CVL4026
THE LAW OF SUCCESSION

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Law of Succession

Dr. Kurt Xerri.

11th May 2023

Lecture 1.

- Law of Succession
- CVL 4026
- Intestate Succession

- Where do you think the intestate arises? In which circumstances?
  - 788. Intestate succession takes place, wholly or in part, by the operation of the law where:
  - i) there is no valid will;
  - ii) the testator has not disposed of the whole of his estate, or;
  - iii) the heirs-institute are unwilling or unable to accept the inheritance, or;
  - iv) the right of accretion among the co-heirs does not arise.
  - It is based on the probable intention of the deceased, as argued from man's natural affections.
  - V. Caruana Galizia, Notes on Civil Law: Succession, p. 1081

- So we go to article 788 which tells us that intestate succession can take place wholly or apart.
- By operation of the law, where there is no valid will, where the testator has not disposed of the whole estate.
  - So where, for example, the testator has disposed of his estate by way of legacies but the legacies do not compromise the entirety of his estate.
- Where the the heirs-institute are unwilling or unable to accept the inheritance or the right of accretion among the co-heirs does not arise. In the words of Caruana Galizia, it is based on the probate intention of the deceased as natural eviction.

- Intestate succession it is based on this presumption. So since succession is taking place by definition of the law rather by the will of the testator, what the law is doing is that the law is presuming what the testator would have wanted , or the decujus or the deceased had wanted, had he or she proceeded to draft a will.

- Now there have been reasons as to why people decide not to draft a will.

  - It might for example, they're happy with the way succession would evolve even in an intestate manner. So sometimes the reason is, let's say less calculated than more rational even though some decide to draft a will out of superstition because they say something bad would happen.

- So intestate succession is very important because it occurs very frequently, obviously less frequently than testate.

- Now let’s look at the provisions, let's try and understand the provisions and then have a number of sort of scenarios where you would be asking to answer these hypothetical scenarios. If you covered all these scenarios, you pretty much have the entire subject covered. Because intestate succession is not something which is extremely complex. So if you can study this part pretty well, please don't overlook succession. You have a good percentage of the final in the bank. Intestate succession mainly always comes out in the exam paper. So if you have just cover pretty well, you have foundations.

  - 790. In regulating succession among relations, the law takes into consideration the proximity of the relationship ...

  - 791. (1) The proximity of the relationship is established by the number of generations.

  - (2) Each generation form a degree.

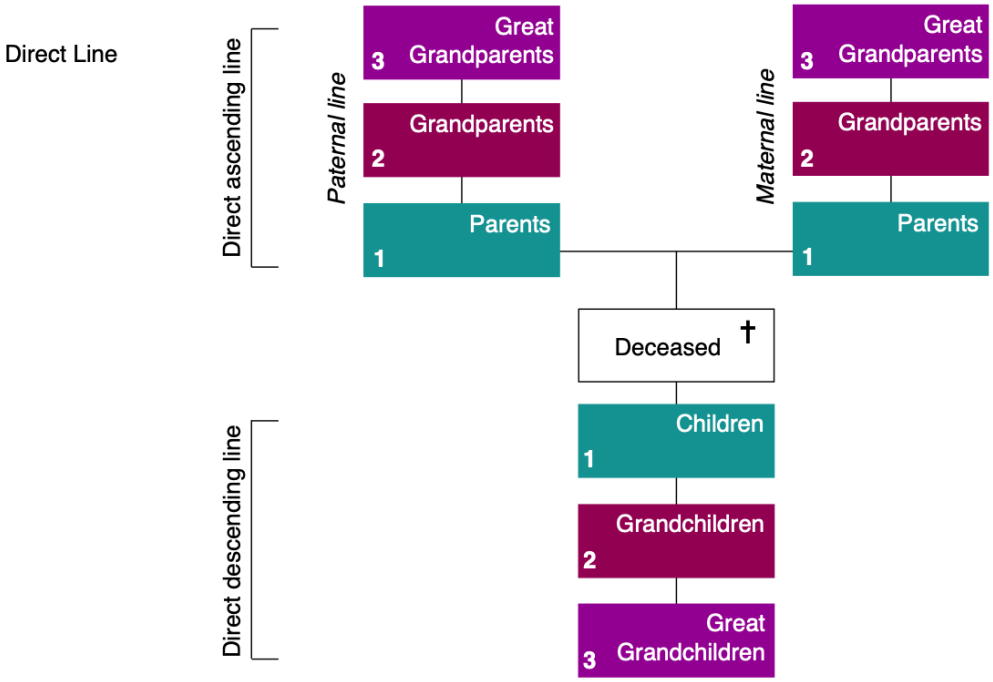
  - (3) The series of degrees forms the line.

- Article 790 So in regulating succession about among relations, the will takes into consideration the proximity of the relationship.

- So this is basically articulating the presumption. The closer the relation and the more important you’ll be, the closest relation excludes the more remote and 791 tells us the proximity of the relationship is established by the number of generations. Each generation forms a degree. The series of degrees forms the line. When read this way, maybe it's not so easy explain. But now we looking at the tables and with graphic illustration it will become easier to understand.

- 794. In the direct line, as many degrees are counted as there are generations, not including the common ancestor.

- In the direct line, as many degrees are counted as there are generations. What can you do if someone's intestate? What are we talking about here? This is a way of explaining it. These are taken directly from Carbonier obviously matters of succession French and Maltese law are very similar although not identical. So we have here, you can have a direct ascending line and direct descending.



J. Carbonnier, *Droit Civil (Tome 1): Introduction, Les personnes, La famille, l'enfant, le couple*, (Paris: PUF, 2017), 784

- You can have a direct ascending and the direct descending, with respect to the direct ascending you have to distinguish, although In legal terms there's no distinction. But there's the paternal line and the maternal line. When you look at the descending line, obviously there's just one line because today no distinction is made between children and they're born in or around wedlock. Now the direct time, therefore it's quite easy. No, we just go by generations and each generation forms an degree.

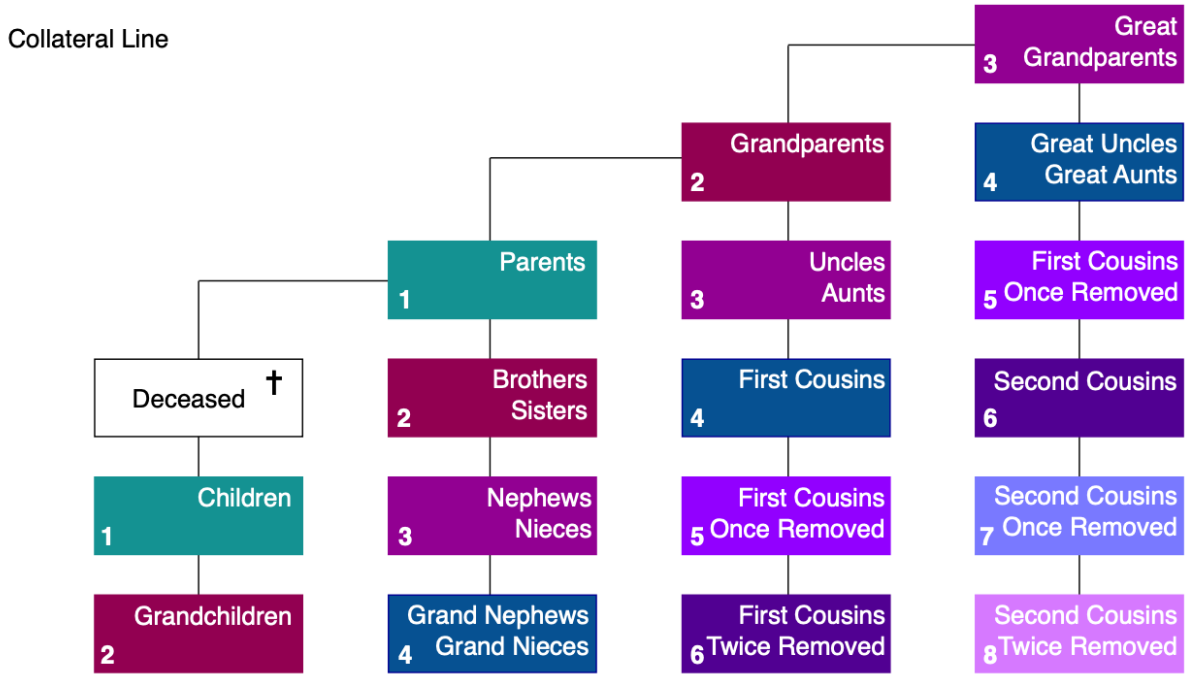
  - So for example, the parents, which are the first generation in the direct ascending line, well those are in the first degree. The second generation of the

grandparents, of the grandparents come in the second degree, Great grandparents come in at the third degree. Always, in the ascending line.

- In descending line, the generations of the children, grandchildren and great grandchildren and every generation comes as a degree. So the children come, the first degree, grandchildren come to the second degree. Great grandchildren come the third.

  - 795. In the collateral line, the degrees are counted by the generations, commencing from one of the relations up to, and exclusive of, the common ancestor, and then from the latter down to the other relation.

- Dr. Xerri think this is quite easy to understand. The complication comes in when you look at the collateral line, Why? because in the collateral line, the degrees are counted by the generations, commencing from one of the relations up to and exclusive of the common ancestor and then from the latter now to the other



https://thismatter.com/money/wills-estates-trusts/intestate-distribution-to-ancestors-and-collaterals.htm

relation. So what does this mean?

- It means that in the collateral line the computation works a differently.

  - So take for example the case of parents, children, grandparents, that's easy because they're just direct line and we've just covered them.

- So let's say the first column over here and then the first row from each of the subsequent columns. Those are practically the direct line. The degrees constituting the direct line.

- Now why is the direct line to determine the degree of the collateral line? Collateral were saying the brother and sisters, nephew and nieces, cousins, uncles, aunts etc, because we must first go up to the common ancestor. So the case of brothers and sisters, they can't be the first degree even though you might think of them being so close to that your immediate brothers. So they are the first degree, they're not, they're the second degree. Why? Because first you have to go up to the common ancestor who is the parent and then go down. So brothers will be the second degree.

- Take note of the children of your brothers and sisters. The children, your brothers and sisters the nephews and nieces, they are the third degree. Why? common ancestor, who is the grandparent, and then we have to go down the line. So brothers and sisters secondary, than nephews and nieces will be the third degree in the collateral line.

- We can complicate it further if you like we can take your cousins are also in the fourth degree collateral. First you find the common ancestor. Who is the grandparent, and then we go and then we'll go down.

  - Capacity to succeed

  - 796. Persons who are incapable or unworthy of receiving under a will, for the causes stated in this Code, are also incapable or unworthy of succeeding ab intestato.

  - The same rules which regulate the capacity to succeed under a will are applicable to intestate succession.

  - Absolutely incapable are those who have not yet been conceived, those who are not born viable and the members of monastic orders.

  - As to relative incapacity, Article 797 corresponds to the cause of unworthiness established in respect of testate succession by article 605(1)(d).

  - 605.(1) Where any person has - ... (d) prevented the testator from making a new will, or from revoking the will already made, or suppressed, falsified, or fraudulently concealed the will,

  - he shall be considered as unworthy, and, as such, shall be incapable of receiving property under a will.

- 797. Persons who, by fraud or violence, shall have prevented the deceased from making a will, shall also be, as unworthy, incapable of succeeding ab intestato.

- The capacity to succeed, of course this is important because for sure when dealing with testate succession, you've looked at who is capable of who is succeeding and the same consideration goes on when dealing with testate, section 796 tells us persons who are incapable or unworthy of receiving another will for the causes stated in this law are also incapable or unworthy of succeeding abate testator. So in a testate manner, in fact the law is saying those which regulate capacity to succeed under the will by arguing the testate succession. So absolutely capable those who cannot inherit and does who have not been conceived/born and does under monastic orders.

- As to rendering capacity, so incapacity which is going to be absolute it must be proven Article 797 corresponds to the clause of unworthiness established in respect of testate succession by article 605(1)(d).

- So here you can see, how these two articles correspond to each other. In 605 we're looking at testing succession. The 797 we're looking at intestate succession. But you can see that the two correspond, in 605 means that where a person has prevented the testator from making a new will or from revoking the will or made to suppress falsified or fraudulently conceived the will he shall be considered as unworthy and as such not receiving property under the will.

- When dealing with testate succession, you can't have a situation where someone prevented the testator from making a new will or from revoking the will or who fraudulently suppressed or conceived the will because you're speaking of a situation where there is no will. So the only relevant circumstance in that case is where someone with apprehension testator, from drafting a will a fraudulent or violent matter.

- So if someone died in testate, because of a person who prohibited that person in a from drafting that will then once again, the regular capacity comes in Article 797 that states that person who by fraud or violence shall have prevented the deceased from making a will shall also be as unworthy, incapable of succeeding. So the person, because one of his heirs prevented him from drafting the will through violence or fraud, that person prevented him from drafting the will, will end up being considered unworthy.

- Now we look at sort of the basic foundations of the a testate. Now we're going to come to the computations very shortly, but before we come to those we also have to deal with representation.

- Representation
  A person may succeed either in his own right or by the rule of representation.

- Representation operates so as to put the descendants of such person in the place, degree and rights of the latter.

- Succession takes place jure rappresentationis whenever the persons who would have succeed jure proprio (in his own right) is (a) dead, (b) incapable of succeeding or (c) by reasons of a long period of absence, is presumed to have died.

- Representation operates so as to put the descendants of such person in the place, degree, and rights of the latter. It is known as representation because the descendants represent that ascendant who it had not been for one of the reasons above mentioned, would have succeeded jure proprio.

- Representation is a fictio iuris and it is based on the probable intention of the deceased just as the entire system of intestate succession is. It is, in fact, reasonable to assume that the deceased's affection for his children, or for his brother or sister extends to the latter's children and descendants, and it is only in the descending direct line and in favour of the children and descendants of a brother or a sister that the right of representation is granted.

- V. Caruana Galizia, Notes on Civil Law: Succession, p. 1085

- Our law does not allow the representation of a person who has renounced an inheritance.

- 864. (1) No person may take as the representative of an heir who has renounced.

- However, children or descendants can succeed by representation even if they would have renounced the inheritance of the person whom they are representing.

- Representation of person whose estate has been renounced.

- 807. It shall be lawful to represent the person whose inheritance has been renounced.

- [Italian Civil Code]

- 468. ... I discendenti possono succedere per rappresentazione anche se hanno rinunziato all'eredita' della persona in luogo della quale subentrano, o sono incapaci o indegni di succedere rispetto a questa.

- What assumption is intestate succession based upon? How does the law try and determine who inherits? Which is that assumption? The closer you are, the assumption that is made. The assumption is, if the succession is going to take place by the operation of the law. The law is assuming to whom the testator would have more likely left his estate. There is an assumption by the law saying if there's the proximity of the relationship the closer it is then more important the person is, in consideration that there is the distribution of deceased's estate. However there can be circumstances.

- We agree here, let's consider the collateral. We can have a situation where the parent passes away but the parent is been deceased. The parent has children there. There is the children and there's grandchildren.

- Now let's say the person passed away but this child had been predeceased him. So when this person passed away, the child had been predeceased him. Now who gets to inherit the will? The grandchild virtue of what? Not substitution but in this case will refer to it as representation.

- Representation really and truly comes in mostly when there is testate. The provision of there testate where representation also comes in this specific instance.

- We are dealing here with representation. So the assumption is that the closer the relation the more important you are in the distribution of the assets. But you can have situations where sort of you have first degree in the descending line. You can have an ascending and a descending line. What happens there if the person dies intestate? Should both, have the same share? We're still at the point of trying to ease out sort of how the assets distributed. We do this before knowing what learning what the law says, sort of to understand little bit the law better.

- Let's say this person dies and he's survived by his child and his father. That was the question. So we said that the close is more important. Should they be given the same degree of importance?

- The descendant is more important. Well this is sort of one of the main rules of representation, this operates so as to put the descendants of such person in the place, degree and rights of the latter.

- What is the situation that we're contemplating here? The situation that we're contemplating is a prospective heir under intestate succession from the child for

example, would criticise the father. So we have a situation where as we said before, the deceased has a grandson but not a child and the grandchild should represent his father and the grandchild there will inherit the share that would have been by his father. Well this is an example. One of the examples of representation.

- So succession takes place, You representationes, by representation, whatever the persons who would have succeeded iure proprio so in their own right are dead, incapable of succeeding or by reasons of law period of access presumed to have died.

- So another example say the person dies without having drafted the will. So the succession here is intestate and he has two children who are still alive and a grandson, a grandson from a child who however predeceased him. What happens then? How do you think the estate should distributed?

- One of his three children is dead, but the child who died left a grandson, another child. This is why representation is important, Because otherwise if we didn't have representation, the fact that one of the children for example would have died, it would've meant that the direct descending land coming out of that predeceased son would practically have no claim over the succession of the deceased. So representation comes to make sure that if you have a prospective heir who the predeceased the deceased, then the share would have gone to him. Still wouldn't be lost. So representation of court, the descendants of such person in the place, degree and writes of the latter. So in the example as you said correctly the grandson would replace his father in the succession of the grandfather in the same place and the same degree.

- It is known as representation because the descendants represent that ascendant who it had not been from whom. Had it not been for one of the reasons about mentioned earlier, it would have succeeded iure proprio. So this is why we have representation.

- Representation is another legal fiction which is why we associate it with testate succession because testate succession is all based on what the law proceeds to have been the probable intention of the person who died. So that is based on the proper intention of the deceased, just as the entire system of testate succession. It is easy to assume that the deceased affection for his children or for his brother or sister extends to latter children and descendants.

- Representation however, this is important. It happens only in two circumstances in the descending direct line. So it doesn't happen in the ascending line, representation doesn't happen in the ascending line. You cannot be represented by your father or by your grandfather. You can only be represented by your

children or your grandchildren and in favour of the children, and the descendants of a brother or a sister.

- Now we will understand this a bit better as we go along because now we'll have more practical examples.

- Now very important exception, very, very important exception. This is very important, because it has come out in exam papers and it's one of the points that you would be expected to know.

- So our law does not allow the representation of a person who has renounced an inheritance. So no person may take as the representative of an heir who has renounced.

  - So my father renounced the succession of my grandfather, can I come in as my grandfather's grandson and claim? No I can't because in that case since my father renounced, there is renunciation. The rules that renunciation blocks representation.

- However, this is also important. Children or descendants can succeed by representation. Even if they would have renounced the inheritance of the person who they are representing.

  - So say for example, my father predeceased my grandfather and when my father died, I renounced his succession. I renounced my father's succession. My father dies and as his son, I renounce his inheritance. So I renounce him. What happens there? Subsequently my grandfather passes away. So after my father have passed away, after my father passes away I renounced the succession, renounce the inheritance than my grandfather passes away. Does the fact that I renounced my father's inheritance prevent me in a way from accepted my grandfather's inheritance. No, This is written in article 807, It shall be lawful to represent the person who's inheritance has been renounced.

- So two important truth, Article 864, You have a situation where you and your father are still alive, But your grandfather passes away. What happens? The father renounces the succession. If your father announces the succession, then you have to represent him. But the fact that he renounces his father's succession, I can still represent him? However, under 864 in the example I given is the first degree. In the second example, it's the second degree that's renounces.

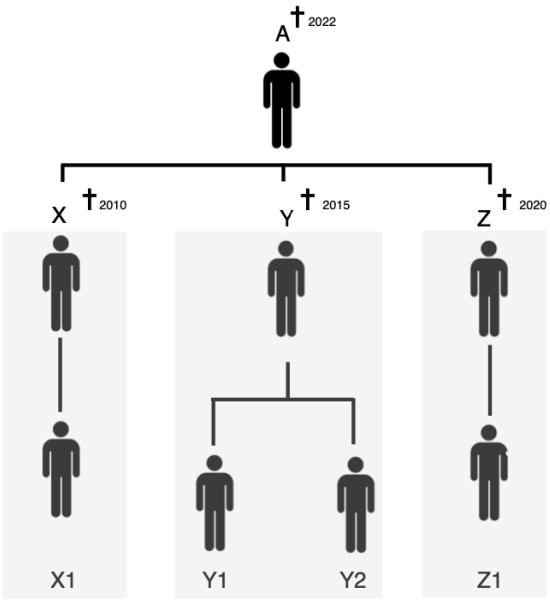
- That's the difference between 864 and 807, because when read without the context, they might seem contradictory but they're not. In fact the Italian corresponding provision is much clearer.

- Rule of representation in the descending direct line
- 801. Representation operates so as to put the representative in the place, degree, and rights of the person represented.
- 802. Representation in the descending direct line takes place in infinitum and in all cases, whether the children of the deceased take with the descendants of a predeceased child, or whether, all the children of the deceased having predeceased him, the descendants stand amongst themselves in equal or unequal degrees.
- In the direct line the descendants take by right of representation even if they stand in equal degrees, consequently, irrespectively of the number of children comprised in each stock. In this way each stock receives an equal share of the inheritance. ... The ground for this rule, upon which the institute of representation itself is founded, is that otherwise the more numerous stock would benefit, from the death [or unworthiness] ... of the person represented by them ... in the direct line, therefore, representation takes place in all cases.

- Rule of representation representing the direct line. So representation operates, So as to put representative in the place rights of the person represented. a total representation in the descending direct line takes place in and all cases where the children of the deceased take with the descendants of a predeceased child. Well this is important in the direct line, the descendants take by right of representation. Even if they stand in unequal degrees, these laws are taken from so you can following this lecture, that would be ideal.
- So when dealing with representation in the descending direct line, each stock must receive an equal share of the inheritance regardless of whether they are in an equal degree or in an unequal degree.
  - So say for example you have a situation such as the one I that I investigate earlier where you have a deceased who passed away and he was survived by children and grandchildren whose father has predeceased their grandfather. There we don't have the same degree. We have unequal degree. Why? Because we have some who are inheriting and they're the children. So they're inheriting in the first degree and others who are inheriting in the second degree because their father has pre-deceased their grandfather.
- So in the direct line there is a certain stock of representation, even if they stand in unequal degrees, what's important is that each stock, so each of the three brothers and the lines from each of the three brothers, they have to receive any equal degree. So even if the son has another two children, these two children

must inherit as if the same amount as if their father had still been alive. So each

Succession *per stirpes*



brother inherits the same amount.

- So we have ‘A’ who simply passed away in 2022. He have three children, all of whom predeceased him. One of them died in 2010, the other one died in 2015, the other one died in 2020 and the heir passed away in 2022. Now in every case where you have representation in the direct line, the direct descending line. What's important is that each of the brothers and the descendants of each brother inherited an equal amount. Had ‘X’ stayed alive, for example, he would have inherited 33%. If ‘Y’ had stayed alive he would have inherited 33% and if ‘Z’ had stayed alive he would have inherited 33%.

- So what the law want is that these proportions are respected, so in this case ‘X’ will inherit 33%. How much will ‘Y1’ inherit half of the 33, ‘Y2’ half of the 33, ‘Z1’ would inherit half of 33% too. And this is practically an explanation of what is being said here.

- There are two brothers and they're the ones who will inherit ‘A’, so in this case her brother predeceased her, but he was survived by 2 children who are her nephews. What happens here? There is representation. So the nephews here represent their father. So there's also representation, but in this case there is representation in the collateral line. Why the collateral line? Because we're talking about ‘A’ and their relationship with ‘A' of ‘B1’ and ‘B2’ is only collateral, it is not direct, of course it is direct with their father who represented. But the relationship with ‘A’ is not direct.

- It's important in the collateral line, representation is allowed in favour of children and descendants of brothers and sisters of the deceased. So representation can only take place with respect to the brothers and sisters of the deceased. Only limited to brothers and sisters beyond that degree. For example, the children of your cousins cannot represent your cousin because representation can only take place up to the degree of your brothers and sisters

- Now this is important and we we'll conclude at this point our lecture, If the children were descendants of brothers or sisters, stand in equal degree. If they stand in equal degree, they shall take per capita without a representation. What does it mean? It means that if you have a situation where ‘A’ died. ‘A’ was predeceased by ‘B’ and ‘C', her brothers, both her brothers had children. One had two and one had one. How do they reflect ‘A’. But why per capita and not per stir plus? Because everyone's on the same degree.

- This is one very important exception. So in a typical situation, are they inheriting on the same degree? No. So that's per stirpes in the collateral line. This is only the collateral line. In the direct line, it's always per stirpes, in the direct line. In the collateral line when you're talking about descendants of brothers and sisters. Now if the degrees are not the same, it's per stirpes, but here if the degrees equal, than it is per capita, this is an exception and this is an exception of Maltese law because even if compared to Italian and French law it doesn’t work the same. The same Italian French law is always per stirpes.

  - Rule of representation in the collateral line

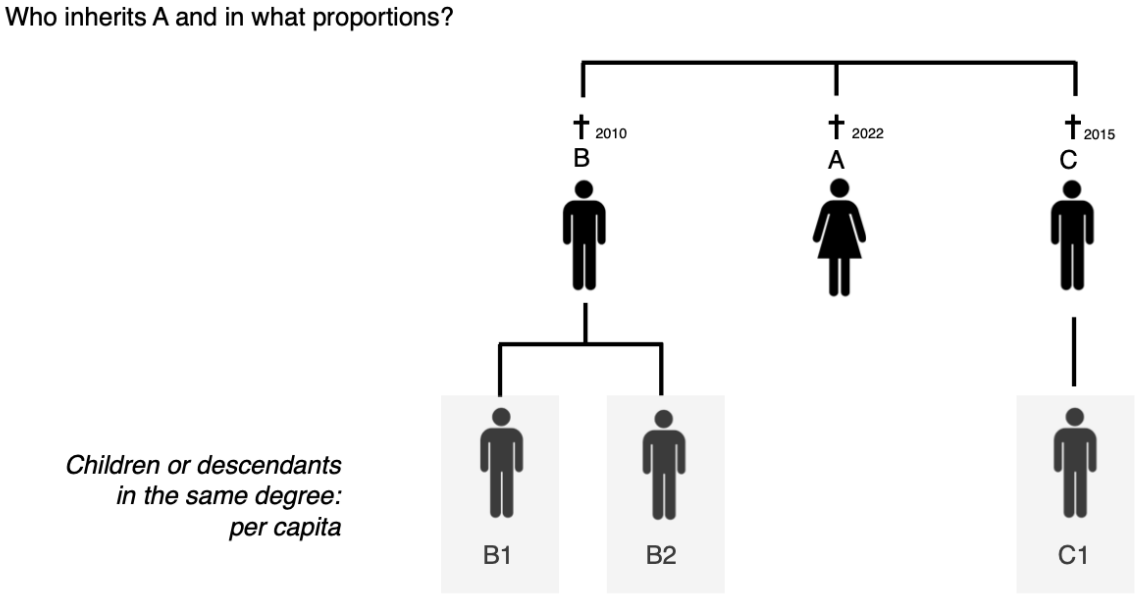
  - Nor is representation allowed in favour of the other collateral relatives whose family ties with the deceased are very much weaker.

  - 804. (1) In the collateral line, representation is allowed in favour of children and descendants of brothers or sisters of the deceased, whether such children or descendants take with their uncles or aunts, or whether, all the brothers and sisters of the deceased having predeceased him, the succession devolves to their descendants in unequal degrees.

  - 804. (2) If the children or descendants of brothers or sisters stand in equal degree, they shall all take per capita, without representation.

- Per stirpes, the law requires, representation, per will you have to represent a stock a quote. When they die, if there is someone to represent the law wants that they stay independent. If the stock is 33%, If x is predeceased, irrespective of his children the stock has to stay at 33%. What does this mean, X1 is representing X, so X1 will have the 33%. Y1 and Y2 will represent 33%. How much will Y1

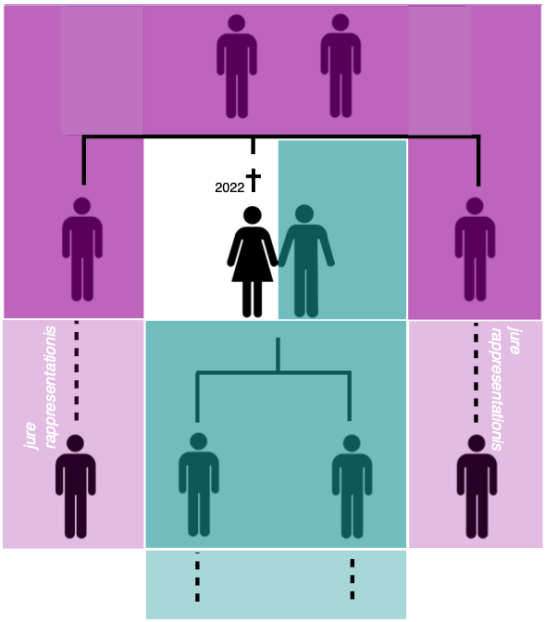
have? Half the 33%. This situation needs to be resolved from the moment it



inherits per capita.

- What does per capita mean? Per capita means, that there is no children in the picture. In this case they are going to inherit per capita because they are on the same degree.
- Generally this is the most frequent situation, the most typical. The most typical situation is when you inherit per stirpes, including also when the succession is not of your father, the direct line but it is of your brother or sister. So it is in the collateral line.
- The typical situation is that if there is an equal degree. The brother is the second degree collateral and the grandchildren are the third degree collateral. It will be split per stirpes with one exception. The exception is succession in the collateral line, since the inheritance is in the third degree collateral, because the three of them are nieces or nephews. Since all three of them are nieces or nephews the law says that there's an exception when there is succession in the collateral line and all the descendants inherit on the same degree then they shall inherit per capita.
- If the succession is happening on the collateral line. In that case if they are inheriting on the same degree it is per capita, if the brother is alive and the other brother died but had children, they would inherit per stirpes.

- Where can you represent your father in an interstate succession? Representation comes in every case of testate succession, which is why we're covering it within testate succession. However, you dealt with representation also under testate and you might tell me how can a representation come in under testate succession?
- Take an example, a very simple example. Your grandfather has two children, your father and your uncle. Your grandfather, nominates in a will, his two children has his universal heirs. Your father passes away, you're still alive after your father passes away, your grandfather passes away he is survived by me, his grandson and my uncle. What happens there do we have accretion? Does my uncle take the entire share? and then there's no substitution clause, nothing. There's no substitution. There is representation, I still inherit in the same degree and the same capacity as my father would have survived.
- The relevant article here is article 745(2), dealt with under the revocation acts of dispositions. The importance is,
    - Say for example I appoint a friend as a universal heir, but my friend had a son and my friend predeceases me and then I pass away.
- Is there representation here? Because in case when case of intestacy they would have represented by the rule of representation.
- Now we're going to talk about intestate succession per se, and we see how accreditations is important in the case of testate succession because it's also based on presumption.
    - 790. In regulating succession among relations, the law takes into consideration the proximity of the relationship ...
    - i. Succession by Descendants and Surviving Spouse ii. Succession by Ascendants and Collaterals
- Article 790 in regulation succession among relations the law takes into consideration the process of the relationship. Now what are the relations that the law considers to be the most important? First of all, the descendants and surviving spouse and then a degree of lesser importance the descendants and the collaterals.
    - The surviving spouse and children of the deceased succeed to their spouse or ascendant to the exclusion of all other successors, because a person’s estate is meant to serve for the support of his family and it must, therefore, be passed down from one generation to the next one.



Surviving spouse and children inherit to the exclusion of the rest

Ascendants and collaterals inherit only in the absence of surviving spouse and children

- Called in the second place are the collaterals and ascendants.

- The surviving spouse and children of the descendants succeed to there spouse and ascended to the exclusion of all the other successors. Why? What is this presumption based on? It is based on a person, based on the fact that a person says estate is meant to serve for the support of his country and than must therefore be passed down from one generation to the next one. So there's also an issue of maintenance and support. So collateral and descendants only come in the second place.

- So you must think of intestate succession as nuclei, there's the first nucleus, the more important one, which is in this case the woman passed away in 2022. She was survived by her husband and her children. Now the nucleus represented by her husband and her children, it is considered as the most important relation.

- In fact, as we said before, succession by the descendants and by the spouse, excludes completely both the ascendants and the collateral. It is only if the lady, the woman passed away 2022 died as spinster and without tissue, without children. So without issue it is only in that case that her died without collateral, so her brothers and her parents would be called to the succession. This is a very important principle. I repeated once again, surviving spouse and children inherit to the exclusion of the rest. If then you a have a child or a surviving spouse that those inherit to the exclusion of everyone else.

- Ascendants tot to collaterals inherit only in the absence of surviving spouse of a surviving spouse achieved.
- The spouse doesn't represent the spouse. If my wife came missing, I wouldn't be able to represent her in the succession of her father. My daughter would of course.
  - Where deceased is survived by descendants and spouse
  - 808. (1) Where the deceased has left children or their descendants and a spouse, the succession devolves as to one moiety upon the children and other descendants and as to the other moiety upon the spouse.
  - (2) The provisions of sub-article (1) shall be without prejudice to the right of the surviving spouse under articles 633, 634 and 635.
  - Where deceased is survived by descendants but not by spouse
  - 809. Where the deceased has left children or other descendants but no spouse, the succession devolves upon the children and other descendants.
  - Where the deceased is not survived by descendants but is survived by spouse
  - 810. Where the deceased has left no children or other descendants but is survived by a spouse the succession devolves on the spouse.
- Coming to the most important question the shares, we're coming to the shares now, When the deceased has left children or descendants and the spouse, the succession involves as to one loyalty upon children and descendants and this is where representation comes in because you see what is stated upon the children and other descendants. So it might not be the children who might inherit under testate succession, it also be the descendants coming from the children and as the other authority upon the spouse. So it's 50/50 one moiety upon the children, one moiety upon the spouse. What happens when they are survived by the descendants but not by his spouse? Always in the case of the testate
- When you see children but no spouse, the succession involves around the children and other descendants. So where there's no spouse, the share that be inherited by a spouse doesn't go to the collateral of the ascendants, it goes to the children. So it’s the children that inherit everything but there's no representation in this case, they inherit a per capita to them directly as children and then we can have a case where the deceased is not survived by the descendants but is survived by the spouse. Then in that case this spouse takes everything. This, this was one of the world, before 2004. Before, if you had no children, this spouse

only inherited part of your inheritance and the rest will go back to the ascendants. So this is when power was given to the surviving spouse.

