition the court for maintenance, care and custody of the children, access rights, and the matrimonial home. This is purely a stopgap, as they are applicable whilst the proceedings are ongoing to offer stability to the parties. However, if one has made do with those arrangements, courts are often unlikely to change them. Usually, the courts would confirm these arrangements if it is satisfied that the parties have lived properly during the interim period. Thus, making *pendente lite* concessions highly important.

Article 46 states:

> **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.*

The courts decide which party shall be allowed to remain in the matrimonial home by taking a number of factors into account, such as the interests of the child, whether any abuse took place in the house, whether the dwelling was unsafe, whether finding alternative housing is at all possible, etc. Naturally, the person who has committed the abuse is the one excluded from the home whilst those who have been abused are left with the memories thereof.

Article 55A states:

> 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.*

The court is supposed to consider the welfare and best interests of the child in its decision.

Article 66l states:

66l. (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.*

> (2) *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, also where the spouses are separated by means of a contract or a court judgement, the court may, where it considers it necessary to do so, either on its own initiative or upon the request of the mediator or of one of the spouses:*
>
> (a) *appoint a children's advocate to represent the interests of the minor children of the parties, or of any of them; and*
>
> (b) *hear the minor children of the parties, or any of them, where it considers it to be in their best interest to do so:*
>
> *Provided that in any divorce proceedings before the competent civil court as referred to in this article, the court may order the parties to present information about the payment of children's maintenance.*
>
> (3) *The court may, in the judgement accepting the demand for divorce, and upon a demand of that party to whom, during the hearing of the cause, maintenance was due for the party or for the children, from the other party, order that the payment of maintenance from the other party be safeguarded by means of an appropriate and reasonable guarantee, in accordance with the circumstances of the parties. That guarantee shall not be of an amount exceeding the amount of maintenance for five years. The court shall grant the said order only where, from the evidence in the cause, it results that during the hearing or prior to the commencement of the cause, the party from whom the guarantee is demanded was in default in its obligation to pay maintenance, or where there are serious objective circumstances which demonstrate the necessity of the said guarantee. A demand as provided for in this sub-article may also be made at any time after the said judgement, when maintenance is due.*

The court must ensure that the agreement makes reference to all of the main points mentioned above.

Article 89, on a child conceived and born out of wedlock of a spouse, born before or during a marriage, states:

> **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.*

This because the party may not wish to welcome the child into the matrimonial home, and in such cases the child may feel very estranged from the non-parent and other siblings. So unless the family is all in agreement then this should not happen.

Article 635 states:

> **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.*

Even though the heirs have inherited the home, the surviving spouse has the right to live in the property and can enjoy any of the furniture within it. There was a time when children would evict the surviving spouse or remove the furniture in other to alienate those assets. This demonstrates the huge protection that the law gives to the matrimonial home, even after death.

Article 639 goes on to states:

> **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, on the subject of trusts, states:

> **2095A.** (1) *Property being the subject of matrimonial contracts may be settled in trust only by means of a written instrument. Trusts between spouses are not created by operation of law.*
>
> (2) *Property forming part of the community of acquests or governed by the system of community of residue under separate administration may only be settled in trust with the consent of both spouses. Paraphernal property of either spouse may be settled in trust by each spouse acting singly.*

> (3) *A trust settled by both spouses jointly may only be varied or, if revocable, may only be revoked by both spouses acting jointly and after the death of one of the spouses such trust shall be irrevocable notwithstanding any of its terms, except with the authorisation of the Court in its voluntary jurisdiction.*
>
> (4) *A beneficial interest held by a spouse under a trust shall not form part of the community of acquests irrespective of when it was settled in his favour or when he became a beneficiary, except in the case of a beneficial interest under a trust into which community property has been jointly settled by the spouses and only in relation to such property.*
>
> (5) *Any distribution of income made under a trust in favour of a spouse shall, unless otherwise expressly provided in the trust instrument, form part of the community of acquests or of the community of residue under separate administration of such spouse, as may be applicable, in terms of article 1320 and article 1338(2) respectively.*
>
> (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.*
>
> (7) *Any debt, indemnity or other liability due by either spouse as a trustee shall not be charged to the assets of the community of acquests in terms of article 1327 except as provided in article 1329 and, for the purposes of article 1341, any such debt shall be deemed to be a paraphernal debt.*

In the case of ***AB v. CDE*** the court went into the issue of who has the right to decide what happened to the matrimonial home.

In the case of ***RU v. SU,*** the court stated:

> *"Fl-affidavit tieghu3 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*

> *Charles U. 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-pronunzjalment tas-sentenza ta' separazzjoni tibqa' tirrisjedi fid-dar matrimonjali ghall-perijodu ta' hames (5) snin".*

Cases in which persons are evicted after this sort of reprieve are legion.