- 811.(1) Saving the provisions of article 815, children or other descendants succeed to their parents or other ascendants without distinction of sex, and whether they are born or conceived in marriage or otherwise and whether they are of the same or of different marriages.

- (2) They succeed per capita when they are all in the first degree; they succeed per stirpes when all, or some of them, take by representation.

- It is stated in article 815 that children or descendants succeed to their parents or other descendants without distinction of sex and whether they're born or co and otherwise and whether they're of the same all of the field managers, they succeed per capita when they are all the first degree. They succeed by stirpes when some of them take by representation.

  - 812. Where the deceased has left no children or other descendants, nor a spouse, the succession shall devolve:

  - (a) if there be an ascendant or ascendants and no direct collaterals: to the nearest ascendant or ascendants;

  - (b) if there be an ascendant or ascendants and direct collaterals: one moiety to the nearest ascendant or ascendants and the other moiety to the direct collaterals;

  - (c) if there be no ascendant or ascendants but there be direct collaterals: to the direct collaterals; and

  - (d) if there be neither ascendant or ascendants nor direct collaterals: to the nearest collateral in whatever line such collateral may be.

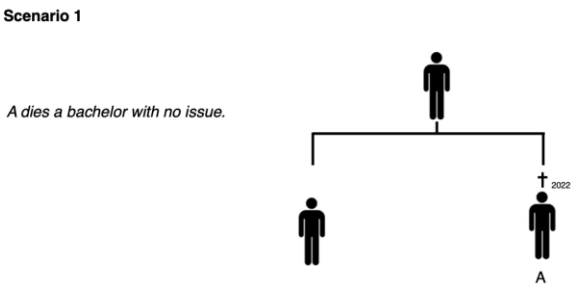
  - 813. (1) For the purpose of article 812 direct collaterals mean brothers and sisters, whether of the half or full blood or adopted and the descendants of predeceased brothers or sisters, of the half or full blood or adopted.

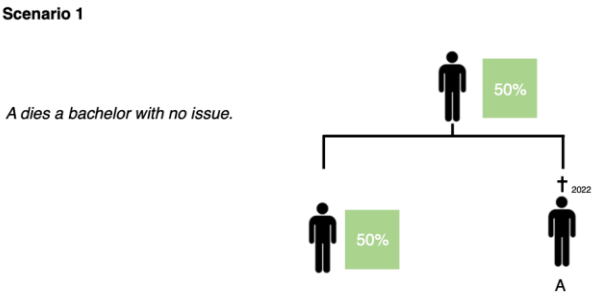
  - (2) The brothers and sisters shall succeed per capita and their descendants per stirpes in terms of articles 804 and 805.

- Article 812, Where the deceased left no children or other descendants nor spouse, the succession shall be forfeited. Important where there are no children and there is no spouse. Why? Because the children and the spouse heading to the succession of everyone else. So we can only consider collaterals and a

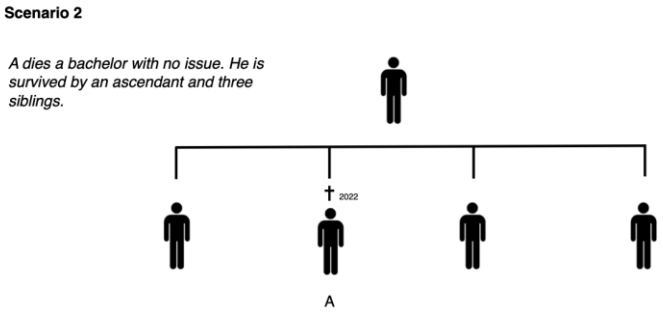
ascendants if only if there are no children and no spouse, ‘A’ if there be a descendants or a ascendants and no direct collaterals, I survived by my parents only, to the nearest ascendants or descendants.

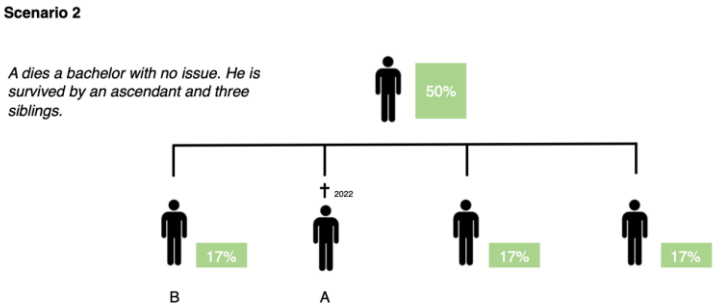
- The hybrid case, If I'm survived by a descendants and collaterals. Than in that case one moiety to the nearest ascendant and one moiety to the nearest collateral, and of course, if there are no children, no spouse or no descendants, so if there are no direct collaterals to the nearest collateral in whatever line such collateral may be. You have to see, which degree is closest? For the purpose of 812, direct collaterals go to brothers and sisters. The brothers and sisters receive per capita under articles 804 and 805.





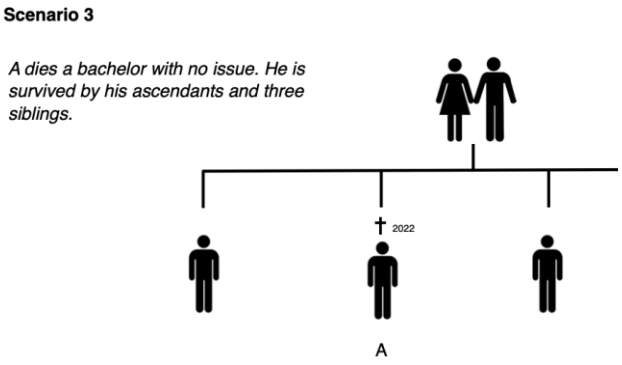
- First example, scenario one ‘A’ dies a bachelor with no issue. So ‘A’ is dead, ‘A’ died in 20202, ‘A’ died a bachelor with in issue, holds what? Do we agree it’s 50/50? ‘A’ dies without getting married and no children. We need to consider the situation of 812(b). 812 is saying where the deceased has left no children, no spouse and is a descendant and a direct

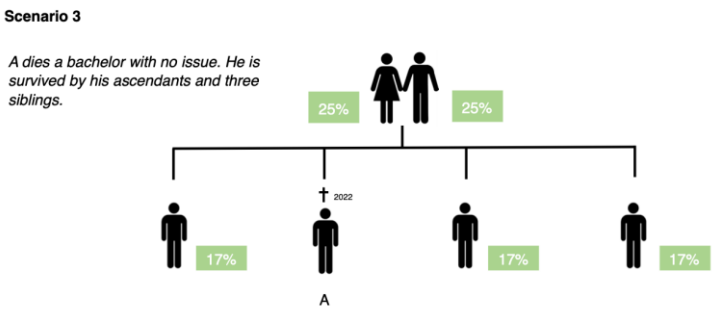




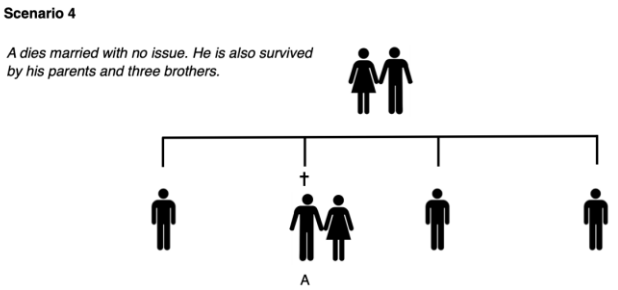
collateral. In this case 50/50;

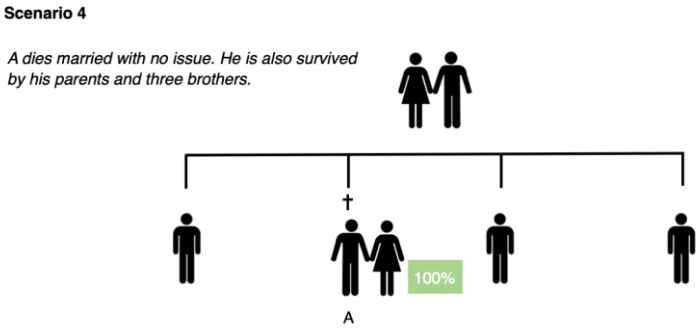
- Scenario two, ‘A' dies a bachelor with no issue. No spouse and no children. He left three siblings and an ascendant and direct collaterals. So this is a case of 812(b). So one moiety goes to the nearest ascendant, the other moiety goes to the direct collateral or collaterals.
- A common question that comes out in proportion. Important, the reserved portion in intestate succession does not get introduced at all. It simply does not apply. There is a logical reason why the reserved portion is there to regulate the disposable portion. Then there is a graphical reason, which is that intestate succession, definitely requires mathematically, how much the reserved portion will be split. In this case, there is the wife and the children in this case the reserved portion is ¼ in favour of the wife and ⅓ in favour of the children, the wife here the reserve portions gets 25%, and the children get 11% each including the sentence. Regarding the reserved portion its important, that the reserved portion applies only to regulate the disposable portion when one is devolving property by virtue of a will.
- The law always takes care of the children. In intestate, it makes sure there is a disposed portion. In testate they take everything.



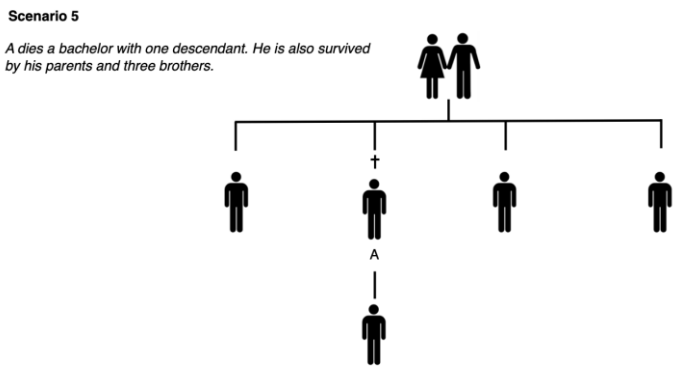


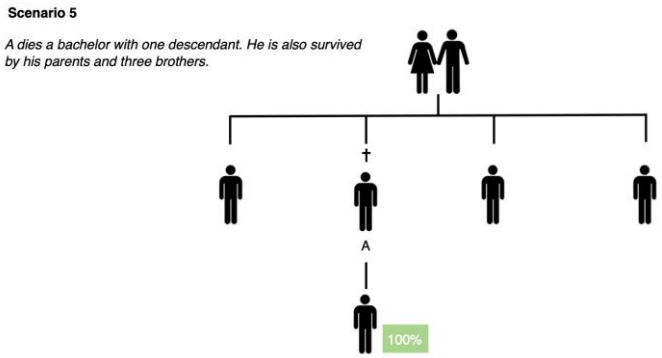
- Next scenario, ‘A’ dies and he is survived by his parents and three siblings. What happens here? 50 to the parents and 50 to the siblings? Yes, everything is split.





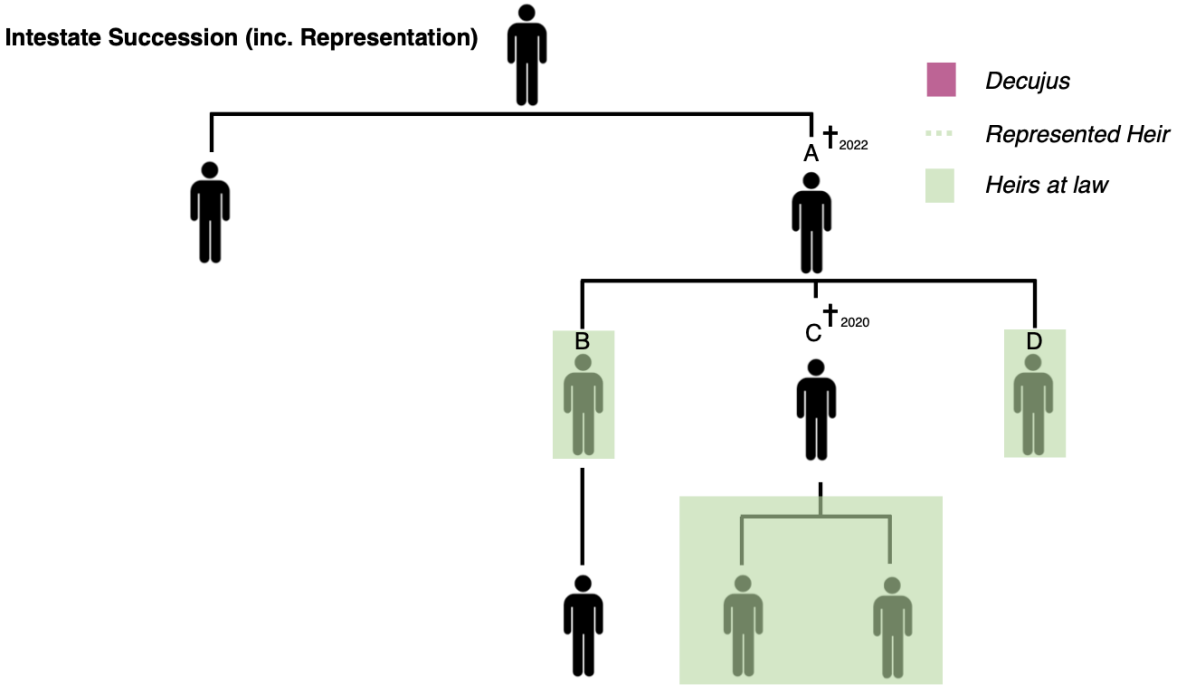
- In this one ‘A’ has a number of siblings and he's also survived by the ascendants but has one descendant, one child. What happens? As you can see, this is where we factor in representation. This is where representation comes into testate succession. What happens here?





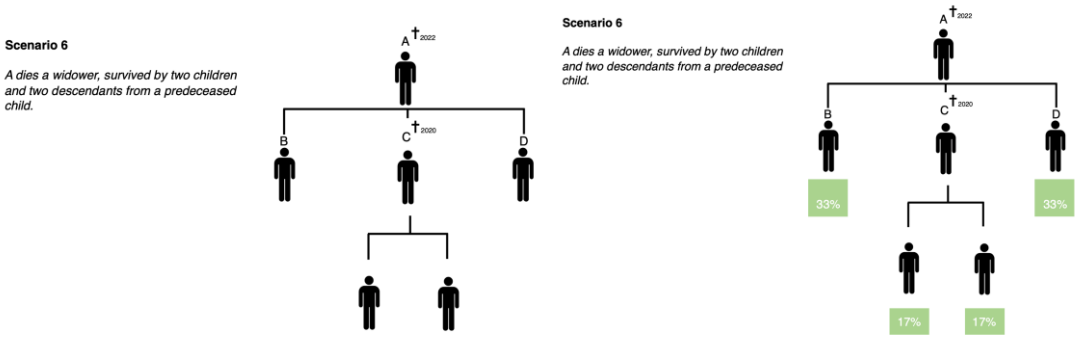
- Father and brother are still alive, not married but had three children and two of them predeceased, ‘B' left a child and ‘D’ did not. What happens here? Important, ‘A’ has children. Since you realised ‘A’ has children who do you immediately cut out? So under testate they get nothing. So your parents are still alive and ‘A’ died intestate. The moment you know he had children, we exclude automatically from this equation his father and his brother. You have to concentrate on that. What we are also told in this case study is that ‘A’ was survived by ‘B’. ‘C’ predeceased

him and was also survived by ‘D’. So A was survived by two children and two

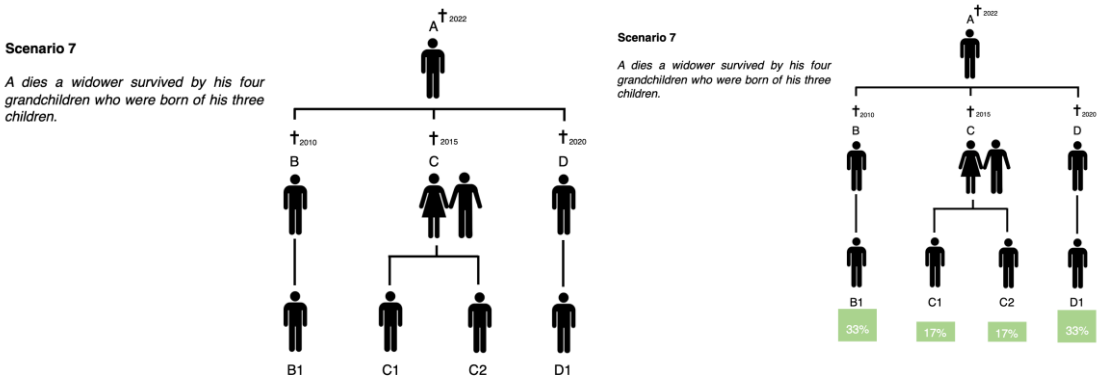


grandchildren.

- So what are the equations? this is where you use representation. ‘B’ has 33%, the son of ‘B’ gets nothing. The cousins get something since there is representation, and how does this happen? With the direct line since we are talking about his succession. Since it’s in the direct line you have first preference. The sons of ‘C’ take 33% divided by two each and ‘D’ take 33%.

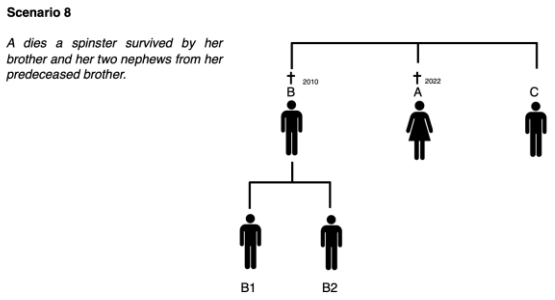


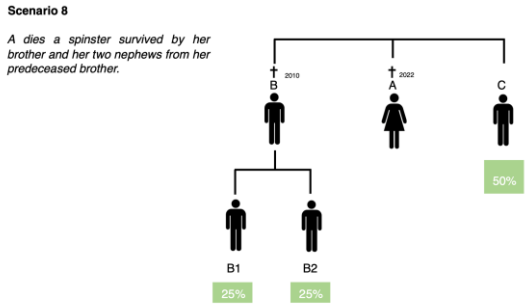
- Scenario 6. A dies a widower, survived by 2 children and 2 descendants from a predeceased child. What happens? Same as the previous situation.



- Scenario 7, ‘A’ dies a widower, survived by his four grandchildren who where born of his three children. What happens ? First thing you need to see if it’s direct or collateral. In this case it is direct. In the direct line is the same line, it’s not the others who are inheriting the brother and sister, we are succeeding the

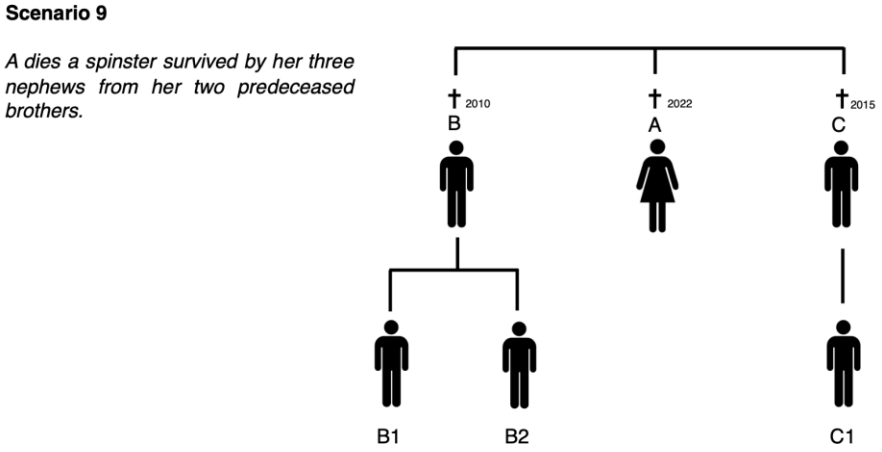
grandfather here. In that case since we are still inheriting in the same degree, it is still per stirpes. Because it is in the direct





line.

- Last one, on the collateral line. So no children and no parents. This is an example of intestate succession in the collateral line. ‘A’ dies and survived by her brother and her two nephew from her deceased brother. ‘A’ doesn’t have a spouse and doesn't have children, and her parents died. Who inherits everything? First they have to see the collateral line which inherits everything. In this line, there is still who is alive. What is included here? Representation. Since representation is included, are they in the same degree or in different degrees? In different degrees, since ‘B1' is in the third degree.

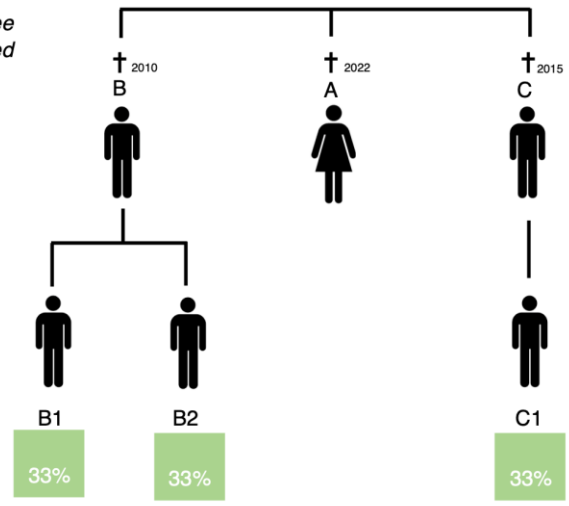


- Collateral line in different degrees. If per stirpes we are saying either 25% or 50%.

- 804. (2) If the children or descendants of brothers or sisters stand in equal

Scenario 9

A dies a spinster survived by her three nephews from her two predeceased brothers.



degree, they shall all take per capita, without representation.

The Law of Succession.

Dr. Peter Borg Costanzi.

17th February 2023

Lecture 1.

- Law of Succession
- Introductory Lecture – Overview
- Dr. Peter Borg Costanzi

- The law of succession is something, is a part of the law that we will all have to deal with when we start working, it will effect everyone whether you're a lawyer or not.
- At one point in time in our lives we will have to deal with inheritance, and as lawyers we will have to give advice, even if we don't practice in court or general practice and work in some company or firm, someone will ask you something about inheritance, so this is an area of law that will be with us for as long as we practice law. Even if we don't it will effect us personally.
- It is not an easy law, it's quite difficult so we have to do it bit by bit and slowly. You cannot untangle a knot all at one go but you have to untangle it bit by bit and eventually, hopefully it will be a bit clear even though Dr. Borg Constanzi will try his best to help us, there are parts of the law that are difficult to explain and take time, some parts are difficult.
- Today we will go through the course generally just a snapshot of what the course is about.
  - GENERAL PRINCIPLES
  - When does Succession take place?
  - Patrimony – Can one transfer one's patrimony? Are there exceptions?
  - Law distinguishes between TESTATE and INTESTATE Succession
  - Should this be the case or should the law regulate all?
- When does succession take place? It sounds easy to ask, when will succession arise? When someone dies, obviously but when does a person die? When is a

person deemed to have died? What is a moment that a person dies? This takes you to another question when is a person born? What makes a person human being? Human beings have a patrimony, and if you are alive you can die. We will go through this part of the law.

- What happens if a person disappears, no one hears from this person in 10 years, 20 years, 50 years, 100 years is a person alive or dead? A law has an answer for this. We will go through that.

- Can one transfer a patrimony, how does this take place, and liabilities is there control what you can do with your assets or you have total freedom?

- Our law logically of course distinguishes between testate and intestate succession, whether there is a will or no will and the question to ask is should this be the case? Why does the law regulate everything why not leave everything up to the law? You have one law which says when you die if you have a wife or children this is what happens whether you like it or not.

- Why should a person be given freedom to do what he likes with his assets after he dies? Obviously, if you go back to article 320 of the civil code, the notion of ownership, when we studied ownership in second year, we learnt that when we own something we had an absolute right over your property, the principle of absoluteness, you have a right to take fruits, the right to enjoy it the right to destroy it the right to sell it, jus abutendi fruendi etc. If you have full rights you have a right to dispose of it both in your life time and after your death.

- In some countries there is total freedom of what you do with your assets, there is no control at all. You can make a will no matter how many wives and children you have, you can leave everything to the kennels in Kentucky and that's it and everything goes to the kennels in Kentucky.

- In Malta this is different, in some countries whatever you write in a will is subject to the law, in the sense that it's almost useless making a will. In the muslim community where we have sharia law, the law dictates what happens in inheritance whether you like it or not it overrides any wish this will happen if you have cross border inheritance. And you have to study foreign jurisdictions so sometimes the question may look simple but behind the simplicity of the question there's a complex set of rules.

  - A: TESTATE SUCCESSION

  - B: INTESTATE SUCCESSION

  - C: PROVISIONS COMMON TO TESTATE AND INTESTATE SUCCESSIONS

- D: CROSS BORDER INHERITANCES/PRIVATE INTERNATIONAL LAW
- E: TRUSTS

- These five points here is how the civil code is divided, it's divided into five parts, it first deals with testate succession; when there's a will, then it deals with what happens when there's no will, it regulates there are several provisions of the law which apply in both cases where there's a will or no will and the two new parts of the law deal with cross border inheritance and trusts, we won't be dealing with trusts and Dr. Borg Costanzi is not sure that he has time to deal with cross border inheritances. (This is important for notaries)
  - A: TESTATE SUCCESSION
  - 1.WILLS –
  - Civil Code - Chapt 16 and Notarial Profession and Notarial Archives Act – Chapt 55
  - Types of wills
  - What makes a will a will?
  - Formal validity of a will.
  - Capacity to make a will?
  - Capacity to Inherit?
  - Unworthiness
- Let's start with testate succession, a taster of what we'll study, firstly it deals with wills, if you're going to regulate cases where there's a will you have to say what is a will? What is the format of a will? What makes a will what are the requirements who makes a will, there any restrictions. What state of mind or what is the physical state that a person must have in order to make a will. When dealing with this part of the law you have to look at both the civil code ad chap 55 the notarial profession and notarial archives act. The two laws have to be looked at in parallel because they regulate the same situation one in more detail than the other.
  - When you download the law, you ideally write the date on the file name, so that you know which is the version of the law. It always pays you even though you look at the computer and download the law double check and see if there are any new amendments. The same with judgements, ideally you download judgements in a folder and create hyperlinks. It takes time to do this and we will

find that we start but not manage to sustain it. A more practical way which is not perfect but quick is when downloading judgements, we save it with initials of judge and one of two words on what the case is about.

- When dealing with wills, what makes a will? formal validity and capacity of the will we will go through that in detail and there's also a part of the law dealing with the capacity to inherit. Why should there be a problem stopping someone of inheriting. My father left me a Villa and there's something in the law saying you can't take that Villa, there's something stopping you. Something to do with the person's death, if you've murdered your wife, there's caselaw where this has happened, going back to even the 1600's but if you murder the person you are going to inherit by law you are unworthy. It's not written in the will. If there's mistreatment, these are stated in the law, the law mentions these particular situations, if you've mistreated but not every type of mistreatment.

  - 2. PROPERTY

  - Which property may be disposed of?

  - Is there a minimum portion which should be reserved to spouse/descendants?

  - Abatement when you exceed the disposable portion

  - Dishersion

- You have to distinguish between unworthiness and dishersion. Unworthiness is when you're unworthy, you aren't going find anything in the will, it's something that happened outside the will, so the person making the will did not write it down saying I will disinherit you, it is dishersion but something that happens independently of the will when the person dies, the other heirs come along and say you are not going to inherit everything, even though in the will have received a villa because for instance you've murdered your father or your wife you're unworthy by operation of laws.

- What property can be disposed of? What can you leave? Can you dispose of anything you like? The obvious answer is you can only dispose of your own patrimony, how can you leave/sell something that doesn't belong to you but in inheritance there's an exception, you can leave something that doesn't belong to you. If something belonged to you and you've sold it or got rid of it through your life time, what happened to that clause in the will.

- There's also a restriction in the law as to how much you can leave to whom. There's a portion of the estate that is reserved. It is reserved in favour of those people to whom who you owe the obligation, an obligation of maintenance and

care. If you look at family law, the first few sections of family law, such as sections 1-4 of the civil code, the code starts off stipulating that parents have an obligation to look after their children even after they're of age if they are in need and vice versa children have to look after their parents, again with husbands and wives there is a reciprocal obligation to maintain this This obligation is reflected in the law of inheritance, in the past there was a restriction which gave a portion to ascendants, the parents, that has been removed and now the only restriction as far as individuals are concerned are the spouses or children. The husband and wife or children by law have a minimum right. You can leave everything to the kennels in Kentucky but if you do so by operation of the law the wife and children will still have a part of your inheritance in Malta, in England you don't.

- So there's a portion saved to certain people and the law specifies how much the portion is, the restriction is both by person who receives and by quantity the person receives. If you go beyond that portion then it is reduced
- As we mentioned before, another aspect is dishersion, a situation where in the will itself the person making the will says I disinherit my son/daughter/wife/husband, as the case may be. The law stipulates the grounds for dishersion. You can only do it for the specific reasons stated in the law and for no other reason at all. It's only in those reasons which apply, they are limited, it's a numerus clausus.
    - 3. HEIRS
    - Rights and obligations
    - Persons who may be heir
    - Things which may be disposed of
    - 4. LEGATEES
    - Meaning and effect. How does transfer take place?
    - Can one be both and heir and a Legatee?
    - What if there is no institution of an Heir?
    - Can an heir/legatee renounce?
- Heirs, what is an heir? What are an heir's rights and obligations, who can be an heir, what is a legacy? We're starting to get technical, we'll hear words like legat and pre-legat. The explanation isn't that difficult to make, an heir is someone who

receives by what we call a universal title and a legatee is someone who receives by singular title.

- What does this mean? If I say I leave half my estate to someone specific, that is an undetermined quantity in the sense that you have half of so many different things, half of a universality of things, in that case that is an appointment of an heir because I'm not leaving a single item but a share an indeterminate number of items, a legacy on the other hand is a gift of a specific or determined object/objets, for example I leave my car/house/field, it's a specific object that is a legacy, a gift, a single gift.

- If the person is an heir and in the will he also is receiving a gift, that is called a pre-legacy. So if a father appoints his five children as heirs in equal shares between them, all five children are heirs, if earlier on he says but I leave my cabin cruiser to my specific son, then that gift is a pre-legacy and it's just what we call it. It doesn't have legal implementation as such, it's just so when one mentions a pre-legacy that person is also an heir. If you say it's a legacy it's probable that that person is not an heir

- Can an heir or legatee renounce? Let's say for example there's a will, the father has left a specific person a cabin cruiser and then appointed him as an heir, and that person says that they don't want the cabin cruiser but they want to be an heir, or they want the cabin cruiser but they don't want to be an heir? Can they do that? The law provides for this kind of situation.

- Again you can have a will, wills take all sorts of shapes and sizes so to speak which leaves a number of gifts but doesn't appoint an heir. Say for example I have a number of objects, I leave them to a number of different people but I don't appoint any heirs? What happens? We will go into that as well, it's a situation that arises even to this day, some people are very hard headed on what they want to write in a will and they refuse to take advice but the notary is bound to accept the wishes of the person making the will. The law provides for a reserved portion, if there's a legacy is it part of your inheritance? Assuming that everyone accepts the will, the dad says you have the cabin cruiser and you're going to have ⅕ divided in the estate, if no one contests, if someone contests, and if you claim the reserved portion that cabin cruiser is a part of the ⅕ reserved portion.

  - 5. CONDITIONS in the will

  - What happens if there is a condition in a will?

  - What types of condition can or cannot be inserted?

  - 6. ACCRETION

- What is the right of Accretion?
- Does it operate automatically?
- What are the effects?

- Conditions in a will, sometimes, conditions are uncertain in a will and these create all sorts of headaches in practice, ideally the best type of will is the most simple type of will, I leave my estate to and name the persons and that's it with with no condition or legacies, that is the easiest and the one that creates the least fights. The moment you start disturbing equality between the children especially and you start showing favouritism, jealousy kicks in, rivalry starts, old fights come out, fights of when they were six years old, when siblings fight it's vicious, its hard, tough and it hurts a lot. They know how to shoot the bullet straight in the place where it hurts most and when it comes to inheritance the emotions are very raw. The mind is thinking about the person's life, how they treated you, what type of person they were. The last thing you want is coming across the will which says I didn't love you and leave you nothing, or I'm leaving you pittance, it creates hurt and anger and this anger goes to litigation, fights and rivalry. The best advice to give is in wills keep it simple and don't add any conditions. We will go into what type of conditions can or cannot be inserted, and the effect they will have.
- Another part of our law is the law dealing with accretion, accrue. Accretion is a situation which operates when there is a clause in the will leaving either co-heirs or co-legatees, in other words two or more people and one of them dies before the person making the will. For example I leave my estate to my four children but one of my children dies before me, what happens to that deceased child's share, it accrues in favour of the other four, so instead of being ⅕ it becomes ¼ there are rules dealing with accretion, when it operates and when it doesn't. It doesn't always operate.
  - 7. REVOCATION AND LAPSE OF TESTAMENTARY DISPOSITIONS
  - What happens if a will is revoked?
  - What if the will lapses in whole or in part?
  - Rights of children who were not yet born when will was made?
  - 8. RIGHT OF SUBSTITUTION AND ENTAILS
  - Can the testator provide for the substitution of the named heir/legatee?
  - Is this automatic?

- Entails: What is an Entail? Compare these provisions to a Trust.

- Revocation and lapse of testamentary dispositions. How do you revoke a will? You've made a will, you changed your mind you want to make a different promise. How can you do it? Can it be implied? Does it have to be one a will which invokes a will? Can you revoke a will only in part or do you have to revoke it completely? These are situations that we will deal with, and what about children that are not yet born when the will is made. Normally you say that when you make a will the will is open and becomes public when you die, that is the time line, and you look at the situation there, if I make a will and say I leave my children I have today or any children I have in the future. You just got married and you had a will, you didn't have any children and hopefully you'll have children later on.

- If we have any children we leave our estate to our children. Then one of them dies and there's two children, the estate goes to the two children, what if the wife is pregnant and the child is not yet born the law makes provisions for this, even though that child is not yet born that child has rights, yet it depends on how the will is worded. We will come to this and explain in more detail

- There is part of the law dealing with substitution and entails. Entailed property, the law on entail has been abolished we have the law of trust, what is an entail? An entail is a kind of regulation of how the inheritance goes down the line.

  - For example I make a will and I say my inheritance goes to the first born and to the successive first born child. (Il primo genitura). My first born child is the heir but when they die it goes to their first born child, or I leave my inheritance down the blood line, in other words my direct descendants and it keeps on going down the bloodline from generation to generation.The property is not owned by the beneficiaries they are holding it on trust for future generations. If there's an entailed property and someone made a will in the 1500's and he said I leave the baron shall be by first born son and with that title comes the estate. The Baron of Bubaqra will own all the estate and the successful relations which holds a Baron and they hold the estate. The present Baron is only holding the property on trust for the next baron and if they wanted to sell the property they would have to go to court to get permission, it's not an automatic rights, you have rights of the fruits but not an automatic right of the ownership of the property.

- This law of entails was abolished, it was partially in 1952 and totally abolished in 1972/1973. The law of entails does not exist anymore, and there no more entails in Malta they are all finished. Instead we have trusts which are similar to entailed property the big strength of trust and entailed property is that it keeps the property united, the patrimony is not fragmented into shares and sub-shares and so on.

So, if you want to conserve your patrimony and keep it as one unit, an ideal way to do it is by putting it into trust.

- For example if you have Portomaso, the hotel and you have ten children, if I die you cannot split it up into ten so they have to sell it yet they want to keep it in the family and non can afford to buy the others out, they're stuck, they can't divide it, they don't want to sell it and they cannot buy each other out, ideally they put it in a trust, it stays there for 99 years or how many ever years, but it's kept in one unit and the children get the fruit. That's how entailed property used to operate and that's why there were these old noble properties who managed for hundreds of years to conserve their properties, since entails finished they gave rise to various sub-divisions which is taking a lot of time and is very expensive. Yet there's a part of the law which deals with these kinds of situations.

- 9. TESTAMENTARY EXECUTORS

- When can they be appointed and what are their responsibilities?

- What are their powers? Do these depend on the wording in the will?

- 10. OPENING AND PUBLICATION OF WILLS

- How are Secret and Privileged wills published?

- What if there is a will but no institution of an heir?

- What if the death of a person is uncertain?

- Another person who has importance in inheritance is the testamentary executor, sometimes its not very often that you come across it but sometimes in a will the testator states I want to appoint someone to execute the will, to give it effect, normally it would happen if it is anticipated that the heirs are going to fight amongst themselves. The five children or how many the children happen to be don't get along, one wants one thing one wants another, they always fight so you appoint an executer who is in the driving seat and they have control or if they are minor children and there's a fear that there's no one to look after them so you have someone you trust and know and you say you'll be my executor because they trust your judgement and they have certain obligations which are regulated.

- The law also deals with the opening and publication of wills, there are certain wills, all wills are secret but there are certain wills that are more secret than others. Those which are launched the civil court second hall. There's a safe in the civil court second hall and you put your will in there. No one knows you've done a will

until you die, when you die they carry out a search, they get the death certificate and they find it, there's a whole process about how that will is published. The law deals with this, so that deals with testate succession

- B: INTESTATE SUCCESSIONS
- General Provisions
- Of the Capacity to Succeed: Who has a right to inherit?
- Of Representation: what is representation and how does it operate?
- Of Succession by Descendants and the Surviving Spouse
- Of Succession by Ascendants and Collaterals
- Of the Rights of the Government / Vacant inheritance

- Then we come to intestate succession, what if there is no will? Again if there's no will you cant have the capacity to inherit, can everyone or anyone inherit, look at the laws of unworthiness and who can inherit then you have what is called the rules of representation, once the law is going to operate the has to regulate what is going to happen in that inheritance, goes to the relatives, the wife, children, parents are the closest but then there are brothers and sisters, and the nephews and nieces. So you keep going further away. If there are children, four children and one has died and there are grand children, then the rules of representation regulate what the grandchildren receive.
- Do you divide by four? ¼ each side or do you count the number of heads? Three children and three grand children so you divide by six. The law regulates it. The law also regulates how the parents inherit if they can and siblings, nephews and nieces. If there is no person inherits, the inheritance is deemed to be patent and goes to the state so by default if an inheritance has not been claimed, and years have passed the default beneficiary is the government.

- C: Provisions common to Testate Successions and to Intestate Successions
- The Opening of Successions : When and how does this take place
- Continuance of Possession in the person of the Heir.
- Transfer of Patrimony?Is there a difference between assets and liabilities?
- Prescription of certain Actions

- How does one Accept an inheritance or is presumed to have accepted?
- How can one renounce to an inheritance and what are the effects? Is this reversible?
- Acceptance of inheritance with the Benefit of Inventory
- Separation of estates – rights of Creditors

- There are certain provisions which are common, of course where and how inherited is open, when the opening of succession takes place, the rules regulating the transfer of the patrimony and we will see that the law distinguishes between assets and liabilities. When it comes to assets, the heirs have a share in every single bit, when it comes to liabilities, you only are liable up to the share you inherit. There's a difference with how the law deals with assets and how the law deals with liabilities.

- Everything has a prescriptive period, a time bar again also an inheritance which creates legal certainty, there are rules regulating how one is deemed to have accepted an inheritance or how one accepts an inheritance, how one can renounce an inheritance.

- There are rules dealing with how one can renounce to an inheritance and there are rules regulating with how to accept inheritance when you are in between situations when the patrimony of the deceased is not mixed up with your own patrimony. Then there are rules regulating separations of estates, separation of estates over here is not the same separation of estates in family law, when you get married you choose the default regime is the community of acquests, but if you don't want to adopt the community of acquests you can choose the regime of separation of estates or the regime of separation of residue, the separation of estates is where each person is the owner of their property, if the husband/wife buys a car it's theirs alone. Community of acquests is if the wife buys a house it's 50%-50%, if the husband buys a car it's 50%-50%. Then you have separation of residue, which is similar to separation of estates with one big difference, at the end of the line when one of the person dies, so when they stop the separation of residue you take stock, and what's left is divided by two. So it's a halfway house. During the period when there is a separation of residue, each spouse has full rights and control over their assets, they don't need the signature of the other spouse but when that spouse dies or the separation of residue is terminated, then you take stock of what's left on both sides you put it all together and divide it by two.

- The separation of estates we're talking about here it's totally different, over here the law provides for a mechanism to protect creditors of a deceased.
    - Say for example, the deceased has some liabilities but his son who is an heir has more liabilities and the son inherits the father, the creditors of the son will obviously seek to enforce their rights even on the inherited property, it can do it, they have a right as it belongs to the son, the son inherits the villa, let's sell the villa at least we will get paid. But what about the creditors of the father? They say hang on a minute we are still owed money from the father and we should get paid first because that house belonged to the father and the law makes a provision for this kind of situation where in the appropriate circumstances the creditors can select that the patrimony of the deceased is kept separate from the patrimony of the heir until that credit has been satisfied. So the estates are separated, they are kept separate.
    - C: Provisions common to Testate Successions and to Intestate Succession
    - Of Partition
    - Of Collation
    - Of the Payment of Debts
    - Effects of Partition and of Warranty of Shares
    - Partitions made by Parents or other Ascendants among their Descendants
- There are other provisions which are common, partition, collation, what is collation?
- Collation is another part of the law that creates stress and hassle, let's go back to the part of the law which deals with the reserved portion were the law says that when making a will there's a minimum portion that is reserved for the children and the wife/husband, how do you calculate how much that person is to receive, and there is a mechanism of how this is calculated. Now what if during the lifetime of the deceased, this child/spouse have received substantial gifts, he left you out of the will but gave you this massive property worth millions so don't complain as during your life time you've benefitted, and this is what collation is about. You collate the gifts, value them and those are set off against what you are entitled to inherit if during the lifetime you have gifts you add them back so that everyone is treated equally, in the appropriate situation this is not always the case but there are situations within which these apply. In most wills the person making the will exempts children from making collation, so unless the will is contested what the

person has done in his life is done and forgotten and forgiven and you justify what's left.

- If you don't exempt from collation then collation will apply, if there's no will, collation will apply, if there's a request for a reserved portion collation will apply, it's not always the case but of course in many instances it does apply and the law regulates how this is carried out.
- It deals with the payment of deaths, partition, warranties and so on.
  - D: Of Cross-Border Successions – Civil Code and EU Regulation 650/2012
  - Formal and substantial validity
  - Wills within the EU – Property/beneficiaries/taxes
  - Wills outside the EU
  - European Certificate on Succession
  - Private International law: Formal and Substantial Validity, lex situs, lex Domicilii?
- Particularly since we joined the EU our law of Cross border succession has changed radically. We have to remember and it's really important to remember that when it comes to a cross border inheritance both the content of the will, the substance of the will and the formal validity of the will are not necessarily regulated by maltese law. We will also deal with inheritance in Private International law as it is relevant.
- We have a lot of foreigners living in Malta, either short term or long term and situations will arise when they pass away as to which law will apply how is the will regulated? Is the will valid? If the will is not valid under maltese law can it be valid in terms of German law or Libyan law? and its a minefield, before we jointed the EU we didn't have a problem on cross border inheritance, the situation was quite straight forward and under the rules of private international law formal validity was regulated by the country where the will was made, so if the will was made in Malta, Maltese law was applied and substantive validity, the content of the will were regulated by the domicile of the individual except for immoveable property. Immoveable property was regulated by the lex situs, if the property was in Malta, Maltese law applied, if it was Germany German law etc, it wasn't complicated.
- With cross border inheritances what has changed is that the formal validity oft he will is no longer regulated by the law of the country where the will was made. You could have a will made in Malta which is regulated by a foreign jurisdiction.

- For example in Malta, a Maltese person cannot make what is called a holograph will, like you see in the old films, I write my will put it in the drawer in my desk and after I pass away someone finds my will. In Malta you cannot do that, but there are situations were a holograph will can be valid if it is done by a person who falls under these cross border rules and the law which applies allows holograph wills.

- For example German, you can have a German in Malta writing a will putting it in his bible at home and when he dies someone finds it in the will.

- We will have these headaches and because of these headaches when it comes to cross border inheritance in order to ensure which is the last will and how the estate is regulated, there is provision for a European certificate of inheritance, and there's this form with a lot of annexes, it takes ages to fill in, it is easy to make mistakes, even the staff in court are not sure how it is done.

- The idea behind this certificate is that this document will certify how the estate is going to be regulated, who is the heir? Who will inherit what? etc.

- In concept it looks nice when you have a regulation dealing with cross border inheritances and you have a centralised unit certifying how the inheritance will be distributed but in practice it is really complicated, they are now realising that the situation is a bit complex and they're trying to simplify it they haven't managed but hopefully It'll be a more simple process.

- In Dr. Borg Costanzi's case he swore he would not do it as it is a nightmare, but if you are a notary you cannot escape it.

  - E: Of Trusts

  - Brief overview

  - Is this a form of Entail?

  - Settlor, Beneficiary and Protector

  - Role of MFSA

  - A separate Patrimony?

  - Reserved portion?

  - Creditors?

- Trusts are another module, it is a special module, we will not go there today, there are a lot of headings dealing with trusts they are all found in the civil code.

20th February 2023

Lecture 2.

- Law of Succession
- Lecture 2
- Title III
- OF SUCCESSIONS
- GENERAL PROVISIONS – ARTICLES 585 - 587
- Dr Peter Borg Costanzi

- Today we will start with the substantive part of expropriation of succession law.
- The law of succession covers around 100 sections of the law.
  - It starts with section 585, most of the law is still in its original state, in other words it is in the same form and content as when it was enacted in 1868, but some changes were made down the line.
  - For that reason, in many parts of the law we need or do refer to own writings, writings by authors who commented on the old italian and French law as it stood in the 1800s authors like birdie and others, their comments are valid in many parts of the law even today.
    - Art 585 – Definition of Inheritance
    - 585. An inheritance is the estate of a person deceased, and it devolves either by the disposition of man or, in the absence of any such disposition, by operation of law
  - The first section, 585, defines what is an inheritance. It's very simple to read like many sections in the civil code, they are single sentence 3-4 lines and yet these 3-4 lines, in this case 4 lines define what the law of succession is about. As we go along we can come back to this section read it again and we will understand it a bit differently.
    - Art 585 – Defenition of Inheritance
    - 585. An inheritance is

- the estate
- of a person
- deceased, and
- it devolves either
- by the disposition of man
- or,
- in the absence of any such disposition, by operation of law.

- An inheritance is the estate of a person deceased, and it devolves either by the disposition of man or, in the absence of any such disposition, by operation of law.
- Sounds simple enough. Now it is the estate of a deceased person, an estate, what is an estate? What is a person? When is a person deceased? It devolves, what does, devolution mean? By disposition of man, A man has done something to regulate his inheritance, or in the absence of any such disposition by operation of law.
- When you break down this section it says all these things at one go, it's telling you what the law of inheritance is about.
  - Art 585 – Defenition of Inheritance
  - Pothier: Transfer of all active and passive rights
  - The Estate:
  - What is an Estate? Is this a Patrimony?
  - Howard Marshall
  - "A coherent mass of existing or potential rights and liabilities attached to a person for the satisfaction of his economic needs. The patrimony, as a universality of rights and obligations, is ordinarily attached to a person until termination of personality" (per Justice Knoll in the Howard Marshall case)
- When talking about an estate, what is an estate? In our second year studies we looked at the concept of patrimony, we had to distinguish between a thing, a good, and patrimony. We will come back to that.
- What is an estate? Looking back at the famous quote of Howard Marshall.

- “A coherent mass of existing or potential rights and liabilities attached to a person for the satisfaction of his economic needs. The patrimony, as a universality of rights and obligations, is ordinarily attached to a person until termination of personality”
- A coherent mass of existing or potential rights and liabilities, of course we’re not talking about potential anymore, the person has died. So, a coherent mass of existing rights and liabilities attached to a person for the satisfaction of his economic needs. We are talking about a universality of rights and obligations and not just one single item but a whole bunch of stuff. It has to have an economic value and it’s attached to a person. If the person dies, the universality of stuff that a person has and which has an economic value is transferred by inheritance, that is his estate. It is his rights and obligations.
- That is what personal is, but are all these rights and obligations regulated by the law of inheritance? Or the law of succession?
  - Art 585 – Defenition of Inheritance
  - Some rights are intrinsic with individuality –
  - Difference between a Person’s personality and his estate
  - Must have an economic value
  - Committee of Privileges of Maltese Nobility :
  - Ramsay vs Bugeja (PA 3-/1/2004 Rik 1722/2001), Bugeja vs AG (Pa Kost 57/2006 dec 10/07/2007 & 20/02/2009).
  - Heir steps into the shoes of the deceased. Solely in respect of the patrimonial aspects
  - Assets paid as a result of that person’s death. Do they form part of the Estate?
  - Salvatore Scerri et vs Richard Rowe et (PA 17/11/1926) re Naval Gratuity
  - Estate may be transmitted by Universal title or singular title
- Some rights are intrinsic to a person’s personality and they died.
  - For example if I’m married, and I pass away my heirs do not become a husband, they are my heirs, they don’t inherit my role as husband and father. They become heirs. That is something personal to me. If I’m a lecture they don’t become lectures because they inherit me, that role is not inherited.

- We go back to an economic estate, something transmitted because it has an economic value, a title of nobility, I am the baron, count of Bubaqra. I make a will and say that the baroncy is inherited by my first born child. Is that regulated by the law of succession? No, its not. It's not because there's a specific legislation which says titles of nobility cannot form the subject of scrutiny by the courts, it not something regulated by the law, it is regulated by what is called a committee of privileges but it's like being a member of a club. It's the club regulating it's own rules. Of course, if there's a property attached with the title that property becomes relevant.

- In fact there are two cases here, Ramsay vs Bugeja and Bugeja vs AG there was an issue to who inherited the title and the courts threw the case out, it threw it out in Ramsay vs Bugeja, it said that by law the court cannot go into such issues, a constitutional case was filed because the person had that the right to have this issue addressed by court and the constitutional court said it is not a right which the constitutional court can examine.

  - It is, you are a member of a club, and the club rules apply.

- Having said that, there's another judgement which we can look at it's called Miriam Fenech Adami vs Gatt decided by Court of Appeal decided a few months ago. In this case, the law said it was about the property, and the plaintiffs were claiming that they inherit this property that was just entailed property.

- What is entailed property? Entitled property is property which goes down the line from generation to generation either through first born or down the blood line or any way dictated by the person making a will. After 100's of years this title and with the title became property came the merits of this court case and the court had to distinguish what type of entail it was because it made a difference on how the property was assigned There was a dispute on the advice given by Prof. Ganado and Ġoġo Mifsud Bonnici who were at the time the two more eminent lawyers, both lectures here and both were regarded. Ġoġo gave advice one way and Prof. Ganado gave advice another way. The Court of First Instance sided with Ġoġo and the Court of Appeal with Prof. Ganado. What was relevant in this case was there was an issue about the original deed/contract/will setting up the entail and this contract could not be traced. The court of first instance said since we can't trance this contract I cannot take cognisance of the law claim because there's no proof, bring the contract and look at it. In appeal, the court of appeal in reversing the judgement said it would have been good to have the contract but since the contract was not found we could rely on secondary evidence and it relied on the determinations and decisions given by the committees of privileges.

- So even the law expressly states that we cant take cognisance of titles, in this case by way of exception the court actually looked at what a club did amongst its members and it said of course since the club decided that this person is going to inherit the right to be a baron it's clear that this contract of will must exist and must state what is being stated. So, this is by way of an assignment, something that is regulated by the law of succession because there was a property aspect.

- If you look up the Caruana Galizia notes, they are the only notes that we have on succession law, he says that a person's estate is that which makes up all the legal relations which will be valued in money.

- Again you go to the Howard Marshall definition of patrimony, a universality, a coherent mass of rights and obligation which have an economic value. That is an estate.

- Now, there is another exception, you step into the shoes of the deceased, so you inherit what the deceased has left. You draw the line when the person dies, you take stock, he had €100,000 euro in the bank, that is his estate what if there was a life insurance policy and say after you die I will pay €100,000 the policy only kicks in upon death and the payment is by force made after death. During the person's lifetime that money doesn't exist. It arises as a consequence of death. So is the gratuity paid part of the estate? And logically you say no because you draw the line when a person dies, what happens after a person dies is not part of his patrimony, and there was a case on this point. There was a guy who worked in the dockyard and according to the conditions of employment if you die whilst still in employment, the heirs are entitled to a gratuity and the issue arose whether that gratuity formed part of the estate or not and the courts said in case going back to 1926 and this principle still applies till today that gratuity is part of a persons estate. So even though it arises upon death and by force is paid after death that is part of his estate.

- The same applies with a life insurance policy the difference with a life insurance policy is that in the policy itself, by way of exception, you can nominate the beneficiary. Forget the rules of inheritance, completely, if in the policy I say the beneficiary is my secretary, irrespective of what have written in my will beneficiary is my secretary, it is an exception in insurance policy but again it's part of the estate so if someone claims the reserved portion that benefit is calculated.

- An estate, dealing with estate can be transmitted by singular title or by universal title, I can leave all my estate to my children or I can leave individual stuff, or both. I can say I leave my house to my son and the rest of my estate will be divided between my two children. I can leave a singular item to one of the persons, and a universality to one or more persons it's freedom and its; flexible you may have

wills were there are a lot of singular times and no appointment of heirs and they create problems.

- Art 585 – Defenition of Inheritance
- A Person
- What defines a person?
- Civil and Criminal Code – No definition " A person who has been born alive
- No definition except the presumption that a feotus is presumed to be born alive
- Juris tantum presumption of viability. What defines viability?

- The second item is a person, so going back, an inheritance is an estate of a person. So what is a person? What defines a person? and the law says, it doesn't say what a person is. In some legislations you find a section in the law which defines a physical human being is, it defines what makes a human being a person but in the civil code and the criminal code we have a clause which in a way goes back, a person who has been born alive is considered to be a person. So the fact that someone is born alive there is presumption of personality.

  - Art 585 – Defenition of Inheritance
  - Civil Code Art 601
  - (1) Those who are not born viable are incapable of receiving by will.
  - (2) In case of doubt, those who are born alive shall be presumed to be viable.
  - Civil Code Art 1747
  - (1) Those who are not born viable, are also incapable of receiving by donation.
  - (2) In case of doubt, those who are born alive shall be presumed to be viable.
  - What defines viability?

- In fact in sections 601, those who are not born viable are incapable of receiving by will and in case of doubt, those who are born alive shall be presumed to be viable and you find the same thing in section 1747.

- So those who are not born viable are incapable of receiving by will. A child is born but the child is taken to an incubator, hopeless lungs, you know the child is going to die once you take them off the ventilator the child dies. So the moment you take

the child off the ventilator you are going to die, is that child viable? That child lives for a week, a month, the moment you switch off the machine the child dies, so is the child capable of receiving by will? The child is still too young to make a will but is the child considered to be a person for succession purposes?

- The issue of viability. The law makes it clear that there's a strong presumption in favour of viability, if there is a doubt that child will be considered viable, when in doubt we say yes. When determining viability you cannot ignore technology and medical science. You cannot hypothetically take a foetus out of the womb and give them fresh air and see that they are viable. If there is medical science and that child is being kept alive that has to be taken into consideration. You cannot ignore it.

- You might say but why is this relevant.

  - Take for example, these things happen unfortunately, a mother giving birth to a child and the mother dies giving brith during childbirth and the child isn't that strong, goes on a ventilator and survives for 2-3 weeks. But eventually the body gives up and the child dies.

  - The issue arises as to inheritance, does the child inherit the mother? And if the child inherits the mother because there is no will, how does the law of intestate succession apply? Will the rules regulating the child's inheritance apply? Do you pay succession duty on a child's inheritance? this can happen, even though you say this is far fetched in practice , it is possible that this situation arise and you may be asked for advice on whether the child will inherit the mother, whether the child's heirs inherit or whether the mother's heir will inherit, or you leave out the child completely because the child was not viable when counting for example the reserved portion, when calculating the reserved portion you have to see the number of children do you count the child as one or not, was the child viable? If the child was viable you count the child if the child was not viable you don't. So again it becomes relevant.

- Again, is there a measure of time, no there isn't you have to look at th particular circumstances of the case whether the child survives for 1 minute, one second or one month, the end result/ end question to ask is was the child born viable? Let's say when the child is born the nurse drops the child on the floor, the child hits his head and dies, the child was born viable but passes away. You have to look at the circumstances of the case. These examples happen in real life, and as lawyers we might be asked to give advice and you have to go back to basics in order to answer it.

  - Art 585 – Defenition of Inheritance

- Deceased:
- How do you prove death?
- Art 296 et seq of Civil Code –obligations to register the death of a person
- Magisterial Enquiries and practical problems with the registration

- Another issue that is worthy of consideration is deceased, so, we said here the estate of a person deceased, so the person has to have died. How do you prove death? With a medical certificate, practically a death certificate proves that a person died but sometimes it's not so easy to prove. When a person dies normally, let's say I die in hospital, in hospital there are doctors, a doctor will come and he will certify a cause of death a table will be filled in and they tell you take this to an undertaker and then you have to get an undertaker and a burial is arranged, eventually you take the certificate of death issued by the doctor, the fact the burial is taken place you go to identity Malta, sign a form and the death certificate is issued. And that proves death.
- That's easy, what happens if I walk in the street and I collapse, so there's no clear cause of death for what happened, and no one is prepared to do so. In practice a magisterial inquiry is carried out. A magistrate appoints a pathologist to determine the cause of death and until that patogolist studies the autopsy, the death certificate is not issued in Malta. In england for example you get what is called a provisional death certificate, you get a certificate stating that this person passed away without stating the cause but in Malta that situation doesn't exist, you cannot even have a burial certificate without having a death certificate and sometimes it takes a long time sometimes a year or two but there's no doubt that that person has died.
- You have to look at not only at the death certificate but there may be other documents or circumstances that can determine the person has died. It's not only the death certificate.
  - Art 585 – Defenition of Inheritance
  - Absentees
  - Art 193: et seq curators for persons who are absent but is presumed to be alive
  - Art 205 et seq – Absentees & Provisional Possession
  - Absent and unheard of for 3 continuous years (or 6 if he left an attorney)

- What are the consequences:
- Court issues an Edict
- 6 months later Orders that Secret and Public Wills can be made accessible and grant provisional administration to heirs/legatees or the heirs at law (if intestate), etc.
- Art 223 et seq - Absolute Possession
- Absence for 6 years since Provisional Possession has been granted or
- Absence /not hear of for 10 continuous years or
- If born over 100 yrs ago and not hear of for 1 year
- Or if born more than 80 years ago and not hear of for 6 years
- Presumed to have died.

- What happens if a person disappears? I left Malta, told no one I was leaving Malta, went straight to the airport and got the first flight out and told no one and I disappeared from the face of the earth and no one knows what has become of me. Something needs to be done, and the law regulates this situation. There is a section dealing with absentees.
- This law was upgraded a few years ago because there was a case, two cases actually where two people were flying, in one case from Libya to Malta and in another case from Malta to Sicily and the plane disappeared, no one knows what happened, the bodies were not found and no traces of the plane were found. Lots of doubts and suspicions were cast but there was no physical evidence for what happened. For all intents and purposes the flight may have made its destination and people got off somewhere else, or not and the people left at home in Malta were stuck, they had a person, a father who disappeared, the wife/children are stuck cannot be hold of their estate or money, there's no right to a widow's pension, horrible financial problems so the law provides and provides and caters for this situation.
- Incase of someone being absent the law allows provides and caters for this situation and in case of someone being absent, the law allows for the appointment of a curator, someone to temporality and provisionally administer the estate as though the person has died. So if there are will, if there are any wills are made public, and there is provisional administration.

- Article 205.

- **205**. After the lapse of three continuous years from the day the absentee was last heard of, or of six years, if the absentee has left an attorney to manage his property, the competent court in the island where the absentee last resided, may, upon the application of any person interested, order the opening of any secret will, or declare, notwithstanding the provisions of article 68 of the Notarial Profession and Notarial Archives Act, accessible any public will, which the absentee may have made.

- Section 205, after the lapse of three continuous years from the day the absentee was last heard of or six years if the absentee has left an attorney to manage his property, the competent court may appoint and so on. So the law provides for two situations, one if I left no prokura in favour of anyone, so I just got the first plane and left without telling anyone, in that case after three years the court can step in upon the request of an interested party and appoint a curator to administer my estates provisionally. On the other hand if I appointed someone to look after my stuff which implies that I intend to come back in that case the timeline is six years rather than three. After that the court will allow the opening of any will and allow for the provisional administration of any estate.

- This can be followed by a second request and converting the provisional administration into an absolute administration, and when the absolute decision is given that person is for all intents and purposes presumed dead. If this person disappeared, no trace has been found and after six years of provisional administration you can ask for that to be converted into an absent warrant.

- There are other situations were the law presumes for a person to have died, and if a person is absent and over one hundred years have elapsed since his birth.

  - (Anyone read the book about the deals or the misdeals of the hundred year old man)

  - Art 585 – Defenition of Inheritance

  - Absentees

  - What happens if Absentee returns or his whereabouts established

  - Is everything put back as it was?

  - What happens if the Absentee’s death is established?

- In our law if a hundred year old man goes missing, he is presumed to be dead. Or if he's a bit younger, if a or if he's a bit younger if a person is eighty years old and has been missing for six years presumed to be dead and you can ask for the opening of succession.

- These are legal interpretations, the law also provides what happens when a person comes back to life and it can happen of course and if that happens he takes on (we'll come to it at a later stage) if he does come back he'll take over where the administrator left off. So if the administrator/people who have inherited him sold the house and they spent the money he'll come to his estate as he stands when he comes back, of course if there has been bad or improper administration you can take action but normally if there isn't anything wrong and they took it as they needed it it is hard luck.

  - Art 585 – Defenition of Inheritance

  - Commorientes: Persons dying in the same incident

  - Presumed to have died at the same Instant?

  - The fittest presumed to have survived longer?

  - Are age, strength or gender relevant?

- Another issue deals with people dying in the same incident, what we call commorientes, (com is together and mortientes is when someone dies). What happens if two people die in the same incident who inherits who?

  - For example I go one a sailing boat with my family we get caught in a storm and the boat sinks and we all die. The husband, the wife and the three children. Who died first?

- We're all in the same both and we get lost at sea. Who would have presumed to have survived the longest? Normally one would say the man because he is strongest but what if the man can't swim or has a weak heart and maybe the wife is a fantastic swimmer, but she's a woman and aren't men stronger than women? What about the children? What about the fifteen year old kid who is on the national swimming team? Isn't he a better swimmer than his father? But he's a minor.

- These questions have arisen in the past and the law especially if you look at roman law, it looked at age and gender. Men were presumed to be stronger than women and therefore survived longer than women and minors tend to be weaker than people who are of age and there was a kind of time line. If you're a you're a

minor you're weak if you're a girl you're even weaker if you're a pensioner you're weak and if you're a female you're even weaker.

- Art 585 – Defenition of Inheritance
- Roman Law
- All over 60: The youngest presumed to have survived longest
- All under 15: The oldest presumed to have survived longest
- Between 15 and 60: Complex rules dependant on age and gender with preference to the younger males
- England: Determined by Age but 28 day rule re spouses
- Some American States: 120 hour rule
- Spanish Law (Art 33), Italian Law (Art 4) German Law (Art 11 of Missing Persons Act and Dutch Law (Art 725 of Civil Code:
- Presumed to have died simultaneously

- In between that group of say between teenage and pension age they were considered to be one group, the men stronger than the woman, and then you look at the age so a 35 year old is stronger than a 20 year old. The law made these funny legal distinctions and in fact. In roman law, if you're over 60 the youngest is presumed to have survived longest, if you're under 15 the older would have survived the longest. If you're between 15 and 60, there were these funny rules, we will not go into them as we can look up Lee and roman laws.
- In some countries we have different situations.
  - For example in England if two spouses are in the same incident and one passes away before the other, they are deemed to have died in the same incident and the same time if there's less than 28 days. So if there is a car crash and both of them are fatally injured he one who survives longest, if they survive more than 28 days okay, if they survive less than 28 days they are deemed to have died at the same time from a succession point of view. In some American states they have same rule but for 120 hours, in other laws, they are deemed to have died a the same time. So they don't inherit each other.
  - Art 585 – Defenition of Inheritance
  - Our old Civil Law (ex Art 872) – up to 2004

- Persons of the same gender
- U 35: Survival of Eldest
- O 35: Survival of Youngest
- Some O 35, and U 70 and some U 14: O 35
- Some O 70 and some O 7 : O7
- Some O70 and some U 7: O70
- Also made provision for persons of different genders with preference to Males
- Presumptions can give skewed results
- Gio Batta Zahra et vs. Anthony Borg, P.A., 4 ta' Mejju, 1943 (Vol. XXXI-II-119)

- Under our old law, it's changed but under our old law under 35 survival of the eldest over 35 survival of the youngest. There are funny rules in the ages in between.
- The court case Zahra vs Borg, an unfortunate case.
  - Why is it important who died first? Say for example there's just a husband and a wife and there are no children and they died in the same incident, if it is presumed that the husband survived one split second longer than the wife, then the husband inherits the wife. If there's no will, the inheritance goes to the husband's side of the family, and the wife's side of the family get absolutely nothing. This actually happened, there was a court case Bianco, these were a couple flying to Sicily the plane disappeared, and they owned lots of property in Swieqi. The family were total log aheads, there was a law suit they both wanted it all. The family of the husband wanted 100% and the family of the wife wanted 50%. The court of first instance said there was no proof of death, case dismissed, they went to appeal, the court of appeal kept on putting the case and refused to give a judgement, in the end they got fed up and arrived at a compromise and they reached the finality of 50%-50% but if it weren't for that it would have been a big problem.
- Today the problem it is resolved but in this case of Zahra vs Borg, which was regulated by our old law. The wife and the child were in a shelter and there was an air raid, a bomb fell and the wife and the child were killed, and the husband lost them both and there was no will. So the rules of intestate succession applied, and under the rules of intestate succession at that time, because now it's different,

at that time if there are no children, then the husband has to share the estate with the parents. So the wife's parents, if the child died first became heirs and the husband who had the misfortune of losing his wife and child had to share his inheritance with his in-laws. Normally it wouldn't be a problem but in this case the in-laws sued. It came to court and the rules indicated on the powerpoint applied.

- So what we have here, we have a child who was a minor and the child was a minor was deemed to have passed away before the mother. Now in this case there was the argument that hang on a minute, the maternal instinct is a very powerful instinct, probably the most powerful instinct of the world and when act kicks in the strength that comes to a woman to protect her children is amazing, but when the mother heard the air raid her instinct was to protect the child and sacrifice herself. So if rocks and buildings were falling she would have curled around her child and protected her child so because of the protection of the mother the child probably survived longer than the mother. In fact that is how the mother and child were found but the court said there is the rule and they will apply the rule, by law the child is deemed to have died first because he was weaker and in fact when the mother died there were no children so the father had to change the inheritance with the in-laws.