In the case of Cutajar v. Cutajar, the Court stated:

> *"… 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 €6,988.12 u €9,317.50)".*

The Court of Appeal stated:

> *"… 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 ssir 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' €8,500 ghandha tithallas lill-attrici mir-rikavat tal-bejgh tad-dar matrimonjali u l-bilanc tar-rikavat jinqasam ugwalment bejn il-partijiet".*

The property was going to be sold and the proceeds split equally, but the wife was due a credit of €8,500 as that was what she spent on the matrimonial home. In a case like this where a husband actually agrees that a sum of money was spent, then that money must be returned. Had he not done that, then there would have been an issue and she would have found it even more difficult to reclaim the funds. Therefore, it is imperative that receipts are kept. With regard to the matrimonial home the issue is who spent what on what.

In a 2016 matter, an individual was sued by his ex-wife and her partner after she left the matrimonial home and he refused to begin separation proceedings. He had been out of work when his wife accumulated a substantial debt which he was required to pay as her husband. Under the influence of alcohol, he used to knock on their door and, on one occasion, emptied rubbish bags in front of their door. In a 2019 matter, the former husband set fire to the door of the matrimonial home.

In the case of ***GCV v. VC*** the husband could not prove that he spent money on the matrimonial home and was forced to leave. These cases usually revolve around one party who owns the home and the other who furnishes it. However, property tends to appreciate in value whilst furniture tends to depreciate.

In ***Joseph Spiteri v. Carmen Spiteri*** (Court of Appeal, 18/07/2021) the five year expiration period elapsed and the husband tried to force the eviction.

In the case of ***Mintoff v. Mintoff*** the aggravating party, in this case the husband, changed the locks on the matrimonial home after he learnt that his ex-wife was living elsewhere with her current, new, partner. The Court stated:

> *"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 Jason George Mintoff, il-fond de quo 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.*
>
> *…*
>
> *"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 talQorti s-serraturi nbidlu fuq inkarigu tal-konvenuti jew min minnhom mingħajr l-għarfien u l-kunsens tal-attriċi.*
>
> *…*
>
> *"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".*
>
> *…*
> *"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 "Suenos", Triq Salvu Gambin, Għasri 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".*

Whether or not she was living in the matrimonial home, it did not make it any less the matrimonial home. The fact that they are married even during separation proceedings means that the matrimonial home continues to exist, irrespective of their residence. Here, there was nothing to say that only one of the parties should live in the home and because of this both had equal rights to access the matrimonial home, regardless of whether the property is paraphernal or not. The offending party was ordered to return

the matrimonial property to the *status quo ante* and restore free and encumbered access whilst making good for any discrepancies caused.

The ECHR, in its guide on Article 8 of the ECtHR, states:

> 393. *"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).*
>
> *394. "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).*

Note how the Court extends the concept of the home as widely as possible.

In the case of ***Milhau v. France*** (application no. 4944/11), 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. 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 matrimonial home also comes up in asylum cases.

Vis-à-vis, child abduction, *vide* the case of ***Sévère v. Austria.*** This case hinged on the fact that the matrimonial home were the children were raised was in France, from which the wife took the children to Austria. 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 the Matrimonial Home

Vide the case of ***Kalucza v. Hungary.***

In the case of ***Alicia Meilak v. Clodomiro Meilak*** (Court of Appeal, 12/05/2022), the Court stated:

> *"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".*

The Court rejected the defendant's claim that the act of violence was a one-off occurrence and held that it happened regularly. It noted that no criminal charges were brought against him but held that he was capable of reacting with violence if provoked or contradicted. What is of note is that abuse, as the Court is confirming, need not be physical but can also be emotional. The Court's having reached this conclusion depends on the testimony of the social worker and the fact that she is receiving psychological help.

In the case of ***Cvijetić v. Crotia*** (Application no. 71549/01) the plaintiff's former partner forced his way into and refused to leave her new home, not the matrimonial home.

In ***JD and A v. The United Kingdom*** (Application Nos. 32949/17 and 34614/17).

The Law of Partition

Vide the provisions of the Civil Code dealing with co-ownership.

Vide Article 496 *et seq*. on partition. The Civil Code actually provides the procedure that one is to follow when wants to leave a co-ownership situation. One can have a partition which is made on a voluntary basis between the co-owners themselves and, if there is disagreement, there are a number of procedures that need to be followed.

The notion of co-ownership is inextricable from the community of acquests. In cohabitation, once it is registered and one of the cohabitants acquires an immovable property intended to serve as their home, it is presumed by the law that that property will belong also to the other cohabitant who did not appear on the deed of acquisition. If the cohabitation is dissolved the same situation would happen as spouses in a community of acquests. The same applies when one is dissolving a CORSA. Until dissolution the property belongs to the spouses themselves, however there is an equalisation upon liquidation following a calculation of their assets. Through the exercise of this mathematical calculation in CORSA with compensation from one spouse to the spouse with the lesser amount of assets, then there is the presumption of co-ownership which further presumes that they enjoy equal shares over the asset or the right. This particular area mirrors the relevant provisions of Justinian's *Codex*.