  - Art 585 – Defenition of Inheritance
  - 1989 Hague Convention on Succession
  - Art 13: If or more persons whose successions are governed by different laws
  - and they die in CIRCUMSTANCES where it is uncertain in what order…
  - AND the different laws provide differently/do not provide
  - NONE shall inherit the other
  - Eu Regulation on Succession Reg 650/2012
  - Same as above
  - Present Law Art 832
  - 832. Where several persons die in a common calamity and it is impossible to determine who survived the other, they shall, where any one of them is called to the succession of the other, be presumed to have died at the same time.
  - Is this the ideal way to avoid disputes?

- Nowadays it's changed. The first change came with the Hague convention on succession which says when two or more people died in the same incident they cannot inherit each other, so you cannot receive anything because you're dead you do not exist anymore you have no more a legal right to inherit, you're not even taken into consideration for that inheritance. You're omitted.

- The same applies to our law, section 832 which says the same thing.

  - Article 832.

  - **832**. Where several persons die in a common calamity and it is impossible to determine who survived the other, they shall, where any one of them is called to the succession of the other, be presumed to have died at the same time.

- If the people die in the same incident they presume to have died in the same time so they don't inherit each other. Yet there's one headache, it says whee several persons died in a common calamity and it is impossible to determine who has survived the other, or in circumstances where it is uncertain in what order.

- So, these parts of the law give room for interpretation and it does create problems, if you google, you will come across situations where if a plane has gone down with all people being lost in this instance, you have the investigators going to the appropriate bodies and aviation authorities trying to scour and find information, going to the site, to try and find information which can help decide if anyone survived more than another.

  - Imagine this billionaire, who take four example a couple very wealthy, they have their own private jet and the plane goes down there are millions at stake and the issue becomes very important because the value is higher and especially in countries were you don't have concepts like reserved portions where there's total freedom of inheritance and you can dispose of the assets as you wish for example if the husband leaves everything to some charitable institute and the wife leaves everything to her children. Who inherits who, who inherits what. So again, even though you have laws, a default situation saying that by default if they die in the same incident they are presumed to have died in the same they don't inherit each other if there are circumstances which show otherwise you can bring evidence to bear and prove that principle wrong.

- So coing back to old Roman law, can you start arguing that the man iis stronger than the woman? The man didn't know how to swim and the woman did? Of course it's an interesting point to make and in the right circumstances you will find that this section even though it creates a presumption it doesn't completely the problem.

- If you look at the the old authors, French authors, they take the situation, the example of let's take the example father and son going to war. The son is in his late teens, the father is in his 40's a seasonal and experienced fighter. And they both go to war, and they both die in the same war, who is presumed to have survived the longest? If you look at old roman law the law tells you that the son is younger and survived longer but you can also argue and say but the father is a seasonal warrior he would have known how to get himself out of scrapes, he is a better fighter than the son. These conflicts did arise and there were court cases on this point.

- Another example that they give, for example thieves break into the house and they kill the whole family, the husband, the wife and the children, who did they kill first? You'd probably kill the strongest first, so even though the legal presumption is that the husband survived longest, the circumstances tell you to get rid of the strongest component and deal with the children at the very end unless you want to use the children as a tool to force the husband/wife to give you the combination number of the case so look at circumstances.

- This same argument in fact there was a court case in Paris because the old days the parliament of Paris was a court, in the 1600's and 1700's, three was a court case were this issue arose were the court needed to determine who was killed first and the court rules that the husband was deemed to have been killed first. But of course today with modern technology and different needs the answer could have been different.

- Art 585 – Defenition of Inheritance

- Devolution of Inheritance:

- Is Devolution automatic or must one be called to succeed?

- Devolution takes place by the disposition of man or in default by law

- The right to make a will as an extension of the absoluteness of the right of ownership.

• Another aspect section 585.

- <u>Article 585.</u>

- **585**. An inheritance is the estate of a person deceased, and it devolves either by the disposition of man or, in the absence of any such disposition, by operation of law.

- Let's go back to the estate of a person deceased and it devolves. What is devolution? What does the law mean by devolution? Is inheritance automatic, or do you have to claim it? If my father dies, do I automatically inherit my father or do I have to claim the inheritance? The law doesn't give a clear answer on this question. Normally I would say that the correct answer is that you have to claim your inheritance. That is the standard answer, an inheritance needs to be claimed it doesn't happen automatically but what happens if you can't claim your inheritance, maybe because you're in a coma, cannot speak, move or communicate. Doesn't mean that you don't inherit.

- If you have a right the right is there so even though an inheritance devolves and has to be claimed, the presumption is that it has devolved especially if you are in physical possession of any part of the estate. If I'm living at home with my parents and one of my parents pass away and I stay living in the home, I have possession of part of the estate if I say nothing I'm presumed to have inherited even though I have not actually physically claimed it. If I want to do something about it and I do not want to accept the inheritance then I have to do something about it. Renunciation of inheritance is not presumed, and this is where the answer comes from. If you want to renounce to an inheritance you have to either do it by public deed or else you have to go to the second alwa, the court of voluntary jurisdiction and sign the paper there if you don't renounce there's a presumption that you inherited and if you are in possession you can't get out of that presumption.

- So when the law says devolves, the evolution is to a certain extent automatic in the sense that there is a presumption that you have inherited the law presumes that if you have a right to inherit, you're presumed to have inherited. Then there are circumstances which can prove otherwise. So it is not an absolute presumption, it is not a jure et de jure it is a juris tantum presumption. So when you have the right to inherit you have the presumption that you have inherited, but it can be disproved.

- Devolution takes place either by disposition of many or by operation of law. So either there's a will, if there's no will the rules of intestate succession are applied. Of course, anyone in his right mind can make a will, anyone who has legal capacity can make a will and this is an extension of article 320 of the civil code.

  - <u>Article 320.</u>

- **320**. Ownership is the right of enjoying and disposing of things in the most absolute manner, provided no use thereof is made which is prohibited by law.

- The absolute right of ownership, you have a right to dispose, and you have a right to see what happens.

  - Art 586: How is inheritance disposed of?

  - 586. Saving the provisions relating to donations made in contemplation of marriage and those relating to life insurance, it shall not be lawful to dispose of an inheritance, either wholly or in part, or of any sum of money or other particular subject belonging to an inheritance otherwise than by a will.

  - Can only dispose of an inheritance in whole or in part except by means of a WILL.

  - You cannot sell your inheritance or your hereditary rights

  - Balzan vs Degiorgio PA 23/2/1959

  - “Keep this gold clasp and chain and it will be yours when I die as long as you keep looking after me”

  - IS this a donation and transferring ownership immediately or is the individual retaining ownership and making it clear that it will pass upon death?

- This takes us to section 586.

- Section 585 we had a definition of what is an inheritance. Now, section 586, is an important section and very easy to ignore or forget about, it states that if you want to leave something to someone you can only do so by leaving a will. It sounds almost obvious but it’s not always the case. If you want to leave something to someone you can only do so (after death) by means of a will, during your life time you can dispose of your assets as you wish in any way you’ll like if it’s immoveables by public deed but there’s no specific formality, if I want to take €500 from my wallet and give it to you, there’s nothing to stop me. But if I want to leave you €500 after I die I can only do so by means of a will and if I tell you, when I die tell my heirs to give you €500, it doesn't count.

- Either I do it by means of a will or not at all so inheritance is regulated by either disposition of man or by the law, if no will then the law applies and the law gives and makes provision of how inheritance is given.

- Let’s recap. The law we’ve dealt with was 585 which defines what is an inheritance. Section 586 is a very important section which is easy to forget about

and when you come look for it you wont find it, normally when you're looking for something you kind of skip the first bits and move on and you don't realise that what you're looking for is right in the beginning. People forget this section's importance. In inheritance, inheritance is regulated by either by the will or by the law or by both but here section 586 the law is making it clear that If you want to leave a gift after your death you can only give that gift by means of a will.

- So if you want to leave something, you either make a will and see what's written in the will or else it's as though that desire has never been expressed, it isn't legally binding. You can tell your children don't forget the maid was really good to us, and when I pass away make sure you think of her and give her something. That's not binding if it's not written in the will, that request was never made. Either written in the will or not at all.

- And this situation arose in the Balzan vs Degiorge case. Where this woman promised a barbazza, a gold chain and she told her when I die this is yours. Everyone knew about it, there was no dispute or at least the evidence about these words being said was quite clear and the court was convinced that this is what the testator said. The issue arose was that binding, when I die this barbazza is yours. When I die so it is conditional on my death, a gift that takes place after my death. The court rules in this case that this was in violation of 586 because it was not done by means of a will. If the testator said take this barbazza it's yours, today whilst I'm still alive it would have been binding. Or she could have said, this is yours it belongs to you it's yours already and then pick it up from my house when I die. It would have been binding as the donation/transfer of ownership took place took place during lifetime but in this case in the Balzan vs Degorgio case the transfer of ownership only took place on death and the court said that obligation was not a binding obligation because it was it was not written in the will, so it highlights the importance of making a will. If someone has any specific wishes to make they have to be written in a will. Or else it's as though it was not made.

  - Art 586: How is inheritance disposed of?
  - What if a person makes a will but does not appoint heirs?
  - Exceptions:
  - Donations made in contemplation of marriage – Art 1793 et seq
  - Donations come into effect on demise of donor and are irrevocable
  - Life Insurance Polices (Art 1712 A et seq). The policy designates the beneficiary

- The law makes only two exceptions. One is in the care of a donation of contemplation of marriage, it's very rare but it exists, that a parent would donate property to a child by means of a public deed but the donation only kicks in when the person dies. So I'll tell my daughter you'll marry this guy, I'm happy for you, I'm going to give you this house, live in it, enjoy it when I die it's yours. When I die it will be that. It will not be a will, it will be a donation which takes place on my death in complementation of my marriage. Today it is not something which is done but in the past especially with arranged marriages where you had a huttar, a broker, who would broker a marriage between the couple, property would form part of the discussion what is the dowry you will give and this would have been an important factor how many camels are you going to give me? How many Mercedes's are you going to give me? In some cultures it still happens.

- Again in some cultures this is a serious thing, but it's not something that didn't happen and people would marry or not marry depending on the dowry being promised or given, this was the dowry promised which would take place on their death, promised as long as the daughter would marry.

- Again, life insurance policies. The wording of the life insurance policy will override the will, the insurance company will pay out to the beneficiary as stated in the policy, irrespective of what is written in the will. If there is a named beneficiary in the life insurance policy, that named beneficiary will get payment, if there's no named beneficiary then the rules of succession will apply. If there is named beneficiary and the beneficiary is not named in the will but they are named in the insurance policy, that insurance policy will apply. And if you want to change the beneficiary, you go to the insurance company, fill in a form and change the beneficiary.

- If there's an insurance policy and I leave everything to my maid for example and my children complain that my maid is going to get an insurance benefit of €1,000,000 and there's no money left in the estate, what rights do the children have? We will see later on that a reserved portion is a credit, it's a sum of money, and it is calculated on the estate, including the value of the insurance policy and eventually if this is the only asset, that asset is reduced to pay the reserved portion, if there are no longer assets the maid will get less, it is a thing called baiting.

  - Art 587: Transitory Provision

  - 587. The provisions of this Code shall not supersede any other law previously in force with regard to any testamentary instrument made before the 11th February, 1870, even though on such date the disponer may have been still alive:

- Provided that if any such instrument is not valid according to such other law it may, unless it is revoked by the disponer, be maintained under the provisions of this Code, provided it satisfies the requirements thereof.

- Confirms validity of wills made pre 11/2/1870 even if in a different form.

- Even if the person died after Feb 1870

- Vide: Grognett vs Petit – PA 28/11/1870

- Finally, and this is the end of the lecture, it's not really relevant today, there's a transitory provision made in the 1870's. Remember the civil code was enacted in 1868 and at the same time the civil code was passed, they also created the public registry as we know it today where you. Have a centralised system for the registration of births, deaths and marriages. There's also a centralised system for the registration of public deeds (a will is a public dead) before that if you want to find out if a person made a will, you'd go to all the notaries in Malta and ask them. Of course in those days there weren't that many, and people didn't move around so much.

- Not many people made wills, only rich people made wills as it was an expensive thing to do. If you didn't hold any particular assets, what was the point of making a will. If you had nothing to leave, why make a will, you had a few goats and that's it. But, in 1868 they changed the public registry and what happened was the government asked what's to happen of the present wills? They said all wills held by all notaries had to be registered by the civil court second hall and it came to be a secret will, secret because it was not possible to find out that a person made a will except by his relatives etc, in the registry of the court and at that point in time all the existing wills were lodged in court.

- Until 1868 the rules for making a will were a bit different, so they passed a law saying that any will whatever form shape or size that existed is a valid will even though it is not in conformity with this new law. If it was a will with no witnesses it is still valid as long as the notary registered in the civil court second hall. This transitory provision protected the old wills, they said if the old wills if they were made in a form which was valid in the time it was made it was valid. If it's done in a form which is in accordance with this new law it is also valid. It was a presumption in favour of validity. This issue arose there was a court case which was in conformity with the new law but not in conformity of the old law and the court ruled in conformity of the will.

24th February 2023

Lecture 3.

- Law of Succession
- Lecture 3
- Of Wills – 588 -591

- Today we're going to start going into a bit more detail in the law of inheritance.
  - Art 588 – Definition of Inheritance
  - 588. A will is an instrument, revocable of its nature, by which a person, according to the rules laid down by law, disposes, for the time when he shall have ceased to live, of the whole or of a part of his property.

- We are going to start dealing with what is a will? Section 588 provides a definition, now, it may look simple to state, but in actual fact again let's break it down into its components.
  - 1. A Will is an instrument:
  - Grima vs Camilleri (App 28/3/1884) – a written instrument
  - Murgo vs Golizzi (15/12/1905) must satisfy legal formalities no matter what you call it
  - Wismayer vs Wismayer (app 17/1/1936) and Giuseppe Axiak vs Antonio Axiaq (App 26/2/1945). Interpretation of wishes of deceased solely from the will
  - Notary has sole competence to determine wishes of testator when drawing up the will.
  - But see Michelle Vella vs Philip Camilleri FDP 274/2020 dec 16/2/2023

- A will is an instrument, it means it has to be in writing. Any evidence to show what a person wanted to provide for after his death is not valid unless is is by means of a written instrument.
  - So if I say I am going to give you my car, and everyone knows I'm going to give you my car, the car is yours take it after I die. That is not a valid or binding obligation. It may have a moral effect in the sense that the heirs may feel personally obliged but it has no legal standing. So unless it's done in writing, in

the form of a will, then that statement no matter how much evidence you bring will not carry any legal weight.

- For example someone is at his death bed, all the family's around him and he tells his wife whose next to him, he tells her look, there's that object make sure you give it to Joe, if she wants to she can but she doesn't have to. It's not a legally binding obligation even though everyone heard the person saying there's no doubt that's what he wished but it has to be by means of an instrument.

- Why is this? In the past this was not always the case and there are situations especially if you go back to Roman law, in times of extreme circumstances it was possible to make a will verbally.

  - For example, this might have be seen in films, a king is about to die, at his death bed and at his last breath he calls one of his trusted servants and he tells his servant I want my second son to be king, the servant after the king dies says the king told me this. Of course, there will be a whole dispute about how true or not it was and it gives rise to litigation. In order to ascertain certainty the law wants the document to be in writing.

  - Another example would be a situation where someone is in imminent danger of death following an incident, or a soldier at war and he's been shot, he's lying there he knows that he's going to die, there's his mate next to him and he tells his mate listen I haven't done a will but make sure my estate goes to that certain person. That is not valid.

- The law does provide for these extreme situations where and we'll come to it later on, where you can do a will even in those extreme situations without a notary but it still has to be a written instrument.

- Now even though it's a written instrument it does not have to be described as a will, as long as you satisfy the format, the legal formalities, the public deed, all registered in the courts as a secret will or extreme circumstances what they call a privileged will (we will come to that). As long as you satisfy the legal requirements as to form then the substance doesn't effect the validity as such. So you can have a public deed (call it what you like) and provide for what happens after your death and that will be considered to be a will.

- There was a case going back to 1905, look it up which you won't find online, you have to look at the published volumes, or else look up Phillip Sciberras's ABC, and look up succezzjoni, try to find a key-word.

- Now, issues have arisen as to how to interpret a will. So there's this will and there's room for doubt as to what the person actually intended. It has given rise to litigation even recent and the courts have consistently (until recently) stated that the will has to speak for itself. That is how a will is interpreted the will has to speak for itself. Look at the clause in the will, or look at the whole will, read it and try to make sense of it if the literal interpretation is clear, if when you read it there's no room for misunderstanding no matter how unfair the provision is or unjust that provision is valid and it has to be interpreted in that way.

- Normally in a contract (let's go to contract law and the rules of interpretation of contracts in Malta). In Malta, when interpreting contracts one has to look at the wording of the contract and if contract leaves no room for doubt you have to interpret it according to it's literal interpretation, you take it literally as it's read, if there's room for doubt still, you have to interpreted that clause, if there is still doubt then of course you have to see the surrounding circumstances but first and foremost the contract has to speak for itself and only after that if you look at the parties and their intention.

- Now when a person dies, he's dead he can't speak, he's not going to rise up from the dead, go to court and says that's what I wanted to do. The court respects this and it says once the person who made the will cannot speak his words are his will, that is what he said, that is what he wanted and we will interpret what he stated in the will literally because that's what he signed for.

- The courts have consistently refused to interpret a will in any other way, there have been situations where injustices have been created but if the wording is clear it's clear.

- There have been instances where the courts in order to interpret a will have also looked at previous will. The before and the after, the changes made from the first, to the second to the third will. Dr. Borg Costanzi knows a case where a person had 22 wills, and his last one was a total disaster.

- In order to interpret the will its what the testator wrote, his will, his previous wills, you look at them.

- When drawing up the will, unless written by the testator themselves, it's the notary drawing the will. When writing the will out the notary writes out the will, you tell the notary that you want so and so, when you go to a notary you are going to a person of trust. You're going to someone who you have full confidence that you can disclose to that person the ultimate wishes. You are going to have a discussion with the notary. There's going to be a discussion, the notary will speak to you, understand your family circumstances, what's going on in your life, maybe try to

discuss with you or you want to discuss with the notary, why you want to make this provision and not that, maybe you have some doubts, saying I'm not too sure whether to do this or that. It's going to be a conversation and the notary will help in this. A will will take at least a good hour or two to be drawn up, you may have a template but if you want to do the job property you have to take your time and explain to the person making the will.

- When coming to make a will, sometimes they go in company, so there's more than one person present when drawing up the will, it doesn't matter. The only person who by law is empowered to write the will and deduct the wishes of the testator is the notary. If the person making the will is accompanied by the elder daughter and she is bossy and tells the father do this and do that, and the father tells the notary Sur nutar, this is what I really want and she says that I know my father this is not what he wants he wants something else, and he's not being straight with you, he is making the will, by law the notary is the only person whose empowered to document the wishes and you have no right to interfere. This power arises from chapter 55 (the Notarial Profession and Notarial Archives Act.)

  - Article 25.

  - **25**. (1) In this Act, "party" refers to the person who is a party to the negotium which is incorporated in the act and, in the case of a will, to the testator; and "appearer" means the person who appears before the notary either as a party or as the representative or agent of a party.

  - (2) The notary shall not receive a notarial act except in the presence of the appearers.

  - (3) The presence of two (2) witnesses shall be required only in the following cases:

  - (a) whenever any of the appearers so requests; and

  - (b) whenever any of the appearers does not know how or is unable to sign his name:

  - Provided that in the case of public wills and in the case of acts of delivery of secret wills, the notary shall in all cases inform and explain to the testator about the testator's right to have two (2) witnesses present:

  - Provided further that in the case of public wills if the testator chooses not to have two (2) witnesses present, the notary shall in the will declare that he has informed and explained to the testator about his right to have

two (2) witnesses present and that the testator chose not to have two (2) witnesses present:

- Provided further that in case of acts of delivery of secret wills if the testator chooses not to have two (2) witnesses present, the notary shall in the act of delivery declare that he has informed and explained to the testator about the testator's right to have two (2) witnesses present and that the testator chose not to have two (2) witnesses present.

- (4) It is the duty of the notary to direct the drawing up of the act from beginning to end, even when he causes it to be prepared by a person whom he deems trustworthy.

- (5) The notary alone is competent to ascertain the will of the appearers and to inquire, after reading over and explaining the act to them, whether it is in accordance with their will.

- (6) Notwithstanding the provisions of this and any other law, provided no witnesses are required in terms of sub-article (3), nor does the proviso to article 34(1) or any of articles 36, 37, 38 apply, where all the appearers on the act declare that they are fully cognisant of the contents of the act and its annexes, they may by an express declaration exempt the notary from reading over the act to them in which case the following formalities are required:

- (a) at the foot of the act and before the final signatures, the notary records both declarations in his own handwriting and signs what he has recorded,

- (b) immediately following the notary's signature, each appearer separately writes in his own handwriting "I confirm this exemption" to which he affixes his signature, and

- (c) all the appearers sign every sheet of the act in the outer margin and every annexe, unless the annexes have already been signed in terms of article 28(1)(k)

- Section 25(5), so when drawing up the will, reading it and explaining it that is the sole and exclusive competence of the notary. It is his job and only his job no one else's. He has to explain and document the wishes of the testator.

- So if an issue arises as to interpretation of the will who is the best person to speak about what the testator wanted after he died, clearly it's the notary if they remember, the testator would have had in most cases a very intimate and detailed discussion, it would have taken some time to draw up the will, people go again and again until they're happy, the first draft, second draft, third draft etc.

- The notary is the person who has the direct contact with the testator, he is the one by law bound to document the wishes of the testator and make sure what is written is what the testator wished.

- An issue arose in a case decided last week, Michelle Vella vs Philip Camilleri (Dr. Borg Costanzi is sure that it will go to appeal) What happened here? We have to side track a bit ,when dealing with succession in later lectures we will come to two principles called accretion and substitution.

- Accretion is a situation where a testator appoints two or more people as beneficiaries and he says with the right of accretion, what does it mean? It means that if one of those two or more people dies before the testator, the person who died's share will accumulate in favour of the survivors. So if he appoints four people with the right of accretion and Fred dies before the testator then if you apply the rules of accretion, Fred's share will go to the other three so instead of getting ¼ they will get ⅓ each. That's the right of accretion it accrues in favour of the survivor.

- That is one rule, then there is the rule of substitution. Substitution is different. Substitution means that if the person dies before me, I substitute him with someone else. So if I leave four people and I say with the right of substitution that if Joe dies before me his children will take my place than in that case if Joe dies before me the other three get one quarter, and Joe's share will go to his children.

    - An example would be let's say there's a will and the father leaves his four children as heirs with the right of substitution. What does that mean? If they're all alive when the father dies they get ¼ each if one of the children dies before the father and there are grandchildren, the rules of substitution mean that the grandchildren of the person who died will take the place of the person who died. So if my daughter has two children and my daughter predeceases me her 2 children will get ⅛ share each.

- So you have two rules, accretion and substitution.

- Take the example as happened in this case where the testator had four children (in Vella vs Camilleri), and in the will the testator wrote I will leave my four children in equal shares with the right of accretion and substitution, he wrote them both and the issue arose which comes first, accretion or substitution.

- When the testator wrote he said I leave my four children in equal shares between them with the right of accretion and substitution and the dispute arose do you apply accretion first or substitution first? If you apply accretion first, if one of the children died as happened, then the grand children of the person who died get nothing, they get the reserved portion only, they don't inherit by will, they inherit

by law the reserved portion because the deceased son's share accrued in favour of the other three.

- If you apply the rules of substitution first then the grand children get the ¼ share between them and this dispute arose and it was argued that when the will was written and the notary wrote with the right of accretion and substitution it was implied that accretion comes first and then substitution. This is what was argued and the court had to decide this point.

- In this case, if all the children died then the rules of substitution will apply. If all four children died before the testator there's no one to accrue, then of course you go to the rules of substitution but in this case one child has died and the question arose what happens to that ⅓ share? Does it accrue in favour of the other three or does it go down the line to the grand children? And in this case the plaintiffs who were the grand children, the grandchildren were actually the defendants but they did a counterclaim, so it was two cases in one. In this case the grand children requested the court to order the amendment of the will, to do an att korretorju. If there's a mistake in a contract, and the court has the power to do it but this is the first ever case that was heard of where the court ordered that there was to be an att korrettorju. It ordered that the will was modified. This is totally wrong in Dr. Borg Costanzi's opinion.

- The court ordered the amendment of the will, appointed a notary and ordered that the clause in the will is re-written. There is an overlap and certain rules of contracts apply to the rules of succession but in succession there are certain rules like capacity and consent.

- In this case in Dr. Borg Costanzi's opinion the court is legally incorrect, you cannot amend a will. And caselaw going back consistently says this.

- In fact this is why the law requires that the will is a written instrument and this is why the notary is the only one empowered by law to translate the wishes of the testator in the form of a contract.

- What convinced the court was that one was that the testator had an excellent relationship with all the family and the grand children, they got on really well, there were no problems, no fights, so it seemed as strange that the grand children don't inherit. It stuck out like a sore thumb and secondly the notary himself, testified in court and said I write my wills like that, and that is what the testator intended, the testator intended that first substitution takes place and then accretion. He actually said so. In other words first the grand children inherit.

- Normally a will is not written like that and if you speak to a notary or ask a lawyer to show you a will if you come across this clause, mostly times it will be written

differently. Normally they say I appoint my 4 children as universal heirs in equal shares with the right of substitution should any of my children peer-decease me and should my children not any grand children or issue then with the right of accretion, accretion is last normally.

- What in dr. Borg Costanzi's opinion should have been the case. If you read the will in its literal version it's clear accretion and substitution and accretion is first but it's written in the same sentence so if you read that sentence and you say accretion comes first, is it believable that the testator is making a will and saying that as long as any of my children are alive it's only the surviving children that inherit and only if all my children die before me will the rules of substitution apply. It sounds wrong. It sounds really wrong and doesn't figure. It's not something that makes sense.

- Secondly these two are put in the same sentence, how can you marry them together to make sense and reflect realities?

- What in Dr. Borg Costanzi's opinion the court should have said that there's a conflict of interpretation of the will because it doesn't make sense when looking at the larger picture and the judge should have arrived at the same conclusion, that there was room for interpretation and maybe a mistake and interpreted the will differently and said substitution comes first and then accretion but using the rules of interpretation not ordering the correction of a will. That is where the judgement is legally wrong.

- Funnily enough, if you look up this judgement it referred to case law and the judge quoted the case of Caruana vs Portanier decided 7th January 1884. Which says li "Fdak il- kaz jinghad li fejn il-kliem ta dispozizzjoni testamentarja ma toffrix ambigwita, mhuwiex lecitu li jinbidel is-sens car taghhom".

- You can't be clearer than that. Dr. Borg Costanzi suspects that one there was a clear mistake and there was no doubt that the notary made a mistake in the will and secondly had the judge applied or come to a different substantive conclusion, the notary would have been exposed to being sued for wrongly interpreting the wishes of the testator by his own words as the notary admitted that that was what the testator wanted, that he wanted substitution first and accretion later.

  - 2. Revocable by Nature

  - Caruana Galizia: a "draft" which becomes "final" upon death

  - NB: Not only death but also "loss of legal capacity"

  - Enforced by Art 781:

- 781. (1) No person may waive the power of revoking or altering any testamentary disposition made by him.

- (2) Any clause or condition purporting to waive such power, shall be considered as if it had not been written.

- A will is revocable by nature, in fact if you look at the Caruana Galizia notes, on inheritance are really good, difficult and technical but you may think they're antiquated as he goes back to roman law times, but remember these notes were written by Dr. Caruana (it was first they weren't caruana Galizia just Caruana) and we're looking at the early 1900s. He was extremely well read, he used to travel a lot meet other professors at other universities, he used to lecture, he was very literate, he could write italian, French, Portuguese, so he was very up to date with legislation. So when these law notes were written, the original version was fantastic, eventually his son wrote them again and this is what we have now. The version by the son, Caruana Galizia, and probably updated by Prof. Ganado. Keep in mind that there are many parts of the law of succession which have been changed. So the basic principles, the notes were good at the times they were written, some parts are not applicable today and we will be lectured on the present law and not the old law.

- Unica Charta wills are one of those areas where the law has been changed. He says that a will is a draft and the draft only becomes final when the person dies because that is when they take stock and see which is the last will. Which also means that you can't be stopped from changing your mind, revokable by nature. You can revoke it and change it at any time you want. The only thing that can stop you from doing so is either if you die or lose your mental capabilities, if you are no longer legally capable to make a will, if you become interdicted for example or if you're insane. Then in that case you cannot revoke your will but as long as you are legally capable or alive you can revoke and change your will.

- This clause is clear article 781, No person may waive the power of revoking or altering any testamentary disposition made by him. Any clause or condition purporting to waive such power, shall be considered as if it had not been written.

- You cannot do a contract and say you're not going to change your will, you always have a right to change your will even in a Unica Charta, you can always change your mind/will. There's only one exception, which is donations in contemplation of marriage, we saw this last time where you can make a prenuptial contract with your daughter/son who is going to get married and in that contract you say when I die you will get this and that is binding but other than that, you can't waive the right to revoke and you can't leave any condition relating to such.

- Art 588 – Definition of Inheritance
- 3. Made by a Person according to rules laid down by law
- Only a “Natural”person” Must have legal personality and legal capacity
- Must be done “according to law”

- Now, the other clause made by a person according to the rules laid down by law, made by a person and rules laid down by law. Person means a physical person, a human being, a company cannot make a will, a legal person cannot make a will has to be a natural person and according to rules laid down by law. So as for formalities you look at the law.
  - Art 588 – Definition of Inheritance
  - 4. For the time when the person ceases to live
  - Punctum temporis: upon death.
  - That is when the will is given effect and not when the will was drawn up.
  - Beneficiaries/property may have changed since then
- Now the will provides for what happens to the patrimony of the deceased when he passes away. The point in time to look at is the point of a person’s death this is where you take stock forming part of the will, of what’s written in the will and what’s going to happen to the estate. Between the moment the will was done and the person’s death circumstances may change so what happens if there’s a change in circumstances both to the persons who are to benefit or to the objects forming part of the will?
  - For example what happens if when the will was made 20/30 years ago the testator said I leave this villa to my best friend Joe and Joe dies before me and in the will there’s no other clause or statement what happens if Joe dies before me what happens to this benefit? When I die Joe is already dead and gone, can Joe’s heirs come along and say hang on Joe should have inherited when the will was done Joe was alive so at the time the will was made Joe could have inherited at that time, that’s not right you look at the moment when the person (testator) died, if when the testator died Joe has passed away already Joe’s heirs get nothing unless there’s a clause saying with the right of substitution. If the clause of substitution is not written then that clause since Joe is an outsider substitution doesn’t apply.

- So even though at the moment that the will was done that clause had a binding effect, if the testator died before Joe, and Joe was still alive, he would have gotten a villa. But because you look at the picture when the testator dies and Joe had already passed away then that is the moment you examine the situation, when the testator dies.

- Another example is for example ii leave Joe my villa but five years after making the will I sell the villa, so the villa isn't mine anymore. So when I die, Joe says where's the villa? It doesn't exist anymore, if the testator sold the item during his life time, that legacy will no longer have any effect, so the testator makes a will, leaves an object to his best friend and sometime later he sells it, when the testator dies it no longer forms part of the patrimony and Joe gets nothing. The testator has full control over his patrimony but the fact that he sold it means that he changed his mind. It means that even though in his will he wrote that he's leaving the object to Joe later on he clearly changed his mind and he sold it, he got rid of it, there was a change in circumstance.

- The same rule applies however even though he didn't sell it let's say it got destroyed if the testator didn't replace it then of course that object is no longer part of the patrimony and Joe will get nothing unless there's an added condition which elaborates further. So the point Dr. Borg Costanzi wanted to make is that you look at the effect of the will as to the effect on the date the testator dies, when he dies you say ok this is the will, these are the conditions, these are the legacies. Are the legatees alive, are the objects still part of the inheritance? That is when you look when the person dies.

- Art 588 – Definition of Inheritance

- 5. Which disposes of the property in whole or in part

- A transfer of Patrimony. May contain other requests. Eg: Funeral arrangements ect.

- "in whole" or "in Part"

- May dispose of a generality of assets without individualising them.

- Now the will may dispose of the property in whole or in part. It doesn't have to provide for the whole estate or it doesn't have to provide for any of the estate, make a will saying you can make a wish, say are we dying my children to that on the anniversary of my death they do a marathon. Or I can make a will saying isma I didn't say this to you in my life time but, now I'm writing it in my will to make sure you read and you're a total idiot, you're wrong with that argument in that fight and

I hate you and can't stand you and that's it you can sign off. But normally in the will you leave your estate.

- It is not normal to draw up an inventory in the will, so when you make a will you don't say I have a list of these items and you say what's going to happen and whose getting them, it's not normally done, but it can be done even though it's not necessary.

- In fact when drawing a will you can make it by singular title or by universal title. Then you say by universal title, I leave all my stuff to, 50% to this one ¼ to that one, what's left, a universality, some group of assets and liabilities. If you want to dispose of singular times, particularly in a special way then you can do a special clause. You can say there are these objects, for example jewellery, I want my jewellery to go to the girls. That is called a legacy, you are leaving a single item.

  - Art 589 -591 - Universal or Singular title:

  - 589. (1) A will may contain dispositions by universal as well as by singular title.

  - (2) It may also contain dispositions by singular title without any disposition by universal title.

  - 590. (1) A disposition by universal title is that by which the testator bequeaths to one or more persons the whole of his property or a portion thereof.

  - (2) Any other disposition is a disposition by singular title.

  - 591. (1) The word "heir" applies to the person in whose favour the testator has disposed by universal title.

  - (2) The word "legatee" applies to the person in whose favour the testator has disposed by singular title.

- These clauses 589 to 591 we've already touched on them that the will can dispose of objects by universal or singular title if it's by universal title the person is called an heir, if by single title the person is called a legatee. Now what you call the person is relevant but not absolute, you've got to look at the contents and in fact this issue had arisen in a lawsuit because if a person is an heir, that person is answerable for the liabilities of the estate.

- Let's say the person owed money and I am one of the heirs and I inherited ¼ I can be made to pay ¼ of that liability because I'm an heir. If you're a legatee you're not an heir so not bound to pay a liability, so if I leave Joe my villa and the bank is owed €500,000 on that villa, Joe gets the villa for free. He doesn't owe a

single penny, the loan is paid by the heirs. If I leave Joe my villa and there's a liability with the bank, Joe will get the villa free of liabilities.

- The law says that you can dispose by singular or universal title, so you can have legacies and appointment to heirs. Now as we were explaining before, an heir is answerable for the liabilities up to the share he inherits. This section written in article 600 something or 800 something (one of the later sections).

- Keep in mind that when it comes to assets, they are uncommon and you don't know exactly what you're going to get. When dealing with the law of property you went into the rules of division of common property and you look at article 495(3) . If property is common and it has been common for more than 3 years then you have a share in each individual item but until those 3 years have passed you don't know what is yours. You'll only know what is yours when the division partition takes place (the famous Borg Olivier case, which says that there's this uncertainty of what you're going to get and if you sell part of something that sale is held in suspense until the division takes place).

- So when it comes to assets, the plus side of the inheritance, you have an undivided share in all the assets but you don't know which will be yours, you don't know if you're going to get a car, a Porsche, a Mercedes, a boat, a villa, you don't know. When you divide you will find out. If there's no division and there's nothing stopping the articulation of article 495.

- After 3 years you have a share in each item, you have ¼ in the house, ¼ in the boat, ¼ in the car etc, and you can sell that ¼ then. Now, that's as far as assets are concerned. As far as liabilities. The heir is not jointly and severally bound, in other words the creditor cannot sue one heir for the full liability.

- He can only sue each heir up to the share that the share inherited, if he inherited ¼ of the estate he pays ¼ of the liability.

  - Art 589 -591 - Universal or Singular title:

  - Difference between Heir and Legatee:

  - Heir Steps into shoes of testator: Inherits Assets and liabilities

  - Testator's Patrimony is vested in the Heir

  - "Confusio" but vide Benefit of Inventory

  - Obligation to give effect to the will

  - Legatee: a singular gift.

- Wording of the will: Mifsud vs Gauci (7/2/1935) " erede usufruttario"
- What if I call it a "legacy" and leave "all my estate to"?
- Is it the NAME or the EFFECT which determines whether it is a bequest by Singular title or Universal Title

- In the case, Mifsud vs Gauci (1935) there was a will where the testator appointed an individual and he granted him a usufruct of some property and when drawing up the will, the notary called this benefit, he called him an erede usufrutuario, and this person was not one of the universal heirs at the end and the issue arose is this a legacy or is this an appointment of an heir? Now the will said erode usufrutuario, and the creditor sued the legatee for the liability saying cause you're an heir therefore you have to pay the court said forget that you've got to look at the substance of the clause and in substance this was a disposition by singular title. It was a specific item given to a specific person. It was not a bequest by universal title and therefore it is not an appointment of an heir but a grant of legacy and therefore the legatee (Gauci) was not bound to pay the liability because if he is not an heir he's not bound and he was acquitted, it's not what you call it its the substance of it that counts.

- Earlier on, Dr. Borg Costanzi was asked, what if there are legacies but no appointments of heirs you have to look at the wording of the will. You can have a legacy where you say I leave of title of legacy the rest of the estate. In Dr. Borg Costanzi's opinion that's an appointment of an heir even though it was written as a legacy as if he says the rest of the estate it's everything. One may argue when you have rest of estate applies only to assets and not liabilities. If the will says I leave the rest of my assets then yes, it is a bequest by universal title but it is not an appointment of an heir because you're not getting the liabilities, you're not getting everything. But if you have just legacies and no appointments of hers then you apply the rules of intestate succession.

- So if for example a father has four children and he writes a lot of gifts in his will but he does not appoint any heirs, by law the four children can be asked to be appointed as universal heirs. They file an application in the court of voluntary jurisdiction for the opening of succession in their favour. Even though they're heirs they have to honour the legacies and grant the legacies to the beneficiaries. In fact this is one of the other obligations and differences between an heir and a legatee. When there is a person appointed as an heir, the transfer of the patrimony is seamless, it's as soon as a person does something to indicate his acceptance of inheritance (no formal document or say yes I accept the inheritance, it's automatic) if my acts and my demeanours, what I'm doing with the estate are such

that they can be only be interpreted that I'm accepting my inheritance, then I'm accepting the inheritance, it shows the transfers immediate and automatic.

- In respect of legacies, if the legatee is not in possession of the legacy, he has to be put in the possession of a legacy and the time bar for doing so is 10 years. So if the legatee, if you have a legacy, if Joe who inherited this villa doesn't come forward and say give me this villa and 10 years have passed, after 10 years the heirs can say 10 years have passed the person is time barred, they can say we'll give it to you because the defence of prescription is facultative, you only raise it if you want to you don't have to but if this guy comes after 10 years they can say it's too late, but within those 2 years he can come and say give me possession of my legacy and they will have to transfer physical possession.

- If it's immoveable they have to do a contract and do what they call a tal-immissjoni fil-pussess. In English it's called a contract of seisin. It's easier to understand and normally, if there's a legacy notaries will insist that if it's immoveable property that there's a public deed transferring physical possession. But you don't have to do it it's not a legal requirement that you do by force.

- If the legatee has physical possession, if he has the keys to the villa it's enough legally speaking but for purposes of legal certainty, nowadays notaries and banks will ask for a kuntratt tal-immissjoni fil-pussess. So the heir has the obligation not only to pay liabilities but even to give effect to the legacies, if there's a whole list of commands in the will, order no. 1 my house goes to Joe, order no. 2 the car goes to Robert etc, the heirs (universal heirs at the end) have to see that agenda and go through it one by one and see it through those who want the legacy have to ask for it and if they ask for it you have to give it to them and they are bound to do so.

  - Art 592 – Unica Charta wills:

  - 592. (1) A will made by the spouses in one and the same instrument, or, as is commonly known, unica charta, is valid.

  - (2) Where such will is revoked by one of the testators with regard to his or her estate, it shall continue to be valid with regard to the estate of the other.

  - (3) A will unica charta shall be drawn up in a manner that the provisions with regard to the estate of one of the testators are drawn up in a part separate from those containing the provisions of the other spouse.

  - (4) The non-observance of the provisions of sub-article (3) shall not cause the nullity of any provision of the will if it is otherwise intelligible; but the notary drawing up the will shall be liable to a fine of two hundred and thirty-two euro

and ninety-four cents (232.94) to be imposed by the Court of Revision of Notarial Acts.

- Unica Charta wills, this part of the law is a part of law that has given rise to lots of instigation. A Unica charta will is a will done by a husband and wife together, normally a will is done by a person on his own but in a case of a married couple they can do it together and section 592 deals with it.
  - Art 592 – Unica Charta wills:
  - Law Amended in 2004, 2007and 2017 – do not rely on OLD NOTES
  - Roman Law
  - Code de Rohan (Bk IV Chapter 1 Para. 20) (Vide Gauci vs Mifsud PA 1501/00TM ded 4/4/2006)
  - Ord VII of 1868 also took into consideration Spanish and Germanic laws
- Now, keep in mind that dealing with unica charta wills that the law has been changed, if you look at old notes and old court judgements you will find different conclusions.
  - So be well aware that the law is different to when it was before (Dr. Borg Costanzi will point out a lot of changes). We will concentrate on the law as it stands today. There are lectures and dissertations which compare the old law and new law, there are some articles by Dr. Debono and some dissertations. Keep this in mind at all times. If you base your answer on your old law you may give a totally wrong answer,
- When dealing with a unica charta will, a unica charta will is a deviate from the law and earlier on we said that a will is done by a testator and only the notary can take note of those wishes and also we saw that a person cannot be put into a situation where he cannot revoke his will/have external influences.
- Here you have a situation where a husband and wife go together they've been discussing, arguing, fighting, agreeing, as any married couple does. And eventually they go to a notary to do a will together, the wife says let's do this, the husband says let's do that, and they come to a compromise, which means no one is getting their way but they are agreeing in a middle road, an intrusion in one's free will.
- Under roman law this wasn't allowed, when it came to enact our civil code in 1868 this issue was discussed and it decided to base on Germanic and Spanish law, you don't find many jurisdictions which cater for unica charta wills.

- If you want to look at some history on unica charta wills look up the case Gauci vs Mifsud.
    - Art 592 & 595 – Unica Charta wills:
    - 592. (1) A will made by the spouses in one and the same instrument, or, as is commonly known, unica charta, is valid.
    - 595. It shall not be lawful for any two or more persons, other than the spouses, to make a will in one and the same instrument, whether for the benefit of any third party or for mutual benefit:
    - Provided that a secret will in one and the same instrument shall not be made by spouses after the 15th August, 1981.
    - Spouses:
    - Only Public Wills
    - What if parties subsequently divorce
    - What if marriage subsequently annulled?
    - Psaila vs Aquilina PA 124/19 FDP dec 30/6/21 (Appealed)
- Now, when making a will, a unica charta will is an agreement it's a kind of partnership when the husband and wife agreed with them what's to happen with the patrimony when they die. They're regulating together what's going to happen. Normally in most cases they will die one after the other so one is going to survive and one is going to pass away.
- You would expect that when they draw up this will, the one who has passed away first would when making the will have his mind at rest saying okay we made this will together we had a whole discussion on it we spend a lot of time thinking and drafting this will and we finally have a compromise, and if I die first my wife/husband will honour my wishes. So when making a will there's an idea, an underlying theme that this will will survive both testators and if one person changes the will, it is a kind of deception, it could be deception but if one of the testators changes the will without the other one knowing it of course there's an element of deceit because they have done will together I agree to compromise, I didn't really want this but to make you happy I chose the middle road and we agreed on a particular package and then I don't expect the other person to go behind my back to change everything so if I die first, she gets the benefits, but if

she dies first then our package doesn't apply her new will will apply and I've been tricked. The law caters for this kind of situation.

- That is why there is litigation, because the law when trying to control and go out of the norm you are going to have conflict. When dealing with inheritance emotions are very raw and people are extremely sensitive and they are sensitive about stupid things sometimes, (I wanted the grandfather clock why did my brother get it and not me, fights happen and fights between family are horrible and hard and vicious and hurtful). That is why there's a lot of litigation in succession, ideally in any will try to keep it simple avoid complications if you ever can keep wills simple and straight forward. If the testators want to do something differently they'd do it in their lifetime. If you have a complicated will and unica charta wills alone are complicated, if you have additional complicated clauses you are going to give room for more litigation.
    - Art 592 – Unica Charta wills:
    - (2) Where such will is revoked by one of the testators with regard to his or her estate, it shall continue to be valid with regard to the estate of the other.
    - Bilateral scope of UC will
    - Bianchi vs Galizia (App 19/4/1937 Vol XXIX.i.991)
    - Can be changed unilaterally – Liberty to change one's mind
- One can note in this section, where such will is revoked by one of the testators with regard to his or her estate, it shall continue to be valid with regard to the estate of the other.
- So already the law is saying that even though there's a joint will, it is envisaging the situation that one of the spouses can change it. it's clear, as far as my own inheritance, I can change my wills as I like so going back to the fundamental rule we mentioned earlier that no one can be forced or put into a situation that he can't change his will that rule applies I can change my will at anytime. Sometimes there are consequence but as far as what I own I can change my will.
- The law makes it clear here, if I revoke my unica charta will, my part, I can do so, and my will for my patrimony will be valid. Now, one change that was made here is the drafting of the unica charta will, in the old unica charta wills, it was a two in one situation where the clauses were in the plural, we bequeath to each other, we leave our children and when one of the spouses died it became very difficult to extract the will of the deceased person without revealing the will of the surviver.

- If you had a unica charta will, a will remains secret until you die and if you die before the other person and they want to find out the will, if it's one of these old unica charta wills one has to go to the notary and say, sur nutar, give me an extract of this unica charta will and he has to convert the you into an I and obviously if it's one of those old wills I can interpret that that was the identical wish of the surviving spouse.
    - Art 592 – Unica Charta wills:
    - (3) A will unica charta shall be drawn up in a manner that the provisions with regard to the estate of one of the testators are drawn up in a part separate from those containing the provisions of the other spouse.
    - To do with drafting and practical effects when publishing the will.
    - Non observance does not render will null
- This was changed and now when they notaries draw up a unica charta will they have to draw it up in two parts, first the part of one spouse, spouse A I leave etc, then they continue and spouse B's wants. So if an abstract is required the law will publish pages 1-4 or pages 4-8 depending on who of the spouses passed away so the will of the survivor is not disclosed. If the notary doesn't stick to this formality it doesn't render the will null, it just subjects the notary to a fine of €232.94 and the fine will be imposed by the court of revision of notarial acts.
- When a notary does a contract, and does will, the contracts and wills, the originals are sent to the notary to government, including the wills. The contracts are bound in one set of volumes and the wills are bound in another set of volumes, so you have the volume of wills, and the volumes of contracts, and they go from the notary to the government. The wills are still confidential, but each notary is appointed a revizur, a revisor, the government appoints revizuri to read through all the contracts drawn up by a notary to see if the formalities of law, the form not the content have been satisfied.
- Was the contract registered in 3 weeks? If not the contract has to pay a fine, is there a mistake in some part of the contract as to a form? The notary is subjected to fine, did the notary draw up the will in the proper form, the notary is subjected to a fine and the revizur will draw up a report after examining the contracts and the wills and submit it to the court of revision of notarial acts (at the moment presided by judge Galea Debono) and the notary will be fined accordingly. What happens is that if the notary makes this mistake and draws up the will in an improper manner the will is valid but the notary can be fined €233.

- It is not possible to do a unica charta will in the form of a secret will. Why? When drawing up wills there are three types of wills, the three are public wills secret wills, privileged wills. The main ones are public wills. 90% of the cases are public wills. A public will is a will drawn up by a notary and indexed in the public registry, indexed by name in the public registry. The contents of the will are secret but the fact that a will has been made is public because the name goes on an index. So I can go to the public registry and check has someone made a will? They will carry out a search and give a certificate that the person has made the will, there will be a list of the public wills, the contents won't be known but you'd know that as a fact the person has made a will. And that is why it is called a public will because the fact of having made a will is public

- A secret will is secret both in content and also in the fact that it has been made. You cannot find out whether a secret will has been made unless you present a death certificate. Secret wills are kept in a safe in the court of voluntary jurisdiction, you have to submit a death certificate a search is carried out on the indexes which are confidential kept by the judge and deputy and the deputy of the court will issue a certificate stating yes there's a secret will, no there's no secret will. That's the only way to find out if a secret will has been done, by presenting a death certificate.

- What happens if there's a unica charta will and it happens to be as a secret will? I present a death certificate of the husband and this unica chart will comes out it will be in a sealed envelope, when the will is sent to the court, the document is not presented as a loose will you present a sealed envelope. The contents of the envelope are opened when the court opens the publication of the will. Until this envelope is opened you won't know what is inside it and sometimes there have been some unpleasant surprises.

- If there's a unica charta will, if it's a secret will you're going to know that the survivor made a will. Normally a secret will is delivered in a court by a notary not always you can actually go to court and write it there and then with the court deputy but normally the notary goes with it and the notary will go with a sealed envelope, and on the envelope the notary will write "the contents of this envelope are the will of the certain person son of this and this, it is sealed and usually there is a sigill, waxed and stamped. Signed by the notary, this document is handed over to the court, to the deputy, it's recorded and put in a safe not opened.

- Alternatively if one wants to make a secret will in court you can actually go to the deputy, meet up and do it there and then with the court deputy or even with the judge and again it's put in a sealed envelope and in a safe but the secret will is sealed, you only get out a sealed envelope from the safe not a loose paper.

- The reason why they don’t want unica charta wills is because it will defeat the purpose of a secret will, the moment the first spouse dies you know there’s a unica charta will and that will is published in its entirety. The court will not remove part, save part, so by law it’s not allowed to have a unica charta will as a secret will, you can’t do it in the sekonda awla.

- Earlier on someone asked what happens if the parties annual the marriage or there is divorce? It’s an interesting point to make, what happens if at the moment the unica charta will is done we’re married and later on that marriage is terminated. You have to distinguish between divorce and annulment first of all. In the case of a divorce, the marriage is valid until terminated. So that will was valid at the moment it was made and if that couple get divorced, that unica charta will will still be valid unless it has been revoked that will is still valid.

- This is of course very hypothetical, because normally before a divorce there will be a legal separation and in a legal separation, whether it’s by court or by agreement there would be a clause or part of the judgement dealing with inheritance. Not always but in most cases at least nowadays in contracts for sure there would be a clause where the parties hereby declare that any previous wills are revoked that they will not inherit each other and they renounce even to the reserved portion. It’s an extended clause in a legal separation agreement.

- In court, if it goes to court it depends on whether there has been forfeiture or not.

- In most cases however if there has been a divorce the parties would have taken advice and proceeded to change their wills but if they don't’ that unica charta will is still binding.

- However what about annulments? Annulment is a different story.

- Look up the judgement Fuchs vs Fuchs. Where, this woman was left her maltese husband met an American left Malta, went to las vegas, had a fantastic time and got married, she wasn’t even separated and the guy in Las Vegas told her are you still with you husband? She said no we left two months ago. The couple was happy and they lived as a couple Mr and Mrs Fuchs for a number of years and traveled the world, because the guy used to work in the oil industry, he was an engineer and they really had a nice time. Eventually they came to Malta and things started going bad, because the guy started having affairs with other women and in the end the wife got fed up and filed for separation and in his defence the husband said hang on, when you married me you were married to someone else, how can you marry me in this way the marriage was bigamous.

- In between the wife had got an annulment of her first marriage and she argued yes it’s true that when we got married in Las Vegas I was still married but later on

I got my annulment. The court said that basing itself on canon law as our civil law was silent on this point, the court of appeal said that if at the moment of second marriage there was a legal impediment that second marriage is not valid even if that impediment was subsequently removed and the court therefore said the second marriage was null and void.

- It never existed it ignored the principle of retroactivity of an annulment, normally when there's an annulment of a marriage the effect is retroactive, from day one what we call ex tunc, a divorce. Not ex nunc, a divorce, the effect is ex nunc from now, whilst an annulment is ex tunc, from day one if you have a contract of sale for example and I sell a house and later on I do a contract annulling the contract of sale it's as though the contract never took place never existed, the sale never occurred.

- If I sell the same house twice I sell the house to Joe and a year later I sell it to Peter and then later on I rescind/annul the first sale the second sale will be valid and this argument was made but they said but in contract law if you rescind the firs contract the second contract is binding. The court said no with marriage its different we have to go to legal principles and in this case they adopted roman catholic principles, and they said under roman catholic religion if you are bound by a previous marriage you have a legal capacity that cannot be cured not even by subsequent events. You have to get married again you can't even do a contract and say I validate my first marriage it doesn't work that way. You have to get married again. That was Fuchs vs Fuchs.

- This issue arose in Psaila vs Aquilina, in Psaila vs Aquilina, the wife suffered from mental sclerosis and she got married, she was already suffering from multiple sclerosis and after a few years, the marriage broke down and they got an annulment, a church annulment. In the church annulment the tribunal said that the marriage was not valid because the wife was unable to assume the obligations of marriage. She had a mental incapacity, inability to assume because it was proved that the multiple sclerosis had affected her neurological powers.

- During marriage they had done a unica charta will and sometime after she was interdicted. So she couldn't change her will and she died, and her husband who was no longer her husband because the marriage was annulled claimed that he was her universal heir because they left everything to each other. The girl's family objected of course, they said first you marry our daughter, taking her away from us, she's sick, you get the annulment because she's sick and now you want to inherit her? The court looked at the marriage act, if you look with the marriage act there's a clause dealing with the effects of an annulment and it makes a distinction whether the spouse is in good faith or bad faith, the court said that in this case the husband was in good faith when he married her, and it's true the evidence in

this case showed that he cared and looked after her but it became too much, he went to see her regularly as a friend not a spouse. The court said he's in good faith therefore the spouse is entitled to get the benefit of the unica charta will but then it said that since (we will come to it again) the church tribunals said this woman was incapable of giving valid consent for marriage, she was unable to assume the obligations of marriage how much more was she unable to make a will? She said she was mentally incapable of expressing herself freely and therefore the court said that the will was invalid for lack of capacity, it skirted around the problem and provided probably a just solution. The judgement is now pending in appeal, it hasn't been decided yet.

27th February 2023

Lecture 4.

- Law of Succession

- Last time we were talking about unica charta wills. Most contestations in court arise from unica charta wills, this is very important, in practice and even in the exam. There will always be a question on unica charta will. It is a part of the law that we really need to understand. A unica charta will is done by two persons, a husband and wife, they have to be married and it is in a way a kind of way bilateral contract, (in the nature it's a bilateral contract) it's two people agreeing together to make one will.

- So, of course these two people have spoken together, they've discussed it and they've agreed on what they both want. One will is in sync with the other, they're synchronised. They're synchronised because there has been a discussion and an agreement, a discussion and an agreement implies that my consent is being given because you're giving your consent, I've agreed because you've agreed and that is why it is very close to a bilateral contract. The two spouses have kind of agreed between themselves this is how they both want their estate to be regulated when they die.

- Now, normally if it's a bilateral contract, (forget for a moment that it was a will), if two parties agree and they agree to do something

  - For example two parties agree to have a joint venture and they agree that they're going to rent out a shop in order to do photocopies for students, they said we're going to do it 50%-50% and the split would be 50%-50% between them.

- As long as this agreement is enforced, if one of them walks out on the other there's going to be consequences, and that is how a normal contract is placed. When you have a have a bilateral contract, one person cannot just walk out of the

contract (except maybe if its vitals). That €100,000,000 is not normal at all, Dr. Borg Costanzi has never heard of a situation where if I am at fault the court says the contract null you have to pay me.

- Normally in a bilateral contract, you cannot change your mind unilaterally and if you do there are consequences to pay but with a will, we say that in the very beginning that the law actually says nothing can stop me from changing my mind, a will is a draft and until I die, I can change my mind whenever I want. So how does this translate to a unica charta will? On the one hand you have a bilateral agreement on how two parties want the will and their estate to be regulated and on the other hand the law provides that you can change your mind whenever you want this is what this section of the law is dealing with. Trying to reconcile these two opposing forces.

  - Art 529 (unica charta wills

  - (3)

- First of all, when drawing up a unica charta will the notary has to be careful how this is drawn up, the two parts have to be clearly defined, (and in fact on VLE there's a draft will, the names are fictitious), one will see that there are two parts, the first is for the husband the second is for the wife they are separate and distinct so you can separate them, if you don't abide with that formality it doesn't mean that the will is null but the notary will get a penalty.

  - Art 593 – Unica Charta wills:

  - 593. (1) Where, by a will unica carta, the testators shall have bequeathed to each other the ownership of all their property or the greater part thereof with the express and specific condition that if one of the testators revokes such bequest he shall forfeit any right in his favour from such joint will, the survivor, who shall revoke the will with regard to such bequest, shall forfeit all rights which such person may have had in virtue of such will on the estate of the predeceased spouse.

- It makes it easier to define and extract the contract of the first spouses. What are the first consequences if I change my mind? So, first of all and this is really important to remember, the law has been changed over here, under the old law, you couldn't change your mind unless you had the power written out in the will itself. You couldn't change your mind unless the power was given to you by the will. Only the will could have given you the power nothing else, so any evidence other than the will had no value, only the will and the will alone.

- That was the old law, so if the supposes wanted to give each other the power to revoke, amend or alter the will it had to be written in the will itself, if it was not then there will be consequences (which will be explained). That was the old law, the power had to be stated in the will. Nowadays it's the other way round, by default you can change a will unless the will states otherwise. So now if you want to exclude the power to change the will you have to write it out in the will itself otherwise you have to change it.

- What happens if there's a revocation? Section 593 speaks about these,

  - For example, a typical example, a husband and a wife have three children and they make a will and they say we leave everything to each other and the one who survives leaves everything to the three children. So I write my will I say I leave everything to my wife, if my wife dies before me I leave everything to my three children. As soon as I make this will I go out of the door, go to another notary I revoke the earlier will and say I leave everything to my eldest son, so my wife doesn't inherit anything from me, and you've clearly changed the previous will.

- If the first will said I can't change my will then there are going to be consequences under the old law, if the will did not allow me to change there were consequences, and why do you think it is the case? The reason being that a unica charta will is seen as a compromise. Two parts have discussed and agreed, so if behind my spouse back I changed what we agreed there's an element of deceit, I tricked my spouse into arriving at that eminence and therefore the law says if you tricked your spouse and your spouse did not want you to change the will and you do then forget that compromise, anything you got from that spouse you lose. Is it anything? Everything or not? How much would you lose if you would have gained.

  - If my wife in the will says I leave everything to Pete and I make a will being my back and I survive her and when I die it is found that I have changed the unica charta will, what I inherited from my wife goes back to her estate and then different rules will apply (we will go into them soon). There is a forfeiture, my estate forfeits part of the assets.

  - If there are children it doesn't usually make much of a difference, the biggest difference is if there are not children, because under the rules of intestate succession, if there's no will, and my wife dies before me and I have no children my estate goes to my siblings, my brothers and sisters and their children, the same with the wife, her estate would go to her brothers and sisters. If I leave everything to my wife and in the will we say isma, if my wife dies before me I leave everything to all my nephews and nieces and then my wife's nephews

and nieces. So it goes both ways. Then behind her back I change it and say it only goes to my family.

- What I would have got from my wife doesn't come to me it stays with the estate and the rules of intestate succession will apply, and we will pretty soon if this in effect makes a difference or not.
  - Art 593 – Unica Charta wills:
  - (2) The forfeiture mentioned in sub-article (1) can also be ordained in the case where, by his or her act, the said bequest cannot be effectual with regard to his or her estate.
  - (3) The notary drawing up a will unica charta is bound on pain of a fine of two hundred and thirty-two euro and ninety-four cents (232.94) to be imposed by the Court of Revision of Notarial Acts to explain to the testators in a will unica charta the meaning and effect of this article and of article 594, and enter in the will a declaration to that effect.
- Let's break this article down,
  - Art 594 – Unica Charta wills:
  - 594. In the cases referred to in article 593(1) and (2) the ownership of the property bequeathed to the spouse incurring the forfeiture, shall, unless otherwise ordained by the other spouse, vest in the heirs instituted by such other spouse, or if no heirs are so instituted his heirs-at-law. The spouse who has forfeited the property as aforesaid shall, however, retain the usufruct over such property.
  - Art 593 - 594
  - Underlies Bilateral nature
  - And therefore changing the will without permission should not be without consequences
  - Binding Clause: Old Law was different.
  - One must look at wording of the will and whether it provides when BOTH have passed away
  - Have effects of will been exhausted/extinguished? Li kieku t-testment unica charta kellu biss id-disposizzjoni fejn it-testaturi hallew werrieta lill-xulxin, dak it-testment kien jispicca l-effett tieghu mal-mewt tal-ewwel wiehed fost it-

testaturi; f'dak ilkaz, is-superstiti jkun jista 'jiddisponi mill-wirt kif irid (ara Kollez. Vol. XVI.II.62 u Vol. XVII.II.130)

- Now the issue of forfeiture depends a lot on the wording of the will itself.
  - Imagine a clause where the will only states I leave everything to my wife or the wife says I leave everything to my husband and there are no children, just they leave everything to each other and nothing else. The husband and wife left everything to each other, one dies, the other survives, the husband inherits the wife and the husband says isma, my wife has died, in our will we left everything to each other now I can't leave it to my wife and we didn't discuss this thing, and there's a vacuum, and I would like to make another will because my will doesn't have any more effect since my wife has passed away. Since I don't have children I want to leave everything to Dar tal-Providenza or someone else and I make a new will. Is there forfeiture in this case have I undermined my wife's wishes by making a will after she died? (No) What if I lay that will before she died? (Yes)
  - If I do it whilst my wife is still alive I would have deceived her but after she died I would not have deceived her,
- It could be that i've done it in good faith, I know I've done a will I said I'm leaving everything to my wife but I realise that that will is not enough and I'm afraid that she's going to leave everything to her side of the family and she won't think of my side of the family, so I said forget it I want to leave my estate to my side only.
- The law makes it clear that as far as your own property is concerned, that will is valid. So if I change my mind, as far as my own personal property is concerned that's okay, no problem. The issue is whether I have forfeited what I've inherited from my wife and in the example given, the courts have come to conflicting decisions. They have said, that just because he has forfeited his rights in the will does not mean that he has forfeited his rights under the law. What does this mean? You have forfeited your rights under the will but not have forfeited your rights under the law.
  - Say for example, my wife left everything to an outside and I have inherited nothing, by law I have right to the reserved portion, that is guaranteed by law, the reserved portion, no one can take it away from me. The only way I can lose my reserved portion is if I have done something horrible (murdered my wife, beaten her up) but otter wise if there are no grounds of unworthiness then I am entitled to my reserved portion.
- In this case we're talking about forfeiture, my wife left everything to me and I made another will behind her back. This is not one of the grounds of unworthiness, so

do I lose my right to the reserved portion? I don't but there have been cases where the court said yes you've lost it and there have been cases where the court said no you haven't there's conflicting case law. Dr. Borg Costanzi's personal opinion is that since our law guarantees the reserved portion so strongly, unless there's grounds for unworthiness you still have a right to your reserved portion. That is the minimum to which it is allowed by law.

- Art 593 - 594
- the testators shall have bequeathed to each other the ownership of all their property or the greater part thereof
- All of their Property or greater part thereof
- with the express and specific condition that if one of the testators revokes such bequest he shall forfeit any right in his favour from such joint will
- Revocatory to have tangible effect on the UC will
- When do you verity "forfeiture"

- Why do you think that the law as it stands today agrees with this type of reasoning? Because, the forfeiture clause, (section 539) where by a will unica charta the testators have bequeathed to each other all the greater part thereof , all the property and this is where the key is, the greater part thereof.
- Why? What is the reserved portion to a surviving spouse? The reserved portion to a surviving spouse if there are no children, is all the estate. If there are children it's half the estate. So if there are children and there are, there's forfeiture taking place, the surviving spouse is still going to get slightly less than the greater part of the estate, the reserved portion.
- If in the will you've been left more than the reserved portion you're going to lose it but the received portion is there and you can keep it. That is Dr. Borg Costanzi's reasoning and there is caselaw which are quoted in the powerpoint to support this kind of thinking, there is also caselaw which says otherwise.
- The judgement that has been quoted was a case, where there were husband and wife, the same day/day after the unica charta was done the husband went and made a new will. That was considered to be very deceptive, then there was another case (according to Dr. Borg Costanzi), the Coppola case, where the court said that the wife is still entitled to the rights at law and therefore still entitled to the reserved potion.

- In the Coppola case remember that the second spouse has passed away, so the spouse who has done the second will has died. So what we're saying that the surviving spouse has a right to the reserved portion, in actual fact it's going to the surviving spouses' heirs. The surviving spouse has died and gone.
  - Art 593 - 594
  - Unauthorised change is "deceptive" and fraudulent in nature
  - Not all changes lead to forfeiture:
  - Renumeratory Legacies :
  - Aquilina vs Bugeja (App 24/1/1930) must be proportionate to the service
  - Brincat vs Zammit (PA 16/2/1965) renumeratury nature mustresult from the will itself
- Now what about what they call remuneratory legacies?
- Let's say, my wife has passed away, another way of going round the issue of forfeiture was to donate or get rid of the property during the lifetime or even making a will leaving a gift in compensation for services rendered.
  - For example, my wife dies I get a Philippine to look after me and I leave her my villa.
- The father has gone against the wishes of the wife in the unica charta will, he has revoked the will in part without being allowed to do so. The courts have been faced at this situation and when faced with this situation the courts have looked at the service rendered and they valued it. They have valued the service in comparison with the nature of the gift.
- They also have a little bit extra, in the sense that the court says we understand that you have to compensate this person for the services rendered, this is fair enough, by giving renumeration where renumeration is due you are not breaching the contract, you are not breaching the will and giving a little bit extra as a gift is no big deal it's when you go overboard, and the overboard part then creates consequences. So when looking at legacies which have renumeration,
  - For example there's a will, say for example in the will the spouses say we leave our three children €10,000 each. So we have three children and my wife or I get the rest. So I get the whole estate minus €30,000 (three children with €10,000 each is €30,000). Later on I change my will and I move two of the

children and give the €30,000 to one of them. That doesn't affect my wife at all so that will not generate any forfeiture.

- Forfeiture only applies if I've effected what my wife would have received. My wife would have received my estate minus the €30,000 of the children. She's still going to get my estate minus €30,000 but instead off going to three children it's going to one and in that case there is no forfeiture because I've just played around with what the children are going to get and I have not disturbed what my wife would have got.

- The same concept goes to the remuneratory legacy. If I leave a legacy because I needed help after my spouse died, the court understands that I have to compensate and in this case by the same type of reasoning the court say sit's understandable, that the surviving spouse needed help that is a justified expense and therefore there is no consequences of course if you go beyond the benchmark things change.