Co-ownership is indivisible, such that when one offers legal advice, say, to instruct a bank for the release and disbursement of a *de cuius'* funds to the heirs, they instruct the bank to divide the undivided shares between the parties as per the *de cuius'* last will and testament. The community of acquests, at that stage, is being terminated with the death of the spouse even though the other spouse survives, and because there is the request to the bank to divide the estate, the bank is being asked to liquidate the community. There can be a situation where the community of acquests is not liquidated when one spouse dies, but only upon the death of both, say, if the estate of the *de cuius* of the first spouse is subject to the usufruct emanating from a clausal

order in the will. Once the *de cuius* passes away, until the community is liquidated the surviving spouse remains a co-heir, even if the community is terminated.

Indivisibility means one exercises the right of ownership over the entire thing including one's own share. But at that point they cannot demonstrate which precise component of the estate constitutes their share. Co-ownership can be created either voluntarily, i.e., when two individuals marry or enter into a cohabitation agreement and purchase immovable property together, with equal shares unless they agree otherwise, or through law, i.e., when one dies testate or intestate. One must distinguish between the terms *pro diviso* and *pro indiviso*, i.e., a divided share or undivided share in a property or a right. One can have co-ownership in property, in a thing, or in a right, e.g., royalties. The presumption, according to the Civil Code, is that the undivided shares are equal unless it is proven otherwise. Shareholders have equal rights to enjoy the property too.

If there is disagreement between the parties and they no longer wish to remain co-owners, unless any of them have instituted judicial proceedings either in a court or in a special tribunal dealing with succession, each co-owner can qualify to request the termination of co-ownership through a partition. In the past, before the 2016 amendments were promulgated, we had a situation which goes back to Roman times. If one is in a co-ownership, the rule is that whatever one does with regard to one's share (e.g., alienation or burdening), in spite of the liberty to enjoy and transfer it, one requires the informed consent of the fellow co-owners. This is to prevent the creation of prejudice to the other co-owners in the enjoyment of their own share. Prior to 2016 the Roman Law rule was that one needs the unanimous consent of the co-owners. Therefore, when there was disagreement between the co-owners it was a problem to sell, and the likelihood was to embark on a lengthy judicial battle to have the property partitioned. Generally, this ended with the sale of the property through licitation, i.e., a court-ordered auction. This situation was sub-optimal due to its length and the difficulty therein. This meant heirs were essentially vetoing good sales of successional property to third parties. However, no one can be compelled to remain in a community of property against ones will, thus leading to the request to partition. Whereas Article 494 of the Civil Code refers to where there is a disagreement between the co-owners the Court is asked to intervene and to order the partition of the property, presuming the property can be easily partitioned. If this is not the case the property would be sold by licitation.

Suppose the majority of the co-owners of an immovable property decide to sell it having found a prospective buyer, but one co-owner objects. They do not have unanimous agreement on the sale, but they also have the right not to be forced to remain in a community against their will. The majority decide to enter into a promise of sale agreement to bind the prospective purchaser of the property but still the one dissenting shareholder remains. Before 2019, unanimity was required, with the only recourse being Court-ordered licitation. With the new amendments under Article 495A it is possible to enter into a promise of sale agreement to bind the purchaser and vendors. Usually, these would include a clause stipulating that the sale will go through as long as a judgement is acquired under Article 495A. Therefore, the next step is typically for the five consenting co-owners to file a *rikors* asking the Court to approve

that sale at that price, and to declare that with that sale the dissident co-owner will not be prejudiced. The next step would be for this application to be notified to the dissenting co-owner who would have twenty days to reply in writing. Most likely he would defend himself by arguing that the price is too low and that he has the intention of acquiring the property himself. The Court then would hear the evidence of both sides and in all property, since we are dealing with an immovable property, appoint an expert to inspect the property and produce an estimated value of that property. If the Court establishes that that co-owner would not be prejudiced it would approve the sale and the majority could proceed with the final deed. It would appear that if the others have acquired approval to sell their share, the purchaser would still need to acquire that missing percentage. In fact, when the application is made and presented to court the co-owners would ask for the approval of the curt, for a declaration that it would not prejudice the third party, and finally to appoint a curator and authorise the notary to proceed with the publication of the deed at a particular date. If the dissenting co-owner does not appear to transfer his share in that property, the curator will appear instead and on behalf of him. Meaning his share will ultimately be transferred. Thus, the vendor will acquire the property as a whole.