  - Let's go back to the first example where my wife and I left €30,000 to the children. If in my subsequent will I say Im revoking that legacy I'm going to increase it to €100,000 to my son only then of course I'm affecting what my wife would have got. If that €70,000 difference is going to affect the inheritance substantially then there are going to be consequences. Substantially because you have to see how much you left your wife, whether she got the greater part of my estate or not.

  - If I left my wife 50% then there's never going to be any consequences under the new law. As the new law applies only if I leave my wife all or the greater part of the estate.

- This idea of deception is something that has to come out in the evidence, how the spouse has been tricked it's like proving motive you don't have to prove motive but if you prove it it helps the same with this kind of situation, you've got to prove the motive.

- Now if there is a remuneratory legacy, the will has to actually state that it is paid in compensation, the wording of the will has to state I am leaving this villa to my Philippine maid because she's looked after me, you can't rely on letters evidence or outside sources, the will has to speak for itself. If the will does not say it is a remuneratory legacy then it is not. The will has to say it.

- This idea behind the will speaking for itself is fundamental in succession law because the person who made the will cannot speak he cannot testify, his testimony is the will so the courts will very hesitantly listen to all the evidence. The

will has to speak for itself. There are situations where the law allows for outside evidence but rarely with great circumspection.

- Art 593 - 594
- shall forfeit all rights which such person may have had in virtue of such will on the estate of the predeceased spouse
- Caruana Galizia (Pg 961) takes a hard line and explains the position as follows:
- " Where such a will is made, what is bequeathed by one of the spouses to the other is considered to be the consideration for what is bequeathed to him or her by the other, and, therefore, the revocation of the will by one of them ought to bring about automatically the revocation of the disposition made by the other in favour of the former
- Art 593 - 594
- Gauci vs Mifsud (PA-TM 1501/00 dec in parte 4/4/2006)
- Will by Mary and Joseph Coppola. Legacies but left each other as heirs
- "lis-superstiti l-fakoltà li jkun jista" jiddisponi diversament minn dan it-testment minghajr ma jinkorri fil-penalitajiet kontemplati fil-ligi accettwati però l-imsemmija legati li ghandhom jibqghu fermi u shah u ghalhekk ma humiex inkluzi f'dan id-dritt li jigi varjat t-testment prezenti mis-superstiti".
- Mrs Coppola made a subsequent will. After her husband's death
- Forfeited all benefits UNDER THE WILL BUT RETAINED HER RIGHTS AT LAW
- There were also consequences of the legacies she made because property was not all hers.

• In fact the two cases we've mentioned before were Gauci vs Mifsud decided in 2006, where the court said the surviving spouse retained the benefits of the law.

- Art 593 - 594
- Childless Couples – with no further disposition
- In Albanese vs Grima (Vol XVII(B), ii.130 the court held:

- “non ha luogo la decadenza comminata nell-articolo 291 dell’Ordinanza No. VI del 1868 quando i testatori fosserro soltanto limitati ad istutuirsi eredi universali propietari reciprocamente, senza alcuna disposizione favore di terze persone”
- Art 593 - 594
- Childless Couples – with no further disposition
- Caruana vs Ainsworth (App 31/10/2007) the Court came to a different conclusion and distinguished whether the will was made before or after the first spouse passed away. The line of thinking quoted below further highlights the contractual and bilateral nature of such a will. The Court in this case was particularly impressed by the fact that the husband made an additional will during the wife’s lifetime with the consequent possibility that had he passed away first, the wife would have been faced with a huge unpleasant surprise.

- Apposed to it was Caruana vs Ainsworth where the court came to a different conclusion. In fact Dr. Borg Costanzi thinks that Caruana vs Ainsworth is bad law, it’s not correct situation, it’s a judgement and you can quote it but it’s not correct (in Dr. Borg Costanzi’s opinion).
- Where in Caruana vs Ainsworth, the court said that once the surviving spouse changed the will where they were not empowered to do so there was forfeiture of all rights including the right to the reserved portion.
  - Art 593 - 594
  - it did not fully agree with the conclusions in the Albanese vs Grima case and went on to apply the law in mathematical manner – almost like an algebraic formula: the reasoning being:
  - If (i) a unica charta will was made with no power to vary/revoke
  - AND one of the spouses varies/revokes his part of the unica charta will
  - THEN such latter spouse automatically loses all benefits from the unica charta will.
  - Court passed a comment that in the subsequent will (made during the wife’s lifetime) the legacies were “di cosa altrui”.
- There was a retrial in this case and in the retrial, the Court of Appeal said we are not going to allow the retrial as this is a question of interpretation and not

application of the law and since the rules for retrial are very strict and since this is an issue of interpretation we're not going to allow it.

- They did however say that if the retrial was allowed there would have been a different conclusion but that's as far as they went, perhaps inviting the parties and trying to touch their moral aspects to try to convince the parties to come to a just solution.

  - Art 593 - 594
  - In Xuereb vs Aquilina (App 3/12/2010 – 133/2007) t
  - Spouses were childless and in UC will agreed to appoint his sister and her sister as heirs – ½ each.
  - After wife died, He made a new will and left everything to his wife's sister.
  - Court interpreted will on basis of wording to the will.
  - The Court held that there was automatic forfeiture once the second will was made and that as a result, the surviving spouse inherited nothing and that the pre-deceased's inheritance devolved solely in favour of his relatives to the exclusion of the surviving spouse's heirs.
  - Art 593 - 594
  - Xuereb vs Aquilina went to a re-trail
  - Judgement was confirmed by the Court of Appeal (18/6/2012) which hinted that it may have had a different opinion on this matter, this alone did not justify a retrial.
  - "Din kienet l-interpretazzjoni li tat din il-Qorti lit-testment tal-konjugi Refalo fid-dawl tal-ligi applikabbli ghall-kaz, u anke kieku din il-Qorti ma kellhiex taqbel ma 'din l-interpretazzjoni, xorta wahda ma kienx ikun il-kompitu ta 'din il-Qorti li tippreferi l-opinjoni taghha ghal dik minnha espressa qabel meta din il-Qorti kienet komposta differentement."
  - Art 593 - 594
  - 593(2) The forfeiture mentioned in sub-article (1) can also be ordained in the case where, by his or her act, the said bequest cannot be effectual with regard to his or her estate.
  - Will any Act apply or merely donations?

- 594 “The spouse who has forfeited the property as aforesaid shall, however, retain the usufruct over such property.”

- “...jekk mara fl-innoċenza tagħha marret biex tagħmel testment u ma ġiex spjegata lilha u għamlitu xorta, din m"għandhiex tbati totalment u allura qed indaħħlu dan l-użufrutt” Parl Debate Per Hon Dr Carmelo Mifsud Bonnici)

- The question to ask is at what point do you verify where the forfeiture has taken place. At what point do you check? The point you check is when the second spouse passes away not before. That’s when you know for sure what has happened because until the second spouse passes away there’s nothing to stop him changing his mind and putting back things as they were before and this has actually happened.

- There was a case, it was the first case quoted for in the slides, where the husband and wife had no children, and they left everything to each other and they also said that when the last one dies the estate is going to be split half on the husband’s side and half on the wife’s side. As soon as the will was done the husband went to another notary, he revoked his will and left all his estate to his side of the family leaving his wife nothing. The wife died first (she died before him) and the issue arose and then eventually he passed away and the issue arose on how to divide the estate. Does his estate go only to his side of the family? Or do the wife’s side of the family inherit? In this case the court said it goes by the unica charta will, 50% of the wife’s side from her share and 50% of the husband’s side from his share. The wife didn’t get a share in reserved portion. If you had to go by the other case, Gauci vs Mifsud case which held that you still have the reserved portion what would have happened? Since they had no children the husband would have inherited everything, he would have inherited all the estate of the wife because there were no children and so by law if you went by caselaw which said that you don’t lose everything you get the reserved portion, in this example because there’s no children even though the husband deceived the wife, clearly deceived the wife, if you’re going to apply this case of Gauci vs Mifsud, it would have been only the husband’s side who would have inherited because there were no children and the surviving spouse gets the reserved portion.

- In actual facts the courts found a way to giving justice even though this judgement was not quite 100% correct. The unica charta will said I leave everything to my husband, if he dies before me it goes half to his side and half to my side. He changed the will without her consent so by law he doesn’t inherit his wife so technically he has half the wife has half. The court eventually that’s what it decided, it said he forfeited the right so her share goes to her side and his share goes to his side, which was exactly what the wife wanted in the first place. It came

to the same result but if you go by caselaw which said when you forfeit you still retain your right to the reserved portion he would have got everything from his wife and his wife's side would have got nothing so to give justice they came to the conclusion, which proves one thing li l-qorti qatt ma taf fejn qieghed.

- An interesting section which was also introduced recently (in 1995 but considered as a new law), and this too has given rise to discussion. The spouse who has forfeited property shall retain the right of usufruct. If you look at the debates at the time the minister of justice was Dr. Carmelo Mifsud Bonnici, he said jekk mara fl-innoċenza tagħha marret biex tagħmel testment u ma ġiex spjegata lilha u għamlitu xorta, din m"għandhiex tbati totalment u allura qed indaħħlu dan l-użufrutt
- In actual fact, the right of usufruct given here was much wider than that taken apart. This seems weird as the law is saying you forfeited but you have the right of usufruct and a few minutes ago we said you get your right tot the reserved portion, the right to the reserved portion doesn't come out from this section of the law but it comes out form a different section of the law, so how do you marry these two classes together, it seems as though the legislator wanted that you lose everything except the usufruct, you only get the usufruct.
- Let's go through section 594. What does section 594 say? When there's forfeiture you have to look at the clause in the will. If the will says what happens next, then they are the heirs stated in the will.
    - For example the wife and husband agree we leave everything to each other, if you pre-decease me I leave everything to my children. So I've agreed what happens next in that case, if there's forfeiture the amount forfeited goes in favour of the children. The surviving spouse has his own property plus the reserved portion.
- This is difficult to explain. If there's a will and the will provides what happens next, whose going to inherit after the second spouse passes away, if there's forfeiture the portion belonging to the first spouse goes to the eventual heirs, the last ones down the line, if its the children or the nephews and nieces because there's forfeiture and the surviving spouse is only entitled to the reserved portion.
- If there are no named heirs fore example the husband and wife say we leave everything to each other and the law says in that case if no heirs are so instituted the heirs at law, now the husband at wife who are the heirs at law? The husband and the wife. So if you have a will which says we leave everything to each other and stops there, even if there's a change in the will there's no forfeiture because the surviving spouse by law is going to inherit everything and that the spouse has

forfeited the property but shall take the usufruct of the property. In Dr. Borg Costanzi's view it doesn't make sense. The second spouse has passed away and enjoyed the property already, this poor woman that was mentioned by the minister has died, she's enjoyed the property not going to be evicted. She's dead and gone, so why did she need protection after her death? She didn't need it, it is her heirs that may have possibly needed protection but that's a different matter altogether, so the justification of this clause here, the person who has forfeited property shall retain the right of usufruct, when we explained that to examine forfeiture at the moment of death of the second spouse it does't make (according to Dr. Borg Costanzi) sense as usufruct terminates on death, so this person had the usufruct but she's dead so how can you give someone usufruct when they're dead?

- This clause here, is done maybe for the right reasons but on thinking further on it Dr. Borg Costanzi finds that it has little or low application, the only benefit it can give, usufruct gives you the right to use and enjoy, so if I have a usufruct of a block of flats, I can get the rent and the rent is accumulated with my estate but there's no real justification for it, it's not going to save someone from being evicted.

  - Art 593 - 594

  - Law does not require good faith

  - What about the effect of previous case law stating that the spouse "retains his/her rights at law?

  - If Will makes provision for what happens next? Does surviving spouse retain right to the reserved portion?

  - If Will DOES NOT make provision for what happens next. Ab intestato

- In actual fact, when dealing with forfeiture, to recap, there are two points to keep in mind. One is, has the will made provision for what happens next? In other words, did the spouses stop at leaving everything to each other or didi they make a further provision of what's going to happen next? Secondly you've got to see whether there were any children, because if there are nay children the heirs at law are the wife or the husband as the case may be and the children, if there are no children the heirs at law are the surviving spouse which creates a difference.

- Why do a will and stop at leaving everything at each other? Not everything is logical, its human nature.

  - The Unica Charta will found on VLE.

- In the beginning if you look at the will there's a part marked date and time, when drawing the will up the notary has to write in their own handwriting, it has to be handwritten. So you can have a template of a draft prepared but the date and time of the will have to be handwritten by the notary. Both the date and the time because it's important to determine which is the last will. People have done wills, more than one will on the same day so you have to look at the time the will was done.

- Secondly in this draft will that was uploaded, the will is done in two parts, first you have the clauses of the husband, then you have the clauses of the wife. So if you want to extract the copy of the husband the notary will just show you the first part, if you want to show the extract of the wife the notary will show you the second part. They are clearly distinguished one after the other. In the draft given, there's also a clause dealing with revocation and it gives the right of the spouses to change the will. This is not necessary, the notary needn't have written it, but most notaries actually write it.

- If there is a clause saying that there is no right to change the notary has to explain it, and it has to be documented in the will that this clause has been explain to the parties over and above the will, in the will you say done and published and duly explained to the parties. This clause requires a separate explanation and that separate explanation has to be documented.

  - Law of Succession

  - Lecture 4

  - Of Capacity of Disposing by Will

- We are not going to the different section of the law dealing with the capacity to make a will, capacity to dispose of a will.

  - Art 596 – Capacity to Dispose by will

  - 596. (1) Any person not subject to incapacity under the provisions of this Code, may dispose of, or receive property by will.

  - (2) All children and descendants without any distinction are capable of receiving by will from the estate of their parents and other ascendants to the extent established by law.

- Section 596 it clear. The presumption is in favour of capacity, a person is presumed to be capable of making a will, a person is presumed to be capable of receiving under a will. The presumption is in favour of being capable and as far

as children and descendants, even more so. So children and descendants are always capable without distinction and you say why without distinction? In the past this section of the law read differently and it made a difference between legitimate and illegitimate children. This distinction was removed in the end. A basic presumption in favour of capacity.

- Art 596 - Capacity
- General Rules
- A: Presumption of capacity
- B: Courts will not easily disturb wishes of the testator
- C: Children are always capable of receiving
- D: Re Capacity to dispose- test not as rigorous
- E: Capacity at moment will was done

- Another important aspect to keep in mind when dealing with capacity because capacity effects the validity of a will, the capacity to contract, the capacity. To make a will is one of the issues that is often challenged when challenging a will, that person didn't know what they were doing, that will is not valid. The presumption is in favour of capacity if there's a doubt the will is valid, the courts will not easily disturb the wishes of a testator and that is why capacity is so heavily presumed. The fact that a will has been made and the person making the will has expressed their wishes are sacrosanct and will very rarely be disturbed. Again children are always capable of receiving. The issue of capacity, because of the strong presumption of capacity, the test of capability is not a rigorous one as we shall see, the test of capacity of a person to make a will is not as rigorous as the test for the capacity to make a contact.
- Why? Because if a person made a contract that person is usually alive and that person can speak up for themselves and the court can assess. In the case of a will that person has passed away so they cannot speak. So, you have to rely on the will, what is stated in the will and sometimes what the notary explains of what they recall from the will itself.
- The test of capacity is not so rigours, if someone is testing incapacity, the proof has to be really really strong. The courts acknowledge that people do weird stuff. People take strange decisions. That doesn't mean that that person is insane

- Presumption of capacity

- 1.A juris tantum presumption
- Paolo Schembri vs Maria Galea et 16/20/1883
- “l’uomo nello stato suo normale si presume ragionevole e sano di mente, fino a concludente prova in contrario. La prova contraria incombe all’opponente lo stato di sanita”.

- This issue has been discussed in case law, there is a iuris tantum presumption in favour of capacity. Here we quote caselaw going back to 1883 (quite a long way ago), where even then, translated a man in his normal state is presumed to be reasonable and sane of mind, as long as there’s no evidence to the contrary. The proof to the contrary is to be brought by the person opposing sanity. If you want to say that a person was insane you have to bring proof. A person is presumed to be reasonable and normal, that is the presumption and this line of thinking is there till today.
  - 2. Mental Integrity as opposed to physical integrity
  - What is important is that the testator can communicate his wishes and is coherent
  - No matter how serious the physical deficient
  - Giuseppe Borg vs Marianna Cini (PA 14/6/1884)
- Now we’re looking at mental integrity not physical integrity here. It’s a state of mind, later on in our lectures we will come across situations about people who are deaf, who are dumb, people who can’t write, people who can’t read and how the law caters for those situations and how and when they can make a will but they can make a will, but you're insane, if you’re interdicted you can’t make a will so when looking at mental capacity not physical capacity even though physical capacity can have effect on the state of mind of the person but normally no matter how serious the physical deficiency, of that person has a good mind he is capable of making a will, if he is capable of communicating his wishes he can make a will. So he has to have the intellect and the capacity to transfer what is in his mind to the person, to the notary making the will, he has to communicate in some way,
- This issue of communication is where the mental and the physical connect, how do you communicate your wish? You talk but if you can’t talk you? Use signs, there has to be some way of communication. If there’s no way of communication then of course the physical deficiency is so great that if that wish cannot be communicated In an understandable manner, then that person of course because of his physical deficiency cannot make a will but if that person finds a way of

communicating his wish then the will is valid, as long as it is shown that that person had a sane state of mind. He is presumed to be sane unless proven otherwise. So, we're looking at mental integrity and not physical.

- 3 Role of Notary
- 1.A public function
- 2.Cannot refuse (Art 11.3 of Chapter 55) even if he knows he is not going to be paid
- 3.Only Notary can determine the wishes of the testator (Art 25.6 of Chapter 55)
- 4.Vide Cassar vs Naudi (PA 6/10/2010 Judge Philip Sciberras)
- 5.Copy and paste clause "testator of sound mind and judgement"

- What is the role of the notary? A notary has a public function and he's not allowed to say no. If someone asks a notary to make a will, he could be having lunch he has to make a will. Otherwise it's an offence, it's the one job the notary cannot refuse. Of course he can use the tactics to postpone and make an appointment but if the guy insists that they want to make the will now, the notary by law has to accept. Not only that, the notary is the only person who by law is entrusted to understand what the person wants, and to reflect those wishes into a will, only the notary can decide how those wishes translate those wishes into the will.

- To this effect, we refer to the judgement of Cassar vs Naudi, this was a very interesting case. The Naudi's were an unmarried couple living in Stella Maris street in Sliema, they had no children and relatives used to visit them once a week or once a month, once every two weeks but not that often and they were getting on in age. So they asked the government to help them by sending a carer. The government provides a service who if there are people in need they can provide a carer, and this woman used to go clean their house, help with their house and whatever.

- As time went on this carer became more and more involved with the family and to such an extent that she convinced the couple to leave the house in Stella Maris Street and come live with her in Luqa, within a week, the husband died. The family got to know that the husband died because on Sunday Mass the priest celebrating the mass said I would like to announce the death of Silvio Naudi. The family said Silvio died? We spoke to them two weeks ago, they went to look at the house and found the house empty and after some detective work they found that the spouse was living in Luqa.

- They made contact with this helper when they made contact with the helper, the helper filed a report to the police that she was being harassed by the family and she told the police this woman is here from her own wish, leave me alone take criminal proceedings against this family who are bothering me. Eventually the family did not accept this situation, they spoke to the commissioner of police, the commissioner intervened and as a result of the commissioner's intervention the family went to the house in Luqa.

- The police could see that this woman was in a very bad state, she was almost dead. The family took the law in their own hands, grabbed this woman wrapped her in the sheet she was lying on took her straight to hospital and she was being treated for severe dehydration. It transpired that this carer was fooling around with insulin giving this woman insulin, and she was very weak, the family found out that between the death of the husband and this moment this carer had the prokura of the couple and sold the house to her own son for a price to be paid later on and also a new will was done under very suspicious circumstances.

- They wanted this woman to do away with the will and she wanted to do a new will but she could barely speak. She was so frail and weak that she was almost dead and they called on a notary to draw up the will, notary Morris Gambin and he went as he was bound to do and he spoke to her, he tried but she was so weak she couldn't even talk, she could barely breathe, and he said I'm not making the will she's too weak he couldn't understand her wishes, if she recovers or gets better he said to phone him again, she did recover a bit, he went again, with a nurse present in order to listen and understand he had to put his ear to her mouth, he could barely hear her but he heard her wishes, he drew up the will there and then she signed it in some way and she passed away a few days later and this will was challenged.

- There were two cases actually, Cassar vs Naudi and Naudi vs Cassar. Naudi vs Cassar where they challenged the contact of statement, and Cassar vs Naudi where Cassar contested the will and in this judgement where the court decided in favour of the Naudi family, the court upheld the validity of the will, it said a person is presumed to be capable, it left with that presumption, anyone alleging incapacity must prove it. The court heard the testimony of Notary Morris Gambin and it was happy that the Notary could understand and understood exactly what the testator wanted even though she was so frail and so weak. In establishing capacity, the court listened to the notary. So that was one factor that carried a lot of weight, the evidence of the notary.

- It also highlighted of course that there was this presumption of capacity. Normally in any will, in most wills you will find an opening clause in the will where the notary will say whereas the parties have appeared before me and the notary declares

that in his opinion the parties are of a capable state of mind and it is a standard phrase. What they call a clausola di stile, you copy and paste it you draft one will once and you copy it and paste it which say that the testators are in a capable state of mind.

- The fact that the will itself, the one signing the will is saying I am of the right frame of mind, I am capable, the courts say yes this carries weight but it is not enough on its own. If there's sufficient proof of incapacity that clause loses its value. However it is there and it does carry some weight its not totally worthless. You don't have to prove it but it creates and reinforces the presumption of capacity.

  - ….. Role of Notary

  - "Whereas the testator is of sound mind and judgement is capable at law to make his will, he has come to this will in virtue of which he orders as follows."

  - Joseph Bonavia vs Giovanni Bonavia (Pa 20/10/1971)

  - "Għalkemm l-attestajoni tan-Nutar, bis-solita "clausole di stile" li t-testatur huwa "compos mentis" mhiex bizzejjed, id-deposizzjoni tiegħu lanqas ma tista 'tiġi ipprivata mil-importanza tagħha, speċjalment meta jkun jista jagħti dettalji li t-testment inkiteb fil-presenza tat-testatur u taħt dettatura tiegħu, u, li, mil-imġieba tiegħu kien jidher li qed jirraġuna, ċioe, kif tgħid il-liġi, kien f'sensiħ, u dan, naturalment, jgħodd ukoll għax-xhieda tat-testment"

- In fact in this Bonavia Bonavia case, the court in 1971 quite a while ago actually commented on this kind of clause. The court said that this normal clause, the clausola di stile on its own is not evidence and conclusive proof but its value cannot be ignored, more so if the notary testifies and explains the circumstances of how the will was drawn up.

  - ….. Role of Notary

  - Testimony of Notary

  - APP - 23 November 2021 (619/15) Anthony Scicluna v. Antonia Dalli.

  - Kif inghad ix-xhieda tan-Nutar hija meqjusa importanti mill gurisprudenza, tant li gieli kien hemm kazijiet fejn ix-xhieda tan-Nutar twaqqa 'l-analizi kuntrarja li jkunu ghamlu tobba medici. Dan jigri peress li n-Nutar ikun fl-ahjar pozizzjoni li janalizza t-testatur fil-mument li jkun qed jirredigi t-testment, u hu dak il-mument li jiddefinixxi l-validita` o meno tat-testment. Kif intwera ma hemmx ghalfejn tkun xi gharef biex dak li jkun jikteb testment validu, u jkun bizzejjed li dak li jkun

ikollu konoxxenza ta ’hwejgu u xi jrid jaghmel bihom. Din il-konoxxenza tista ’ taraha l-ahjar in-Nutar li tirredigi t-testment.”

- ….. Role of Notary
- A medical Certificate?
- Victoria Xuereb vs Joseph Refalo (APP 2/3/2010)
- “ma tista' tinġibed ebda konklużjoni mill-fatt illi t-testment in kwistjoni tad-decujus ma kienx akkumpanjat minn ċertifikat mediku, bħal ma donnha qed tippretendi l-attriċi. Huwa minnu illi l-eżistenza ta' ċertifikat bħala dan jista' jsaħħaħ il-prova favur il-kapaċita` mentali tat-testatur, imma n-nuqqas tiegħu ma jfissirx illi ma kienx hemm dik il-kapaċita`.”

- There was another case, there were quite a few cases Xuereb vs Refalo. What happens if there’s no medical certificate attached to the will? In most instances if the person making the will is of a certain age, the notary would ask for a medical certificate, any prudent notary would ask for it, because ultimately if an issue had to arise, the only person to testify is going to be the notary and the notary’s evidence is going to carry a lot of weight and a lot of responsibility but what if the notary cannot remember at all? The notary will testify in court, your honour I’m sorry it’s been so long I’ve done so many wills, so many contracts, I just cant remember this particular will when it was done and how it was done I know that I did it, I know at the time I knew that this person could make the will because in the notary’s opinion he was capable otherwise the notary wouldn’t have done it, but he can’t remember.

- So in that case of course the evidence of the notary is not going to be very helpful. If the will was accompanied by a medical certificate it would carry a lot more weight. In most cases the notary would ask for a medical certificate which would be dated on the day or very close to the date of the will otherwise it will lose its value because the time to look at is the exact time the will was made. A person can be unreasonable but you have 10 minutes of clarity and if he makes that will in those ten minutes of clarity where they are capable of explaining themselves logically, understandably and perfectly normally. That will would be valid. It doesn’t matter if ten minutes later the guy goes insane. If at the moment he made the will he was sane, what happened after is totally irrelevant. It is the moment of the making of the will that counts. So the medical certificate has to be as close to the moment making the will as possible, the closer the stronger the value.

- There was a case Scicluna vs Dalli 619/15 decided on the 23rd November 2021. In this case, the person making the will had neurological surgery, an operation I

his brain and after he died the issue arose as to whether his will was valid. In this case the court in upholding the validity of the will relied heavily on the evidence of the notary and it said that the notary is the person who is in the best position to analyse this situation and determine whether the person was capable or not and if the notary was convinced that that person knew what they're doing and was capable of making the will and testifies as much that will carry a lot of weight.

- When reading through judgements of this nature you will constantly note that the court will bend over backwards to protect the will it's like having the defender in a will. In a marriage if you're trying to annul marriage in the curia there's the defender of the bond, someone defending the marriage. In court the judge is the defender of the will. By law he has to presume that the will is valid and case law has indicated consistently that judges have bent over backwards to protect a will as though it is something holy, the sanctity of a will.

- Consequently in alleging a mental disorder it has to be shown not only that there was a disorder but also that it existed at the every moment the will was made.

  - For example someone is a junkie, a drug addict, normally spaced out. He's high on coke. You see him lying around qas jaf fejn qieghed, he's lost orientation in time, space and people he's living in a world of his own. If that person is under the influence of drugs clearly that person doesn't know what he's doing but he may have a moment when his mind is clear when even though he's going through withdrawal symptoms he knows exactly his situation, he's orientated and at that moment that person can make a will. You can get witnesses stating that he was a junkie but at the moment he made the will was he under the influence of drugs? The evidence of the notary at that point is cardinal.

  - ….. Role of Notary

  - Medical Certificate

  - Court of Appeal on the 23/11/2020 -Rik 799/2006 "Victoria Galea vs. Mary Casingena" which also considered that fact that a medical certificate was not attached to the will. In this case the testatrix had been suffering from progressive senile dementia for some time. She did a will radically changing her previous will and fifteen days later some members of the family filed proceedings to have her interdicted on the grounds of her advanced senile dementia as certified by a psychiatric certificate attached to the request.

  - Both the Court of first instance and the Court of Appeal did not look too kindly at the fact that Notary did not deem it necessary to request a psychiatric certificate and attach same to the will.

- ….. Role of Notary
- The Court referred to a UK case Kenward v Adams tal-1975
- “In the case of an aged testator or a testator who has suffered illness, there is one golden rule which should always be observed, however straightforward matters may appear, and however difficult or tactless it may be to suggest that precautions be taken: the rule is that the making of a will by such a testator ought to be witnessed or approved by a medical practitioner who satisfies himself of the capacity and understanding of the testator, and records and preserves his examination and finding.”
- It went on to add “Ghalkemm tali prova xorta tista ’tigi kkontestata, jibqa ’il-fatt li certifikat simili jipprovdi prova aktar b’sahhitha u toffri serhan il-mohh lin-nutar involut.”

- In fact here, in the case quoted here Galea vs Casingena, the court referred to a UK case. UK jurisprudence is slightly different to ours but this quotation of Kenward vs Adams this quote has been repeated constantly. Over here the court in England said that if someone is aged, (in his 90’s) it’s advisable to get a medical certificate, almost common sense. Ideally you should get a medical practitioner to confirm the state of mind of a person.
- There have been cases however where the situation has been abused, and people have brought the services of a medical practitioner to certify a person’s capacity knowing full well that this person is susceptible to changing their mind very easily, to being pressured. A doctor who wants to be fooled can easily be fooled in this situation. How far should the medical practitioner push? Should he ask horrible questions or is a two minute interview enough? You get all sorts, and if this unscrupulous doctor issues a certificate and the person isn’t really sane, and they leave everything to one child, and the others are left with just the reserved portion, and it transpires that these were lies and the woman was easily influenced and that the doctor was a personal friend of this woman and had an affair with her, so there was this whole scenario that they didn’t even know about.
- Of course the medical certificate lost it’s value, and in this judgement of Kenward, the person making it should keep their own personal records.
- Just presenting a certificate is not like winning the lottery if you get substantial proof you can challenge it.
- In fact in the case of Galea vs Casingena, “Ghalkemm tali prova xorta tista ’tigi kkontestata, jibqa ’il-fatt li certifikat simili jipprovdi prova aktar b’sahhitha u toffri serhan il-mohh lin-nutar involut.” It gives the notary peace of mind, one because

he may forget and secondly it's not his but someone else's. The court said it with some reservation yes there's a certificate it's not absolute it can be contested.

- ….. Role of Notary
- The Court then went on to examine the contents of the new will to ascertain whether the contents were "reasonable" (In kwantu ghar-ragjonevolezza tat-testment in kontestazzjoni….) and noted that the interests of the deceased's child who had special needs were not as well catered for as was the case in the previous will.
- "Huwa risaput li l-genituri jkollhom preokkupazzjoni partikolari fil-kaz ta 'wlied bi bzonnijiet specjali u li xi hadd jiehu hsiebhom wara li l-genituri jigu neqsin, kif effettivament ghamlet it-testatrici fit-testment precedenti taghha.
- To the Court, this drastic change in heart without any external justification further attested to the testator's lack of mental soundness
- SHOULD THE COURT HAVE THE RIGHT OR THE ROLE TO TEST THE REASONABLENESS OR CONTENTS OF A WILL?

- Now, another point is the reasonableness of the content of the will. Now, people make weird decisions, and with weird decisions come weird wills having a weird will doesn't mean that a person is nuts, it means he's weird but the will is perfectly valid but if there are other circumstances which indicate incapacity the weirdness of the will becomes important and so in examining the capacity of a person the court will invariably listen to what the notary has to say if the notary can testify and also look at the contents of the will and see if the contents of the will make sense in relation to what was happening around that person's life. If the contents of the will are totally out of context it indicates that there was an element of suggestion that someone has forced his opinion on the testator and that that opinion was not a genuine opinion of the person making the will but was strongly suggested to them. This issue of suggestion comes out from the wording of the will and how that will reflects on the circumstances surrounding the deceased's life.

3rd March 2023

Lecture 5.

- Unica Charta will
- Consequences of revocation
- Dr Peter Borg Costanzi

- Before we continue with capacity Dr. Borg Costanzi would like to go over once again what we said last time about unica charta will. We're going to go over unica charta wills again just to make sure it's clear and that we aren't confused, it's confusing enough as it is.

    - Art 593 – Unica Charta wills:

    - 593. (1) Where, by a will unica carta, the testators shall have bequeathed to each other the ownership of all their property or the greater part thereof with the express and specific condition that if one of the testators revokes such bequest he shall forfeit any right in his favour from such joint will, the survivor, who shall revoke the will with regard to such bequest, shall forfeit all rights which such person may have had in virtue of such will on the estate of the predeceased spouse.

- If you go into section 593, which is the clause dealing with forfeiture, the testator shall have;

    - Art 593 – Unica Charta wills:

    - (2) The forfeiture mentioned in sub-article (1) can also be ordained in the case where, by his or her act, the said bequest cannot be effectual with regard to his or her estate.

    - (3) The notary drawing up a will unica charta is bound on pain of a fine of two hundred and thirty-two euro and ninety-four cents (232.94) to be imposed by the Court of Revision of Notarial Acts to explain to the testators in a will unica charta the meaning and effect of this article and of article 594, and enter in the will a declaration to that effect.

    - Art 594 – Unica Charta wills:

    - 594. In the cases referred to in article 593(1) and (2) the ownership of the property bequeathed to the spouse incurring the forfeiture, shall, unless otherwise ordained by the other spouse, vest in the heirs instituted by such other spouse, or if no heirs are so instituted his heirs-at-law. The spouse who has forfeited the property as aforesaid shall, however, retain the usufruct over such property.

    - 3 conditions:

    - 1.Must be a Unica Charta will not 2 separate wills done at the same time

- 2.the testators shall have bequeathed to each other the ownership of all their property or the greater part thereof

- 3.with the express and specific condition that if one of the testators revokes such bequest he shall forfeit any right in his favour from such joint will,

- the survivor, forfeit all rights which such person may have had in virtue of such will on the estate of the predeceased spouse.

- The conditions are that there must be a unica charta will first of all. So doing two wills at the same time, two separate wills at the same time is not a unica charta will, a unica charta will is a single document, a single will, if the two spouses go together and draw up one document/will, they just sign at the end that is one single will, if they do two separate wills at the same time it's not a unica charta will its two separate wills. The first condition is that it has to be a unica charta will and not two separate wills.