In the case of ***Josephine Grech pro et noe v. George Joseph Parnis*** (Court of Appeal, 27/10/2017) there was an immovable property. Although there was a lot of conflict between the defendant, who wanted the property for himself, the plaintiffs decided to sell the property to a niece and proceeded to sign a promise of sale agreement selling their shares in the property, bringing an action under Article 495A. The defendant argued that he offered a better price and would therefore be prejudiced. When proceedings began, the judge appointed an architect to inspect the property, which had fallen into disrepair. She proceeded to value the property at €40,000 more than that price on the promise of sale agreement. *Prima facie* it would appear that the defendant was right and that he was being prejudiced by the fact that the property was being sold below its value. Vis-à-vis prejudice, the court held a different view, quoting other judgements that stipulated that even if the property is valued at more than the agreed upon price, the sale could still proceed. However, the judge carried out an analysis, comparing what the defendant would have received had the property been sold at the estimated €180,000 compared with what he would have received had it been sold at the agreed upon €140,000. The court took into consideration his share of capital gains tax and the change to the proportion of his share, thus leading him to hold that there was no prejudice and that the promise of sale could proceed. This was confirmed on appeal. Prejudice, taking this judgement into consideration, does not simply arise from the *prima facie* value of the transaction. The Court also stated that Article 495A is also meant by the legislator to act as a compromise between the dissident and other owners. The Court stated:

> *"Illi fis-sena 2004 il-legislatur zied l-artikolu 495A mal-Kodici Civili bil-ghan li jiffacilita l-beigh ta' proprjetà mizmuma in komun ghal izjed minn ghaxar snin permezz ta' procedura orhos, u iktar spedituza, minn dik ta' kawza ghal licitazzjoni. Dan fl-interess kemm tal-komproprjetarji nfushom, kif ukoll fl-interess pubbliku li l-proprjetà ma tithalliex vota b'detriment ghal min irid isib negozju jew*

> *akkomodazzjoni residenzjali, b'dannu kbir ghall-ekonomija tal-pajiz. Dan barra l-ghadd kbir ta' kawzi kwazi interminabbli aktarx frott ta' pika jew nuqgas ta' bon sens. L-amministrazzjoni tal-gustizzja fiz-zminijiet kontemporanji ma timmirax ghal rettitudni perfetta fl-applikazzjoni tal-ligi ghall-fatti veri. Filwaqt li dan jibqa' l-ghan tal-procedura civili, dan irid jigi bbilancjat minn ghanijiet ohrajn li l-gustizzja trid tilhaq, bhaz-zmien li jittiehed biex tingata' kawza, li jrid ikun ragonevoli - u dan huwa jedd fundamentali tal-bniedem - l-access ta' kulhadd ghall-gustizzja - li ma jistax isir jekk l-ispejjez ikunu kbar izzejjed ghal-litigant inkella ghat-taxpayer li jiffinanzja l-apparat gudizzjarju. Ghalhekk kwalunkwe sistema gudizzjarja hija bilfors kompromess bejn dawn id-diversi ghanijiet, kultant konfliggenti ma' xulxin.*
>
> *"Illi l-artikolu 495A tal-Kap. 16 huwa ezemplari eccellenti ta' dan il-kompromess. Proprjetà li tithalla mhux maqsuma ghal iktar minn ghaxar snin, li huwa digà perjodu twil hafna, tista' tinbiegh mill-komproprietarji li jkollhom il-maggoranza tal-ishma b'kundizzjoni wahda suprema: li l-komproprjetarji dissidenti ma jkunux gravement ippregudikati. Ghalhekk mhux bizzejjed li jigu ppregudikati, imma jinhtieg li jkunu gravement ippregudikati. Hawn il-legislatur qed jaghmilha cara li anke jekk il-kundizzioniiet tal-beigh ma ikunux ottimali, jew l-añjar li jistghu jingiebu fis-sug, xorta wahda - beigh irid isir: il-linia trid tingata' u tingata' malair. Altrimenti ligi mminat l-iskop kollu tal-precitat artikolu 495A tal-Kap 12".*

This confirmed that judges are obliged to conclude proceedings under Article 495A as expeditiously as possible. It also confirmed that matters under this Article are for the general public interest, beyond the needs of the parties involved, this owing for the need to avoid dilapidated properties littering the country. This also emphasised the flexibility awarded by this particular provision.

This naturally relates to the liquidation of common property upon the termination of the community in a consensual separation.

Vide Article 10 *et seq.* of the Cohabitation Act.

Luca Camilleri

Divorce

The difference between separation and divorce is that separation ends the effects of marriage whilst divorce ends the marriage itself. If you divorce the obligation to pay maintenance persists.

Article 66D(2): there is no reason why maintenance should make the payment of divorce more difficult. This provision has never been successfully applied.

Living apart
The intention to live apart does not need to be shared.