- Secondly the testators must have given each other all the property all the greater part thereof, this is a huge change to what there was before, before there was no benchmark of how much one spouse is giving to the other, now as you will see later on there's a kind of link as to this bench mark of 50%+1, the greater part thereof because in rules of intestate succession, when there's no will, if the married couple have children the surviving spouse receives half, if there are not children the surviving spouse receives everything.

- So it could be that there are linking this concept of if there are children the spouse has half by law, if in the will the spouse is getting more than ½ there's the risk of forfeiture. So if the unica charta will says I leave my spouse 50%, that. Is not the greater part, it has to be 50% +1 so if I say 50% of my estate plus the usufruct over the remaining 50%, then it's 50% plus a bit more, the greater part. When looking at an amount or percentage greater has to be more than half, half is balanced so it has to be ½ and a bit.

- Thirdly in the will there has to be an express condition in the will stating that if there's a change, a new will being done then forfeiture kids in since the amendments of the law were made it is not often that this clause is written and Dr. Borg Costanzi asked a number of notaries wand none of them could give a template of how they write it out it means that they never came across it. Normally a notary will explain to the persons making the will that despite the fact that it is a unica charta will they can change their mind and normally a clause is written in the will that they can change their mind. You don't have to write a clause that you're changing your mind but if you want to insert a clause stopping or saying that I don't want you to revoke this will, if you revoke you will suffer consequences

of forfeiture that has to be expressly written and the notary must also explain what it means, it's not just written out it has to be explained and the notary has to write out in the will that it has been explained. So besides writing the clause of forfeiture the notary must say I have explained this clause to the persons making this will and they have understood its consequences.

- What happens if the notary does not explain or if the notary does not write that he has explained?

- First of all if the notary has not explained you wouldn't know because the two people have passed away so there's no one to speak up, but if the notary does not write a note stating that I am explaining and they have understood, that will not rended the will null, the will is still valid the condition is still valid it will only expose the notary to a fine.

- A little sentence to highlight is "the survivor, forfeit all rights which such person may have had in virtue of such will on the estate of the predeceased spouse". "In virtue of such will", this is what the law provides you don't get anything from that will.

- So what happens? There's another clause before moving on, the law also says that forfeiture takes place even if by some act inter vivos, the bequest in the will is rendered ineffectual. This is a bit funny, in the sense that normally, when you own something you can do what you like with it you have absolute rights over that property. So you have your own property, your own half and you've inherited the other half from your spouse. If you decide to donate the property, and therefore if there's something else in the will about what happens next that part of the will disappears, it goes out of my patrimony. That donation will still be valid in respect of my half. If there's forfeiture there's an issue regarding the other half, but it does't stop there, it gets more complicated.

- Let's say I have donated a property which I inherited from my wife to my son, and my son sells it. The person who buys it buys it in good faith, ten years have elapsed and therefore the buyer is convinced it's his, then I pass away and the issue of revocation comes up.

- The law says I lose all benefits under the will so my own half is mine but the half I inherited from my wife is forfeited, it will effect the donation, but what about the third partition possession the person who has purchased the property in good faith? The ten year prescription you have title, there's title, there's a contract, possession, good faith, ten years continues uninterrupted so the third party in possession say there may be a problem but I bought it in good faith, I have prescription on my side.

- So how can you challenge my title to the property since I have prescription in my favour and on the other hand the person claiming forfeiture will say hang on but the person who donated it to his son was still alive, he only died two months ago so to speak by way of example. Before two months, I couldn't find out whether there was anything done in the will to make good for this problem I had to wait till the person passed away in order for me to be able to do anything about it and therefore even though you may have bought in good faith and had possession continuous and interrupted for ten years, my remedy could not have been exercised until my father passed away and therefore the prescriptive period should not be allowed to run because as far as he is concerned the clock could not have started ticking.

- They have these two conflicting arguments. The buyer can say you could have done something because this was an act of donation, inter vivos it was not a will something no one knows, something that is secret and confidential. This is a public deed, a donation is a public deed. You could have known about it and taken steps and you didn't have to stay waiting ten years and two months to do something about it and in fact in a way it contradicts what we said before where we said when is the moment that you examine the issue of forfeiture and it would seem, (there's no caselaw at this point) but as far as this clause is concerned forfeiture applies if by some act inter vivos the request in the will is general and effectual.

- It would seem that in this particular instance, a challenge could be correctly presented in court even though the surviving spouse is still alive because you can prove that by an act inter vivos he has rendered the will ineffectual. It is an exception because normally you only examine forfeiture after the second spouse dies but in respect to an act inter vivos I suspect that the court will entertain or be willing to examine complaint if the donation is such as to render the will of the wife/husband ineffectual.

  - Consequences:

  - 1.Forfeits all rights under the will

  - 2.If the will makes provision for what happens next: the will applies and the "forfeited" property goes according to the will

  - 3.Otherwise if goes to the heirs at law

  - 4.But what about the Reserved Portion?

- Going back to the consequences of the unica charta will. You forfeit all rights under the will, by forfeiting all the rights under the will do you forfeit the rights

under the law? The surviving spouse has a right to the reserved portion if there is a will, if the rules of intestate succession and there are no children or if there are children the surviving spouse inherits either all the estate or half the estate, as the case may be. As far as reserved portion, the reserved portion of the surviving spouse is ¼. The reserved portion is ¼ not ½.

- So what happens if there is a will and there's forfeiture, can the surviving spouse claim the reserved portion or not and this is where our courts have not be entirely consistent.
  - EG 1: Husband and wife leave everything to each other with no further provision.
  - In that case the forfeited estates goes to the 1st spouse's heirs at law.
  - Who are the heirs at law:
  - If there are children 50% children and 50% surviving spouse
  - If there are no children: 100% the surviving spouse
  - So is there forfeiture so absolute?
- Let's take it step by step, husband and wife leave everything to each other with no further provision so you have a will and the husband and wife just say we leave everything to each other and they stop there, so the will doesn't cover what happens next.
- Now in the previous section in article 594), the ownership of the property bequeathed to the spouse shall unless otherwise ordained by the other spouse vest in the heirs instituted by such other spouse. In this case in this example given there was nothing ordained in the will, what happens next. So it vests in the heirs of such a spouse if no heirs are instituted in his heirs at law.
- If the will is silent on what happens next, the rules of intestate succession will apply and under the rules of intestate succession if there are no children the surviving spouse gets everything if there are children the surviving spouse gets half.
  - So take the situation where the spouses left everything to each other and said nothing else, the husband who survives changes the will. Clearly there is forfeiture but since the will is silent and there's no provision of what happens next by the rules of intestate succession he's going to inherit everything anyway. Forfeiture or not forfeiture the results are the same, if there are children he will get half (he would have passed away so his patrimony gets half).

- When it comes to forfeiture the effects sometimes are meaningless. If there are no children and children he will get half and he would have passed away. So when it comes to forfeiture, the effects sometimes are meaningless if there are no children and the will does not provide what happens next, under the law as it stands today the husband or wife will get anything. If there are children it has some difference. Therefore the will makes no provision, till now we don't need to go into the issue of received portion because the will has not made a provision.

- The first example here, who are the heirs at law? If there are children 50% children and 50% surviving spouse. If there are no children 100% the surviving spouse. So forfeiture here is not absolute and in the second instance it has no effect.

  - EG 2: Husband and wife leave everything to each other and provide that in case of forfeiture, the estate goes to the children.

  - In that case the forfeited estate goes to the children

  - Does the Surviving spouse lose the "Reserved Portion" which is 25% of the 1s spouses estate?

  - Case law conflicting but prevalent view is that the RP is NOT LOST.

- If the provide for what happens next,

  - for example they say we leave everything to each other and should you predecease me I leave everything to the children. So there is provision in the will what happens next.

  - So the forfeited estate, goes to the children that's what the law says, clearly the rules of intestate succession do not apply. You have to leave as though the will says I leave everything to my children as though husband/wife don't exist. So what about husband and wife's right to the reserved portion, do you lose it? As we will see the law gives a lot of protection to the reserved portion and there are detailed provisions which ensure that this right is not lost. It's almost going overboard, it protects it to the extent that if there are a lot of donations they go back to the patrimony they're considered, they take the value. The law wants the reserved portion to be safe guarded and it is not easily lost so over here, is the penalty for having revoked a will without being authorised or put in another way if revoking a will when you are not allowed to do so does that make you lose your right to the reserved portion? Is it a ground of incapacity of inheriting the reserved portion, the law doesn't say so and case law is conflicted.

- The courts have distinguished between whether the will was made before or after the first spouse died, not because there is anything in the law but because the

have to look at the element of deception. Has the predeceased wife been deceived? And this aspect of deception had a strong baring on the courts.

- As we said earlier, a unica charta will is bilateral by nature, two people agreeing and compromising and this aspect of compromise and discussion and agreement gives protection so if you backstab the person you've negotiated with the court will not look on it very kindly and there have been cases where (quoted in the last lecture) the court distinguished between whether the will was made before the first spouse died or after the first spouse died and it arrived in different conclusions in two different situations.

  - For example, a husband and a wife make a unica charta will and they go to the notary in the morning, and they leave everything to each other and they have no children. They made a will and left everything to each other, they had no children and they said after we die our estate will be divided by our nephews and nieces. The husband in the afternoon or the next day went to another notary, he was the richer of the two spouses, he had his own paraphernal property and he did not want his own estate to go to the wife's side of the family so he made another will, giving his estate to his nephews and nieces and placed it safe.

  - His wife died and his will of course didn't come out yet, when he passed away and they found out that he had changed his will during the wife's lifetime the court said this wife deceived his wife and tried to play it safe. He made sure that if he died after his wife he would inherit his wife, if he survive he gets the benefit, if he died first it would go to his side of the family, these issues carried out ignoring the wife he took advantage of the fact that the unica charta will was made to convince his wife to give him her share. The court said it was deceptive and it concluded that he lost all rights under the will and was not even entitled to the reserved portion, he didn't even get the reserved portion

- In a different case there was a similar situation but the will was done after the frost spouse died, the reason was that in the will there was no provision for what happens next and the court said there was no forfeiture, the person did not want to change it there was no element of deception and therefore forfeiture did not apply.

- There was another case where there was provision in the will for what happens next and the court said yes there's forfeiture but you don't lose your right under the reserved portion because the will was done after the first spouse died. It's a case by case situation. Judges some times are rules by emotions and if you manage to prove your case and show your circumstance it would have a strong bearing on the outcome of the case.

- In one judgement, the reasoning of the court was a bit year. In denying the right of the surviving spouse to dispose of the estate differently, it said when the husband inherited he wife, he could not be considered as the owner of the estate because he had forfeited the rights under the will. That's not correct, the issue of forfeiture arose after that person passed away not before. But might this reasoning when the court said when the second spouse, he had forfeited his rights under the will and therefore he was not the owner of the wife's patrimony.
- Can one argue that in these situations despite the fact that you're an heir your rights are on hold, it's suspended animation, they're in availance until you pass away that's not the case when you inherit you inherit you become the owner when you inherit you step in the shoes of the estate of the deceased immediately upon the opening of succession. When you inherit the transfer of ownership in favour of the heirs is seamless there is no break it is a continuation
- The reasoning of the courts saying the husband was not the owner was totally incorrect, he is the owner but later on there could be an issue of forfeiture and the aspects of the effects of forfeiture will be back dated. But that issue of forfeiture is still to be determined if it is determined at all. So when the court said the husband had no right to dispose of the wife's share, he had the right because he was the owner but whoever acquired that property was going to be subjective to the possibility of having to give it back because that title was revoked.
  - Last sentence in Art 594:
  - The spouse who has forfeited the property as aforesaid shall, however, retain the usufruct over such property.
  - Does this clause make any sense at all?
  - Does this clause mean that the survivor loses the RP and only gets the usufruct?
  - If the usufruct taken to be part of the RP?
  - Forfeiture is examined when the 2nd spouse passes away and therefore does not need the usufruct.
  - During his/her lifetime such spouse would have enjoyed the full benefit of the UC will.
- The last bit, this section in Dr. Borg Costanzi's opinion should be deleted it does not make sense and he cannot see why it has been written.

- Usufruct in this case is a life enjoyment. The surviving spouse has passed away and when he dies they realise that he has revoked the unica charta will and forfeited the rights under the inheritance. He's dead and gone, his usufruct is terminated so there's no usufruct being retained it's finished. You look at usufruct douruign a persons's life time, forfeiture if it's a will changing a will, it applies only after.

- The only exception Dr. Borg Costanzi could think of which is unlikely is if there has been a transfer inter vivos, so if the surviving spouse sold part of the estate to render the will of the first spouse unaffectionate. In that case if someone challenges the surviving spouses' right to the inheritance this is the only circumstance that Dr. Borg Costanzi could think of where this would apply. It's a very hypothetical situation because if the surviving spouse is thinking of disposing of the estate or part of it that person would seek legal advice and be warned of the consequences that might happened and they'd think twice about it.

- For Unica Charta wills that's it.

  - ….. Role of Notary

  - The Court then went on to examine the contents of the new will to ascertain whether the contents were "reasonable" (In kwantu ghar-ragjonevolezza tat-testment in kontestazzjoni….) and noted that the interests of the deceased's child who had special needs were not as well catered for as was the case in the previous will.

  - "Huwa risaput li l-genituri jkollhom preokkupazzjoni partikolari fil-kaz ta 'wlied bi bzonnijiet specjali u li xi hadd jiehu hsiebhom wara li l-genituri jigu neqsin, kif effettivament ghamlet it-testatrici fit-testment precedenti taghha.

  - To the Court, this drastic change in heart without any external justification further attested to the testator's lack of mental soundness

  - SHOULD THE COURT HAVE THE RIGHT OR THE ROLE TO TEST THE REASONABLENESS OR CONTENTS OF A WILL?

- In dealing with capacity one aspect to mention is the degree of consciousness and awareness of the testator. How conscious and aware is the person making the will of his surroundings, what's going on what's happening is he with us or in space? Last time we quoted the case of Naudi vs Cassar of the old woman who was taken to Luqa by the helper and eventually the family rescued her, took her to hospital. The issue arose as to whether she was sufficiently conscious and aware of what was happening or was she in some delusional state.

- ….. Role of Notary
- At the very moment when the will was being made.
- Carmelo Mifsud et v. Maria Giordano et, (PA 8/3/1953)
- “Ir-regola tal-ligi li huma nkapaci jiddisponu minn hwejjighom dawk li ma jkunux f`sensihom ghandha tigi pprovvduta u sostanzjata minn min ikun qieghed jattakka t-testment minhabba l-inkapacita` u min jimpunja testament ghal vizzju tal-menti tattestatur mhux biss huwa obbligat jipprova dak il-vizzju, izda lprova tieghu ghandha tkun tikkolpixxi wkoll il-mument stess jew iz-zmien prossimu meta sar it-testment.”
- In contrast see the Grima vs Aquilina 30/6/21
- ….. Role of Notary
- “Joseph Bonavia et -vs- Giovanni Bonavia et”, Prim ’Awla Qorti Civili, 20 ta ’ Ottubru, 1971 per Imhallef Maurice Caruana Curran;
- “..... hu sinjifikattiv, izda mhux bilfors deciziv, il-fatt li t-testatur seta ’kien inkapaci f’mument antecedenti, u successiv ghat-testment. Dak li effettivament ghandu piz jibqa ’x’kien l-istat psiko-fiziku tieghu fil-mument tal-konfezzjoni tat-testment. Fundamentalment, jekk kienx ta ’stat tali li seta ’jissoprimi l-attitudni tieghu biex jiddeciedi b’mod koxjenti u liberu. Prova din li, dejjem fuq l-istregwa tal-gurisprudenza enuncjata, trid tkun wahda serja u rigoruza.”
- Baudry- Lacantinerie (Trattato di Diritto Civile: Delle Donazioni fra Vivi e dei Testamenti: Vol. I para 620) :
- “Quanto alla capacita ’di fatto (sanita ’di mente) basta ch’essa esista nel testatore al momento della confezione del testamento; poco importa ch’egli la perda piu ’tardi . Una volta manifestata in forma legale, la volonta ’testamentaria e ’ritenuta persistente, fino a che essa non sia ricoverata da una volonta ’ contraria legalmente espressa .”

- In deciding the court referred to an 1871 case decided by the court of Torino, 4th February 1871. The court said for one to make a will there is no need for a perfect or rigours state of mind, we’re not looking at perfection here. It is enough if that person has a limited amount of reasoning that allows that person to know what he is doing. That’s enough. The bare minimum, no matter how weak or fable that person is if that person has a limited amount of consciousness and that person despite all things going on around him has an idea of what is going on that is enough to make a will.

- 4. Degree of Consciousness/Awareness
- Corte della Cassazzione di Torino 4/2/1871 quoted in Cassar vs Naudi
- non basta “una mente perfettamente e rigorosament sana, ma basta quel limitato uso della ragione che permetta la coscienza di cio che si fa; e per valutare i diversi gradi di debolezza di mente dei testatori si deve aver riguardo alla ragionevolezza o meno delle disposizioni testamentarie
- 4. Degree of Consciousness/Awareness
- TWO GOLDEN THREADS
- A: One who knows and is aware of what he is doing one is considered as capable
- B: The very contents of the will and whether they are reasonable under the circumstances may be an indication as to the “gradi di debolezza di mente”.

- The two golden threads to follow are; one who knows and is aware of what is happening, not some fantastic knowledge just the bare minimum. Secondly the very contents of the will, what the person wishes for may be an indication as to that person’s state of mind. They usually are an impression of that person’s state of mind. Those are his wishes, so are those wishes in line with reality. Or is it some imagined situation?
- In making up the will has the testator created some fantasy in his mind that is totally outside of reality.
  - For example I make a will, leaving out expressly leaving out one of my children and state that I'm leaving them out because that child is refusing to visit me. I have two children, one looks after me everyday the other doesn’t come and I say this person is just going to get the reserved portion and I’ll leave him out of my will. When in reality that other child spends every single night with the person making the will. It’s totally out of context and unreal, what happened for this person to make the will during the day when at night the son was looking after her.
  - It’s an imaginary situation and if there’s an allegation that that person was not in their right frame of mind of course the surroundings surrounding that person’s life become relevant. So the contents of the will are an indication of what’s going on in that person’s mind. What the person has written in the will, stated to the notary and is stated in the will shows what that person is thinking. Is the thinking

realistic or is it some complete nonsense? We're not talking about weird decisions, like people deciding to leave their estate to cats/dogs.

- Situations where a person imagines a situation or believes a situation to be true when in fact it is totally false and in fact in that case the contents of the will may reflect a person's incapacity to make the will.

- 4. Degree of Consciousness/Awareness

- Joseph Vassallo vs Dr Victor R Sammut (App 24/4/1950)

- sufficient perception, reasoning and memory were the test. – Lucid Intervals?

- " Ne 'a questa bastante mediocrita 'delle facolta 'intelletuali ordinarie osta, per un testament da farsi, che talora si mostrino errori mentali e passeggiere apparenze di aberrazione; poiche nel concorso di simili difetti, quando lo stato abituale esebisca la sicurezza di una commune ordinaria intellegenza, e non si conosca che al momenti di testare si in istato di aberrazione, non si puo ' supporre una insanita che escluda la facolta 'di testare"

- We're looking at perception, reasoning, awareness, memory these are all mental aspects of a person. The issue arose in the case of Vassallo vs Sammut.The Vassallo vs Sammut case, it's quoted in the published judgements as you'd have to look at the books because it's easier rather than seeing it online.

  - This was a case of a spinster who lived in Hamrun, there were four siblings living together and she was the last one to die. She was estranged with her surviving brother, so four siblings living together and one is her brother. She had done a number of wills, in her last will by the time she was drawing up her last will, for some time a priest used to come to her house, every day and they had a very good relationship, totally above board, no allegations of impropriety. She also was friends with this particular neighbour Shepard who also looked after her.

  - This woman, the deceased made a will, she left a number of legacies, favouring the wishes of what she had discussed with the priest. A few days after she made the last will the brother found out that she had made this will and he suspected also that she was planning on selling a property or giving it away in her lifetime so he filed proceedings for interdiction. The will was made today and 2/3 weeks later, this application for interdiction was filed in court. The court appointed a case psychiatrist and he examined this woman on a number of occasions but did not present a final rapport. He only said there are indications offering capacity but he needed more time.

- On the basis of these indications the court provisionally interdicted her, this all happened after the will and she died a few months later before the interdiction process was completed. Therefore an issue arose as to the validity of the last will, and the court of First instance appointed a psychiatrist, they actually appointed the first psychiatrist, they weren't happy with the results and 3 psychiatrists were appointed and the court found that the last will was done in a moment when she was incapable and it went to appeal and it is the appeal judgement that we should look at because it is a really studied judgement it looks at preceding case law and goes through the issue step by step.

- First of all the role of a psychiatrist. Should a psychiatrist have been appointed? This person made a will and weeks later, a psychiatrist is appointed after she died the court appointed a psychiatrist to determine whether when she made the will she was capable. The most important thing when assessing a person's capacity is direct contact, so you speak to the person but the psychiatrist couldn't speak to her as she was dead. He couldn't examine her

- So they have to rely on witnesses, what people tell them. So it's third hand it's almost hearsay. The court of appeal said this is a judgment call ,it's a valuation of facts. As a judge it is their job not the job of the psychiatrist to make a judgement call. The role of a psychiatrist from a medical point of view can be helpful but the ultimate decision is not one of the psychiatrist but it lays on the hand of the court and in fact the court of appeal reversed the judgement of first instance and looked at the evidence anew, completely, it made a re-evaluation of all the evidence and the major turning point in this case were the contents of the will with the consistency of the will with the wishes of the deceased and the way she lived.

- It was known that she was estranged with the brother, it was known that she had preferences towards the church and church institutions so the will was consistent. The people used to see her on a daily basis knew what her wishes were and the will reflected what she had been telling them. There wasn't anything weird. It was something done by someone who was thinking about it and did it in her mind and eventually making the will. It wasn't something done by someone who was unaware of what was happening in their life. She had consciousness, she had awareness it was reasonable and it was relevant. The circumstances justified or explained her decision.

- Despite the fact that the first psychiatrist when interdiction proceedings were taking place said that she's a woman easily influenced the court said this does not render her incapable.

- Another aspect that was discussed in this case, it was said that this woman was very prone to suggestion, if someone speaks to her she agrees with them, then another person goes and she agrees with them. Kull min ikellimha taqbel mieghu u tghidlu iva. It was alleged that when this last will was made it was done as a result of the suggestion of the priest.

- The court said in order to make this allegation, you are making it by saying one, this person is capable, two, this person is prone to suggestion. You can't argue that a person has made the will on a basis of suggestion or pressure and say that person is incapable one contradicts the other. You're either incapable and that's it or if you're capable someone can suggest something to you but you are capable, therefore the court dismissed the argument on suggestion because it was conflicting with the argument of incapacity. The two conflicted.

- At what point do you examine a person's incapacity? A person's incapacity is examined at the moment the will is made. That is almost obvious and in fact our courts have said repeatedly that a person could be crazy two/three months ago, a few minutes ago but if they have a lucid interval at the moment making the will, that will will be valid, the time when a person's capacity is examined is the moment of making the will, there's a long line of case law.

- There is one judgement which says otherwise and that is Psaila vs Aquilina which is pending in appeal. We explained this last time, about the married couple where the wife had multiple sclerosis and after they made a unica charta will leaving everything to each other afterwards the marriage was annulled because the doctor said her multiple sclerosis was so serious that it was affecting her mental state and she was incapable of giving married consent for a marriage and therefore an incapacity that occurred 2 years before the will was made was considered to have continued till the moment the will was made. Legally this is not a correct judgement, morally it may but legally Dr. Borg Costanzi doesn't agree with it.

- In the last lecture we referred to Kenward vs Adams, the English case where the court said that in situations where the notary had some doubt it is always advisable to have a medical certificate as it gives the notary comfort, you don't have to but there are circumstances where it would help. The benefit of getting a medical certificate beside protecting the notary it protects the validity of the will. This is an added support which protects the notary from having to carry everything on their own shoulders but it also protects the validity of the will.

  - 4. Degree of Consciousness/Awareness

- Vassallo vs Sammut the Court quoted with the approval the following text from Troplog (Donazioni tra vivi e testament No 463)
- E ’opinion ricevuta come vera che il testamento si deve presumere fatto nel tempo della remissione del male, se l’infremo ha avuto dei lucidi intervalli e l’atto porta i caratteri della saggezza”
- Not all degrees of mental infirmity will lead to the legal incapacity to make a will.
- Maria Assunta Bartolo vs Domenico Psaila (App 5/5/1909)
- Testator was known to be moody and do weird things (carattere maloncolico, bizarro, eċċentriċita’). The Court stated:
- “Che nell’ezame della capacita ’mentale del testatore i fatti deposit dai testimoni devono essere precisi e riferirsi all’epoca del testemento or ad un tempo prossimo; ed a nulla servono quindo le deposizini che si riferiscono a tempi diversi o genericament alla voce pubblica”
- Alessandro Gauci vs Vincenzo Mercieca App 23/10/1922
- The proof must be rigorous to show that
- “non avena conoscenza dell ’atto che compiva ne ’volonta ’propria”
- Imbroll vs Mougliette (App 17/6/1921 – the young wife case
- Using her youth for the service of the fanciful pleasures of the testator to beguile him

- There was another case Dr. Borg Costanzi would like to mention, Imbroll vs Mougliette which was decided in 1921, the young wife case. This was a case where an 80 year old man who married a woman many many years his junior, it was alleged after he died that she married him for money and when he made his will he was so infatuated with her that he was totally out of his mind and therefore his will was invalid because she had he family of the husband, because they didn't have children argued that she should not inherit because she was pretty and used sexual advances and all that stuff. The court was not persuaded by these arguments and it said why should a woman be penalised for performing her obligations in a marriage. The court said it was not seducing her youth, the court said this was not the case and she was honouring the obligations but it shows that there's nothing new. These things happen till today and they keep on happening.

- Proof of incapacity must be conclusive
- Presumption in favour of capacity,
- Cannot be destroyed by “doubts” , “suppositions” or “possibilities”
- but only by positive and conclusive evidence.
- Role of Psychiatrists – Case law inconsistent
- The Courts tend to make their own assessment.
- In Danastas vs Danastas (App 28/5/1926 Vol XXVI.1.498) appointed psychiatrists to assess a person’s alleged incapacity after his death
- Role of Psychiatrists – Case law inconsistent
- Vassallo vs Sammut: Psychiatrists appointed. Judgement reversed in Appeal
- “ Jingħad, qabel xejn, li l-istess periti perizjuri fil-bidu tarrelazzjoni tagħhom irrokonoxxew id-diffikulta ’tal-kompitu lilhom assenjat, billi MV, oġġett ta ’dan l-istudju psikjariku, hija mejta, u biex tiġi rikostriwita l-personalitaġ ’uridika tagħha ma hemmx mezz ieħor ħlief dak ta ’provi indizjarji u ċirkostanzli ottenibili mix-xhieda, u l-apprezzament tagħhom l-iżjed delikat u important ta ’perit, biex jista ’ jasal għal konkluzjoni konformi għall-verita ’u għall-ġustizzja.
- Għalhekk, f’kazi bħal dawn, il-konkluzjoni tal-periti psikjatra tiddependi prinċipalment, jekk mhux esklussivament, mil-apprezzament tal-provi li jkunu ġew imressqin quddiemu. Infatti, ġie zmien li din il-Qorti (5/5/1909 in re Bartolo vs Psaila Vil XX. i. 193) sostniet li “non si puo ’commettere ai periti il gudizio sulla capacita ’mentale di una persona ġia morta al tempo in cuie ordina a perizia, perche ’tale esame dei periti psichiatri si ridurrebbe all ’aprezzamento, che spetta alla Corte, delle prove prodotte”
- Role of Psychiatrists – Case law inconsistent
- Vassallo vs Sammut: Psychiatrists appointed. Judgement reversed in Appeal
- Għalhekk, f’kazi bħal dawn, il-konkluzjoni tal-periti psikjatra tiddependi prinċipalment, jekk mhux esklussivament, mil-apprezzament tal-provi li jkunu ġew imressqin quddiemu. Infatti, ġie zmien li din il-Qorti (5/5/1909
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ordina a perizia, perche 'tale esame dei periti psichiatri si ridurrebbe all ' aprezzamento, che spetta alla Corte, delle prove prodotte"

- Role of Psychiatrists – Case law inconsistent
- "minn eċċentriċita għal miġnun hemm differenza immensa".
- "Din il-Qorti ma tistax tilqa 'l-konkluzjonijiet tal-periti adoperati mill-Ewwel Qorti, għaliex jinsabu bazati fuq provi li, bħala ma ntqal fuq, mhumiex attendibili"
- and concluded that on the strength of the evidence produced, it was not proven that the testatrix "ma kellhiex il-koxxjenza ta 'dak li kienet qieghda tagħmel u volonta propja."
- Alleging INCAPACITY: Evidence which will have a strong bearing will be:
- a)Evidence by the Notary
- b)Evidence by the witnesses to the will itself
- c)The contents of the will itself and whether the bequests look reasonable under the circumstances
- d)Evidence by neighbour, friends and family
- e)Evidence by Doctors and other professionals who may have known the testator
- f)Evidence by court appointed experts
- g)the particular circumstances of the case

- In looking at incapacity, first of all there's a presumption of capacity the burden of proof is the proof of incapacity if you don't manage to prove it you're presumed to be capable. The evidence of the notary will carry weight, the evidence of the witnesses in the will because in the past, now you don't have to but in the past you would have two witnesses and they would be able to testify on the circumstances of when the will was made if they remember. The contents of the will itself, are also very relevant and the court will look at the reasonableness of what is written in the will. Going down neighbours, friends, family, doctors experts, you've got to look at the checklist if you're alleging incapacity what is the type of evidence you'd want to produce. Always remember that the evidence must be very strong.

- Margaret Rossignaud vs Myriam Pellegrini et (333/94 JZM) decided on the 28th June 2018.

- “Interessanti ferm huwa dak li qal Lord Chief Justice Cockburn f`Banks vs. Goodfellow, fejn inghad:

- “It is essential to the exercise of the powers of making a will that the testator shall understand the nature of the act and its effects;

- shall understand the extent of the property of which he is disposing;

- shall be able to comprehend and appreciate the claims to which he ought to give effect; and,

- with a view to the latter object, that no disorder of the mind shall poison the affections, pervert his sense of right, or prevent the exercise of his natural faculties;

- that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

- The issue arose in the Rossignaud Pellegrini case, this is quite a recent case, it is a very good judgement, it holds a lot of jurisprudence and study. In this case the person making the will was at Capoa was a very good friend of judge emeritus Joe Said Pullicino, he was even one of the witnesses in the case, and he was one of the persons whom the deceased had consulted and discussed the contents of the will.

- In his will he had not disposes of his estate as his daughter wished, Rossignaud and of course during the case it came out the issues to why he did this came out that she was a total pain, drove him crazy, she was only interested in money and things and not interested in the father.

    - Margaret Rossignaud vs Myriam Pellegrini et (333/94 JZM) decided on the 28th June 2018.

    - No doubt when the fact that a testator has been subject to any insane delusion is established, a will should be regarded with great distrust, and every presumption should in the first instance be made against it. When an insane delusion has ever been shown to have existed it may be difficult to say whether the mental disorder may not possibly have extended beyond the particular form or instance in which it has manifested itself. It may be equally difficult to say how far the delusion may not have influenced the testator in the particular

disposal of his property, and the presumption against a will made under such circumstances becomes additionally strong when the will is an inofficious one, that is to say, one in which natural affection and the claims of near relationship have been disregarded."

- What is really relevant is that the court in deciding the case put a lot of weight on the contents of the will and the circumstances surrounding the deceased. And whether the contents reflected reality where the deceased was aware of what was happening and whether it made sense. In fact the cost concluded that the way the will was done was proof of capacity rather than incapacity he was so aware that he reacted to the circumstances surrounding his life.

6th March 2023

Lecture 6.

- Law of Succession
- Lecture 5
- Of Capacity of Disposing by Will …….continued
- Dr Peter Borg Costanzi

- Dealing with capacity to make a will.
  - WILLS BY MINORS
  - 597. The following persons are incapable of making wills:
  - (a) those who have not completed the sixteenth year of their age;
  - 598. (1) Those who have not completed the eighteenth year of their age cannot make by will other than remuneratory dispositions.
  - (2) Nevertheless, where any such disposition, regard being had to the means of the testator and to the services in reward of which it is made, is found to exceed a reasonable amount, it may be reduced by the court to such amount

- Can a minor make a will? Someone under 18, can someone under 18 make a will? The law provides that a person under 16 years of age cannot make a will. So if a person under 16 passes away his estate is not governed by a will but by the law, under the law of intestate succession, succession rules apply but the law of intestate succession applies.
  - WILLS BY MINORS

- Up to 2004 – Benchmark was 14 yrs of age – as was the case under Roman Law which was the age when a person became sui juris
- Under 16 - Not considered as having sufficient understanding and volition

- Over 16, and until the age of 18 there are some restrictions. Keep in mind that our law was changed in 2004 and until 2004 the benchmark was not 16 but 14, so, until 2004, a child, 14 years and over could make some form of a will. Nowadays the benchmark is 16, according to the law as it stands now anyone under 16 is considered as not having enough understanding, volition or not being able to express themselves properly. The three benchmarks, volition, understanding and communication.
- By law a person under 16 doesn't satisfy those three requirements and therefore cannot make a will.
  - WILLS BY MINORS
  - Between the ages of 16 -18:
  - Can only make a remuneratory will:
  - A) means of the minor
  - B) the services rendered
  - C) whether the reward is reasonable
  - Courts have a discretion
- Now, what about the case of anyone between 16 and 18?
- Between 16 and 18 there can only do what is called a remunerator will, a will which compensates for a service rendered. Someone has done you a favour or a good deed or helped you out and you want to say thank you and a minor between 16 and 18 can do that.
- The law provides that in this type of will, you've got to see the means of the minor, how financially strong that minor is and cross relate it to the bequest. So if the minor owns 10 houses and wants to give one house away to someone who saved his life, it makes sense because in relation to his means and the service rendered there is a justification but if someone got a lift to come to university and in compensation this person wrote a will leaving €100,000 there's no balance. So you've got to see the means of the minor and the type of service that has been rendered and whether the reward is reasonable. So it's a balancing act,

- The court has to balance if there's a challenge, if there's not challenge the will will stand. But if someone challenges the will and say look, the child didn't own that much property how come he's left most of his property to this person, what was the service rendered? Is there a balance between the gift and the service and in that case the court has a discretionary power and the court can reduce the value of the gift. This is very very unusual, normally, we keep on saying that the wishes of the testator are sacrosanct and those wishes are given effect, and the courts will normally bend over backwards to make sure that's the case if there's a will the court will presume that it is valid, that that person is capable the presumptions are all in favour of the effect of the will and yet over hear were seeing a situation where the court has the power to adjust the benefit and reduce it not because there's a reserved position, we haven't even gone there, claims of a reserved portion haven't even been risen yet. We're only seeing the service and the compensation that's it. It is a kind of inbuilt mechanism to protect the estate of the deceased minor against undue influence and abuse.

- Here the court, the law is saying anyone under 18 can give a gift to compensate but the law is going to protect you against yourself, and if after you die it is found that that gift was overboard it will reduce it and this reduction will happen even if that person lives to be of age.

  - Say for example a 17 year old has a fling with this girl, has a fantastic time and leaves €100,000 of compensation, makes a will. Eventually, they remain together and eventually they grow up, they don't get married and he passes away at the age of 30 without having ever made any other will, that will is valid and the court will say when he was 17 what was the service rendered was there justification for this compensation even though they spent the next 15 years together without getting married, it's the moment in time that the will was made will be examined.

  - WILLS BY MINORS

  - What if child has been legally emancipated at the age of 16?

  - Vide Articles 9 and 10 of the Commercial Code

  - Is this right: Under Criminal Code (Chapt 10) see Articles 26,27 and 35:

  - Under 9 - exempt

  - 9 -14 – mischievous discretion – 4 yrs imprisonment

  - 14-18 – punishment reduced by one degree

- How does this idea sit with other laws? Because in other laws we have this issue of age, for example the criminal code, which we've done, and the commercial code, so if we've done the commercial code and commercial law we will know that parents can emancipate their child at the age of 16 and from 16 onwards that child can trade, that child can buy and sell property, have a bank account, without any restriction at all, no control, he can even donate if he wants to and yet when it comes to making a will he cannot. At least he hasn't gotten full liberty.

- The criminal code, you have various ages according to the sections here, under 9 there's no criminal criminal liability, between 9-14 you have to prove mischievous discretion, and between 14-18 there's no difference except that the punsihment is reduced. So here in the criminal code we're stuck at the odd age of 14, 14 is the benchmark for full liability the only difference is that if you're a minor you'll go to the juvenile court and the punishment is reduced but as far as liability is concerned, a 14 year old is treated as an adult. The elements of the criminality, for the proof of the criminality are the same, the actus reus and the mens rea in respect of a 14 year old are the same as an adult and yet the civil code holds a benchmark of 18 years old and the restrictions between 16 and 18.

  - WILLS BY MINORS

  - Marriage Act – Chapter 255

  - Can get married at 16 with permission of tutor/parents

  - What if "minor" spouse wants to make a will?

  - Canon Law – males at 16 and females at 14 yrs

  - Cohabitation Act (Art 5 of Chapter 571) same age as Marriage Act

  - Constitution: Art 57 – 16 yrs + citizen of Malta

  - Local Councils Act (Chapt 363 – Art 5) – 16 + Good Conduct

- The marriage act, you can get married at 16, of course with the permission of your parents or your tutors but you can still get married. So you can have the hypothetical situation where minors get married and have children and are still minors, you have a husband and wife under 18 with children and they can't make a will leaving everything to each other, the law of intestate succession will apply they can only leave remuneratory gifts. A situation where a minor has married, that person should be deemed to be sui juris, and therefore should be entitled to make a will and not be restricted to the age of 18.

- In canon law, canon law provides that males can get married from 16 year upwards and females 14 upwards, so this is where the 14 came about, from the age of puberty.
- Cohabitation act holds the same benchmarks as the marriage act.
- The constitution, and local councils' act you can start voting at the age of 16, you can't be a member of parliament at 16 you have to be over 18 but you can vote. With these changes of benchmark because of the law, it doesn't make sense to keep restriction of people between 16 and 18 and eventually someday that will change. So that is wills made by minors
  - Those INTERDICTED
  - 597 (c) those who are interdicted on the ground of insanity or of mental disorder
  - The ground of interdiction must be "insanity" or a "Mental Disorder"
  - There must be an actual Court decree. The mere filing of the application is insufficient under THIS section of the law :
  - Vassallo vs Sammut (App 21/4/1950) quoted earlier
- What about wills made by those who are interdicted? Now, not any kind of interdiction, the interdiction has to be on the grounds of insanity or mental disorder, quite frankly, Dr. Peter Borg Costanzi cannot think of any other ground that would fit as insanity or mental disorder cover all the grounds for interdiction. We're not talking about incapacitation, there's a difference in law between interdiction and incapacitation. Interdiction here is talking about the mental powers of a person. Incapacitation you can have situations were people are not capable of administering their affairs, they're still sane. it's just that they're spendthrifts or they don't have a full appreciation of the value of money, or they can't have a penny in their pocket, they just have to spend it by force.
- We'll come to that when dealing with providence but over here the law is not talking about incapacitation it is possible to incapacitate someone and say that person can only spend up to €500 a month, if he wants to spend more than €500 euro a month he has to ask permission from the court.
- It is important to note, look up the judgement which we already mentioned in earlier lectures, (Vassallo vs Sammut), the mere failing of a request for interdiction is not enough. This was a case where a person did a will after one of the children filed a rikors ghall-interdizzjoni, that will was not invalid under this section of the

law because that person was not interdicted there was no formal decree. There has to be a formal decree of interdiction.

- What happens, if there is a formal decree of interdiction and a will is done accompanied with a psychiatric report, saying this person is capable. So I've been interdicted I go to a psychiatrist and my psychiatrist says you can make a will, he actually comes with me to do the will just to prove it and eh comes with me to the notary to do the will, you know what you're doing, you have volition, you have understanding and you're capable communicating your wishes, therefore you have the mental powers to do a will and the notary agrees and I do a will is that will valid? So you have a decree of interdiction and nonetheless I have a medical psychiatrical evaluation saying I am capable, is that will valid? No. If there's decree of interdiction you lost your powers to make a will, it is only a subsequent decree removing the interdiction that gives you back the power.

  - Once the decree is issued, the legal capacity to make a will is terminated even if the person recovers or has lucid intervals and even if there is a subsequent psychiatric report attesting to capacity

  - Rosario Mallia vs Louis Mallia (PA 585.10 MCH dec 2/5/2011)

  - Il-ligi hi tassativa f'dan il-kaz ta 'inkapacita legali u tipprovdi ghal nulita assoluta mhux relattiva. Minn dakinhar tad-digriet 'l quddiem l-atti li jaghmel l-interdett huma nulli. Hekk sehh f'dan il-kaz. Il-fatt li hemm rapport psikjatriku anness mat-testment ma jnehhix l-istat ufficjali ta 'interdizzjoni u konsegwenti nullita tal-atti maghmula mill-interdett. Inoltre kif qalet il-Qorti fil-kawza Benedict Hadrian Dingli noe vs Joseph Mifsud Bonnici, PA 21.05.1953 "L-effetti tal-interdizzjoni jibdew mill-gurnata tad-digriet li jordna l-interdizzjoni

- This case rose in Mallia vs Mallia, any will done whilst a person has been interdicted is null even if later on that interdiction is lifted. If the interdiction is lifted that lifting does not have retroactive effect. During the moment of interdiction from day one when it's been issued to day 2 when it's removed during that period of time any will done has no legal value it is null and void not annullable, null.

  - "L-effetti tal-interdizzjoni jibdew mill-gurnata tad-digriet li jordna l-interdizzjoni anki ghat-terzi indipendentement mix-xjenza jew injoranza taghhom". Stat ta ' interdizzjoni ufficjali titnehha biss b'digriet iehor tal-Qorti fejn jigi muri ghas-sodisfazzjon tal-Qorti li r-raguni ghall-ordni ta 'interdizzjoni ma ghadhiex tezisti, u ghalhekk jigi revokat id-digriet originali ta 'interdizzjoni (ara Arturo Perini vs Dottor Vincenzo Gatt, App. Sup. 11.06.1948).

- This is what this judgement decided here.

- The law was amended by Act II of 2012 and the words " or of mental disorder" were added.

- "insanity " or "Mental disorder"

- We find no definition of what constitutes a "a mental disorder" though under the Mental Health Act (Chapter 525) it is clearly stated that it is only consultants who can certify a person as having a mental disorder.

- Mental Disorder: has a wider meaning than "insanity". One person and one mind.

- Can be sane but have a mental disorder

- When looking at case law, keep in mind that the wording of the law was changed and before the law used to say insanity only and now it added the word mental disorder. Dr. Borg Costanzi has not yet come across any case law where this issue created problems but in his opinion when the law allowed the introduction of the word mental disorder it opened up a huge can of worms because everyone suffers from some mental problem or another, every single one of us.

- Luckily we manage to balance them out and that temptation to do something or that feeling you have you manage to pull back and hold back and you manage to balance yourself and that's what makes you normal. Sometimes that balance goes and you become unbalanced and something takes over and you will be considered to have a mental disorder. There are degrees of mental disabilities. If you look up writings on mental disorders, every single disorder that you study you have it for sure. When it comes to mental disorders it's an issue of degree, at which stage is that imbalance sufficient to make a person incapable of wanting something and expressing their wishes freely. When does the benchmark tip over? This is something argued in court. When dealing with mental disorders it's not easy.

- Another point is that by law if you look up the mental health act, it is only a psychiatrist who is allowed to say when there is a mental disorder, not a judge but a psychiatrist and yet if there is an issue of whether a will is valid it's the courts who ultimately have the power to evaluate the content and capacity of the person making the will.

  - Is an addiction considered as a mental disorder? If that addiction takes over that person's life and a consultant certifies accordingly, this may well lead to that person being interdicted.

- The law does not define or condition the type, quality or extent of such disorder. All that is required for this sub-article to apply is that a Consultant has certified that the person is insane or suffering from a mental disorder and the Court proceeds to issue a degree of interdiction.

- For example, is an addiction a mental disorder, of course it is, but if someone is addicted to gambling can they make a will because he has an addiction, of course he can but then if he makes weird legacies in his will and you find out that he's left legacies to his money lenders. If someone is a junkie, and junks have taken over his mind and he's fixated and if he sleeps and when he sleeps he'll only think about his next fix and someone will tell him okay I'll give you a fix but make a will and leave everything to me. Is that person capable or is he incapable? If he's capable was the will done as a result of undue pressure.

- Our courts have been faced with this question and they have distinguished between capacity on the one side and doing the will as a result of undue pressure. The two are distinct our courts have said if you're incapable you're incapable but if you do a will as a result of undue pressure it means you are capable but someone has forced you but capacity is presumed, you cannot have these two arguments running concurrently, you're either capable or not if you're capable then you can be forced to do a situation but you're capable you're not incapable.

  - Case Law:

  - PA- AE 792/2002 dec 14/1/2013 Ellul vs Busuttil confirmed in appeal 18/7/2017

  - Case of the semi demented Mother at VILLA MESSINA.

  - Ghalhekk il-prezunzjoni juris tantum, hija li min jaghmel testment huwa kapaci biex jiddisponi mill-beni tieghu, salva l-prova kuntrarja li trid issir minn min jagixxi ghallimpunjazzjoni tat-testment." (Joseph Vassallo et vs Avv. Dr Victor R. Sammut3).

  - L-Imhallef M. Caruana Curran spjega li f'kazijiet ta 'din ix-xorta, "Certament ghandha tahrab kwalunkwe prekoncett, sia li min hu xih mhux kapaci, sia li kull min hu marid mhux f'sensih. Jekk qatt ghandu jkun hemm xi prekoncett, jekk dan huwa ilvokabolu korrett, dan huwa biss il-presunzjoni tal kapacita', salva il-prova kuntrarja li pero 'ghandha tkun, kif fuq intqal, rigoruza." (Joseph Bonavia et vs Giovanni Bonavia et deciza mill-Prim'Awla fl-20 ta 'Ottubru 1971). 3 Qorti tal-Appell deciza fl-24 ta 'April 1950 (Vol. XXXIV.i.108).

- Let's go through some case law, case the semi demented Mother at villa Messina.

- This was a case which was case which was decided by Judge Anthony Ellul. So what about case law? And in this case this mother had lost her husband and she started forgetting, she had signs of dementia and she was residing at villa Messina. Eventually she was released and moved to a home in Sliema and she was evaluated by psychiatrists and they acknowledged that she did have signs of dementia and she was forgetting. Her children would see her and the next day she'd forget they would go to see her or if she had 5 children she would only remember 2 or 3 of them.

- It's important to see how Judge Ellul examined this case. First of all he said there is a juris tantum presumption in favour of capacity. The rule is a person is capable, that's the starting point everyone can do a will over 18. It referred to the judgement of Vassallo vs Sammut, which we quoted last week.

- Secondly he referred, incidentally judge Tony Ellul is a big fan of Judge Caruana Curran, and whenever he can he will quote him, and then in fact when it came to presumption (Dr. Borg Costanzi likes the way Judge Caruana put it) "prekoncett" so the court said you should avoid preconceptions, if there is a preconception if you want to call it that, if there has to be a preconception the preconception has to be in favour of validity, in favour of capacity.

  - Case Law:

  - Fil-kaz Joseph Vassallo et vs Avukat Dottor Victor R. Sammut et nomine, il-qorti elenkat il-principji li ghandhom jigu segwiti f'kazijiet ta 'impunjazzjoni ta ' testment meta t-testatur m'huwiex f'sensih:-

  - "1. Illi l-kapacita 'li wiehed jaghmel testment hija r-regola u l-inkapacita 'hija l-eccezzjoni w ghalhekk il-presunzjoni hija favur il-kapacita', liema presunzjoni hija juris tantum.

  - 2. Illi huma inkapaci li jiddeponu f'testment dawk li fizzmien it-testment ma jkunux f'sensiehom u illi l-inkapacita 'tat-testatur ghandha tigi pprovata minn min irid jimpunja ttestment.

  - 3. Illi biex testatur ikun kapaci jaghmel testment, ma hemmx bzonn li jkun perfettament u rigorosament san minn mohhu, imma huwa bizzejjed li jkollu l-uzu tar-raguni fi grad tali li jippermettielu li jkun jaf x'inhu jaghmel.

  - 4. Illi biex tigi stabbilita l-insanita 'mentali tat-testatur hemm bzonn li jirrizultaw indizi gravi.

  - 5. Illi l-Qrati taghna dejjem kienu reticenti li jammettu domanda biex jigi annullat testment minhabba insanita 'mentali tat-testatur jekk din l-inkapacita 'ma tkunx

tirrizulta b'mod cert minn fatti precizi w univoci w ma jkunx gie provat li kienet tezisti fil-mument li t-testatur kien qed jaghmel it-testment.".

- These are bullet points from the Vassallo vs Sammut case and Judge Elul copied and pasted them again capacity is the rule not the exception, those who are not in the right frame of mind are incapable and the burden of proof on the person alleging incapacity. So again every presumption of capacity the burden of proof is on the person alleging incapacity.

- In evaluating capacity, the courts do not require a rigorous proof of perfect sanity, if such level of sanity exists, it is enough and the courts have said this repeatedly going back to a hundred years, it is enough if the court is satisfied that that person has a degree of volition, understanding and communication. The bare minimum is required and the courts have gone on to say, and this was the case in Vassallo and some other, in order to challenge the sanity of a person making a will the evidence must be very strong, it has to be rigorous so besides having the burden of proof, the proof must be very very strong and finally the sanity of the person making the will has to be examined at the moment the will was made. The timeline is the moment the will was made neither before not even after. What happens before and after is indicative but the exact moment of making the will is important.

  - Case Law:

  - Evidence by the Notary:

  - Inoltre, il-qorti hi tal-fehma li d-deposizzjoni tannutar ma tantx tghin meta tqies li ddikjara li ma kienx jiftakar il-kaz partikolari. Mill-provi li tressqu l-qorti temmen li n-nutar kellu jinduna li t-testatrici kienet indebolita, u sserjeta 'kienet titlob li jinsisti li t-testatrici tigi ezaminata minn tabib u jinhareg certifikat mediku dwar jekk kenitx mentalment kapaci taghmel testment dakinhar li ghamlitu.

- Therefore, coming back to the further evaluation of this case, the court examined the evidence of the notary, why? Who was present? The notary. Who was independent of what was happening? The notary. So ideally the notary is the best person to explain why he made and drew up the will for this person, the notary wrote it down and the testator signed it so the notary got the information from the testator translated it to the will in accordance to the wishes of the testator, so the evidence of the notary carries a lot of weight but in this case the notary could not remember the circumstance of when the will was made and what the notary said was that your honour, I always make sure that the person making the will is in his right frame of mind, I speak to him, I realise that he's okay if there was something wrong I wouldn't have done the will that is how I work, for the court it is not enough. In fact the court said it is true that the notary said this and fair enough but I can't

rely solely on this in order to decide this case. So the evidence of the notary was neutral, out.

- Case Law:
- Evidence by the Psychiatrists:
- Mix-xhieda ta ’Dr Spiteri l-qorti tifhem li d-difett li kellha t-testatrici kienet limitazzjoni fil-memorja.
- Pero ’dan ma jfissirx li ma kellix l-uzu tar-ragun li jippermettilha li tkun konxja ta ’dak li taghmel. Fil-fehma tal-qorti d-deposizzjoni ta ’Dr Spiteri setghet kienet iktar fid-dettall li certament kienet titfa ’iktar dawl fuq il-kaz.

- What about psychiatrists? Again in this case there was evidence on psychiatrists and ini fact Dr. Spiteri who was one of the psychiatrists testified that she was beginning to suffer from dementia from the first day that she went to villa Messina (she made the will about a year after she went to villa Messina) but the court wasn’t happy why this, it wasn’t enough and in fact the judge said explained this. In this case Dr. Spiteri said I knew she was beginning to suffer from dementia but it wasn’t sufficiently detailed. When he came to testify in court he couldn’t elaborate further, he couldn’t remember the detail of why he came to this conclusion and so the court wasn’t satisfied. Again this takes us to the Vassallo vs Sammut case where the court said there’s a presumption of capacity, incapacity must be proved and the evidence must be rigorous and strong. In this case the evidence of the notary was neutral, the evidence of psychiatrist had some weight but it wasn’t very strong so what else did the judge do?
  - Case Law:
  - Contents of the will:
  - Ezami tad-disposizzjonijiet testamentarji ma jwassalux lill qorti biex tikkonkludi li huma irragonevoli. Fil-fatt ittestatrici ma eskludietx lill-membri familjari min-naha ta ’zewgha li kienu jissemmew fit-testment li ghamlet ma ’zewgha1
- He looked at the contents of the will are the dispositions in the will reasonable, do they make sense? In fact in this case the court examined the contents of the will, it double checked them with earlier wills and found that they made sense there wasn’t something strange, she did change (the testator) some provisions but all in all the court was satisfied that the terms of the will made plenty of sense.
  - Case Law:

- Pious dispositions:

- Sahansitra fit-testment iddisponiet li l-flus kollha “....kontanti taghha (cash) li jkollha fil-pussess taghha filjum ta mewtha jsirilha Quddies ghall ruhha u skond il-pija intenzjoni taghha.”. Disposizzjoni testamentarja simili “Una dei criteri della sanita ’mentale del testatore e ’la ragionevolezza delle sue disposizioni e nella disposizione testamentarie non e ’neccessaria la prova di una giusta causa.” (Volum XXII.i.88).

- Fis-sentenza Joseph Bonavia et vs Giovanni Bonavia et, Prim’Awla (Imhallef J. Caruana Curran), tal-20 ta ’Ottubru 1971 gie applikat l-istess principju:- “L-ahjar indizju fi kwistjoni simili huwa l-kontenut stess tat-testment li jista bli stranezza, bil-kontraditorjita ’jattesta ghall-istat ta ’infermita ’mentali tat-testatur”……. li l-qorti ddikjarat li turi sens “ta ’ghaqal u rikonoxximent tieghu innifsu u tal-bzonnijiet superjuri tieghu tat-testatur f’epoka vicinissima t-testment.”.

- Another point that the court looked at was in the will there was a legacy setting up a pious benefit, it said I leave my money for masses to be celebrated in repose of my soul. Again, the court looked at Judge Caruana Curran and the court said where there is this type of bequest, where someone is making a will and when making a will you’re thinking of your death, saying I’m going to die this is what is going to happen when I die and one thinks what about my should and who is praying for me? The court said in those types of situations the fact that this type of bequest has been made further rubber-stamps capacity that this person is conscious, is aware and is taking a decision to cater for a situation which is very close to that person. In fact as Caruana Curran put it, “ta ’ghaqal u rikonoxximent tieghu innifsu u tal-bzonnijiet superjuri tieghu tat-testatur f’epoka vicinissima t-testment.” Something which is very close to the heart of the person making the will. In fact this was a factor taken from the contents of the will which reinforced capacity and in fact he declared that the will was valid.

- It went to appeal and the judgement was confirmed in appeal but the judgement at first instance is more detailed and elaborate than the appeal judgement. When you look up the judgement read the appeal judgement

  - Case Law:

  - (Lorenza Bonnici vs Maria Dolores Mifsud

  - (PA 1118/05AE 26/9/2013 –

  - Partially reversed in Appeal - APP 2/3/2018)

- Case of the depressed and suggestible mother falling prey to an unscrupulous daughter

- 1. Presumption of capacity

- Another case which was quite interesting is Bonnici vs Mifsud. In Bonnici vs Mifsud, this was a mother who was widowed and had four children, and she had a unica charta will with her late husband leaving everything to the children and in the unica charta will there was a clause saying that if any of the children do not look after the survivor, they will lose the benefit of the will and get the reserved portion, so the unica charta will, conditioned (put a condition) on the heirs that if they didn't keep on looking after the surviving spouse they risked losing out on the inheritance, so of course, all four children wanted to look after the mother because they feared that they would lose out.

- This was too tempting for one of the siblings and the mother was living with one of the siblings, and in time this sibling made it extremely difficult for the other brothers and sisters to even visit the mother. She didn't even allow them to take her out.

- One time, one of the sisters told the mother ma let's go for a short walk, the mother got up and was going to get changed for the walk and the sister told her if you're going out you're not coming back, and the mother sat down and stayed there, she was a prisoner in her own house. Another will was drawn up and they got a notary who had just started working and didn't have experience and innocently this woman came to do a will and came with this daughter and the daughter of course was very nice, this is my mother, this is what my mother wants to do, you can speak to her, the mother said yes to everything that the daughter said and the notary drafted the will giving a lot of benefits to this daughter. When actually concluding the will, the notary told this girl, leave the room and give me some time with your mother. The notary read the will eventually the will was done.

- The mother died, a lawsuit was filed, and it was alleged that the mother was incapable of making a will and it was alleged also that the will was done as a result of the undue pressure of this daughter. There are two grounds of challenge, incapacity and allegation of fraudulent acts of this daughter, now this mother, was depressed and her depression was recorded. Apart from being old, losing her husband and depression she had problems with dementia.

  - Case Law:

  - Evidence of Notary/Evidence of Psychiatrist

- 32. Relevanti ħafna hija d-depożizzjoni tan-Nutar Dr ……. li rrediġiet it-testment. Hija enfasizzat illi t-testatriċi kellimitha u li kienet “fully lucid” u li kienet taf x’qed jintqal. Veru li nutar mhux persuna medika, iżda ċertament li kienet f’pożizzjoni li tikkonstata jekk Carmela Cassar kienitx qed titkellem bis-sens jew le. Hija stess qalet li kienet ċerta li Carmela Cassar kienet qegħda magħha, għaliex kieku ma kienitx taċċetta li tagħmel it-testment. U fid-dawl taċ-ċertifikat tat-tabib ……. li sar ħames ġimgħat qabel, din il-qorti tikkonsidra l-verżjoni tan Nutar bħala waħda verosimili.

- Court then went on to consider whether the will was null on the basis oof undue pressure by one of the children.

- Now when examining capacity, again the court looked at the evidence of the notary, it is how when the courts started to process the case and evaluate evidence there’s this will let me hear evidence of the notary and the notary testified and she explained the circumstances of the will, she remembers but she made it clear that the woman was perfectly lucid, she knew what she was doing, she wanted the will to be written in that way and there was no doubt about it. If you read the judgement you’ll get quotations of what questions were put by the court and what answers were given by the notary and the judge asked specifically did this woman tell you exactly what she wanted, did she communicate with you, the notary said yes I have no doubt, she was clear in her mind, she was lucid and I’m sure this is what she wanted.

- There was a medical certificate issued by the doctor, a few weeks before this will was made and this doctor said this woman was incapable of looking after her affairs and yet, the court said I cannot rely on this certificate because it was done five weeks before, at the moment she made the will she was lucid. The court had to evidence this evidence of the doctor with the notary and sided with the notary and said that the will was valid. The court said she was capable of making the will.

- There was a second argument raised, whether the will was done as a result of undue pressure of this daughter so in order to examine the second ground the court had to say yes this woman was capable but she was unduly pressurised . So the court said yes she was capable let’s see if she was pressurised and the judge in first instance when evaluating the facts said she was not pressurised and decided in favour of the validity of the will and it went to appeal.

- In appeal the court confirmed the first part of the judgement and agreed perfectly with the reasoning by the judge Ellul that this woman was capable however it reversed the second part. In reversing the second part, and this is why Dr. Borg Costanzi’s asking us to read it, you won’t find a lot of legal discussion but you’ll

get a lot of facts, and discussion on facts. The court looked at the circumstances surrounding the woman's life and said first of all under the unica charta will there was a condition that all the children look after the mother. All the children wanted to look after the mother and evidence showed that the other children tried to look after the mother but the one daughter made her life hell and stop them from doing so. So that one daughter was using the condition in the unica charta will to get her siblings to forfeit her rights. (Only I looked after her, you would never come, she was trying to make her point, she was not allowing them to come, take her out, she kept her mother under her thumb and the mother was so depressed she had no strength to fight.

- When the court saw the situation and also the fact that the daughter was present when the will was made, was waiting outside the room until the will was signed, so the mother knew that as soon as the notary went she's going to see the will what was written and what was signed for and if she didn't obey she was in trouble and even maybe kicked outside the house. The court said yes this woman was capable but there was undue pressure and concluded that it was done as a result of fraud practiced on the part on that daughter and it stopped there.
- The big consequence of that, (Dr. Borg Costanzi doesn't know if this actually happened) is that if you are guilty of this kind of situation it is a ground of unworthiness and you get nothing from the will not even the reversed portion so in this kind of situation this daughter who used every means within her power to trap her mother and get her to conform with her wishes ended up getting nothing from her mother's estate. Or should have gotten nothing from the estate.
    - Case Law:
    - 30/6/2021 case No 124/19 (Maria Viviana Psaila vs Mario Aquilina"
    - Spouses going out together since 1992
    - Married December 2001
    - Unica charta will May 2002
    - Health of wife detoeriated 2007/08 and husband left the house
    - 2012 husband commencd annulment proceedings in curia – decided 2015
    - Wife interdicted in 2015
    - 2016 husband commenced legal separation proceedings – still pending in 2021.

- Wife died in 2018

- There was another case which is the contrast of one mentioned earlier, it is the Psaila vs Aquilina case, the gozitan wife who had multiple scoliosis. Dr. Borg Costanzi has highlighted the fact they started going out together in 1992, and they got married in December 2001 so they'd been 9 years together. They made a will a few months after marriage, they got married in December, they did the will in May, which is good Dr. Borg Costanzi recommends that a married couple makes a will as soon as they are married.

- A few years later she was diagnosed with multiple sclerosis, or even before soon after marriage and the husband used to go with her for regular visits, her head got worse and worse and worse and in 2007/2008 the husband couldn't take it anymore and left and in 2012 he started annulment proceedings in the curia which were decided in 2015.

- Wife was interdicted in 2015, 2016 he commenced legal proceedings which are still there, the wife died in 2018.

- The issue arose in 2002 and in this case the court, said that if the woman by the decision of the Curia could not give valid consent in December how could she validly give her consent in may 6 months later? And annulled the will on the basis of incapacity.

- This judgement is a strong contracts from previous judgements, we had psychiatric evidence attesting to a person not being 100%, having a mental disorder, but the mental disorder in the other cases had to be proved and very rigorously proved.

  - Case Law:

  - 30/6/2021 case No 124/19 (Maria Viviana Psaila vs Mario Aquilina" where the Court relied on the strength of a decision given by the Ecclesiastical courts in the interests of justice.

  - 44. Il-Qorti tirrileva illi l-Qrati huma Qrati taĠ 'ustizzja, u għalhekk trid tassikura ruħha illi l-ġustizzja attwalment issir. Dana qiegħed jingħad in vista ta 'dak illi issa l-Qorti ser tikkunsidra…….

  - 50. Ta 'l-istess opinjoni kien it-Tribunal Ekklesjastiku fid-deċiżjoni tiegħu datata 6 ta 'Mejju 2015 u kkonfermata mill-Qorti tal-Appell fid-9 ta 'Frar 2016, fejn it-Tribunal ddikjara illi "this marriage is to be declared null on the ground of lack of due discretion of judgment and inability to assume marital obligations on the part of the Respondent."

- 51. Il-Qorti tqis illi għandha tagħmel referenza għal tali deċiżjoni, peress illi, la darba ġie meqjus mit-Tribunal Ekklesjastiku u konfermat mill-Qorti tal-Appell, illi Sharon Psaila kienet inkapaċi tassumi u tifhem l-obbligi tagħha taż-żwieġ abbażi tal-marda tagħha, u dana fid-data taż-żwieġ tagħha fis-sena 2001, dana jfisser ukoll illi fl-24 ta 'Mejju 2002, minħabba fid-diżordni mentali u kundizzjoni illi hija kellha, hija ma kienet fi stat kapaċi tieħu ħsieb ħwejjiġha meta sar it-testment unica carta ma 'l-intimat.

- In other words it has to be of high intensity of disorder. Having the early stages of dementia was not enough in the previous cases, being depressed wasn't enough, so how come in this case the court stretched a decision based on a mental state of mind in December to also cover a mental state of mind in May. Worse than that, the consent for a valid marriage is totally different from the consent and capacity required for a will.

- In a marriage, the tribunals and the courts look at the marriage as a sacrament or a contract and they're looking at matrimonial rights and obligations and the consent to those matrimonial rights and obligations only. That is what is in picture. Did you give valid consent to enter into those obligations to take a sacrament did you understand what a sacrament means? Did you know what that obligation meant? When you gave your consent was this done freely?

- When it comes of a will you are disposing of your estate and law says volition, understanding and communication. Was this woman capable of volition? Was she capable of understanding? Was she capable of expressing and communicating her wishes. It's not the same test as a test for consent for marriage it's a totally different test and yet the court decided else way, and what turned it for the court was the only paragraph and it shows you how sentimental a court can be and requested the marriage to be annulled as though the marriage never existed. Of course this is now in appeal. It just goes to show that case law helps but it's not everything and if you make a right case and put your arguments strongly enough you can win the case even though case law is against it.

  - Wills by persons having some "defect" or "injury"

  - 597 (b) "those, who, even if not interdicted, are not capable of understanding and volition, or who, because of some defect or injury, are incapable even through interpreters of expressing their will:

  - Provided that a will can only be made through an interpreter if it is a public will and the notary receiving the will is satisfied after giving an oath to the interpreter that such interpreter can interpret the wishes of the testator correctly;"

- Moving on Section 597, over here there's (we've already dealt with this section in what we've already explained) in the sense that before we were dealing with persons who have been interdicted and if not interdicted, had insanity or a mental disorder. Here w are talking about cases of people who are not interdicted and are not capable of understanding and volition, or who, because of some defect or injury, are incapable even through interpreters of expressing their will.
- We have a situation where a person can understand and can express a wish, if he can't understand or if he can understand but can't wish for something there's no capacity to want in order to be done. There's no volition, then you can't have a will. If he can understand and has power of volition he has to communicate those wishes, if he can't communicate them there's a problem, if it's impossible to communicate those wishes then there's a problem but if he can communicate those wishes, the law provides for those situations.
- The obstacle can be physical, mental or both, till now mental issues capacity we're talking about mental issues here we're going into the realm of physical, and the law introduces the possibility of an interpreter which is a bit unusual because the general rule is that it is the notary and only the notary who is empowered by law to register the wishes of the person making a will. A hundred people can come and say this is what my mother wants to do do, but the notary can say forget it I am the one who decides, and I listen to your mother not to you, you cannot interfere in my work, the law gives me the power and responsibility to understand what the testator wants, the testator has to communicate with me, and I will reflect those wishes in her will.
- Yet here the law is saying if you can't communicate with the notary the notary can use an interpreter
  - Not Interdicted
  - not capable of understanding and volition,
  - or who,
  - because of some defect or injury, are incapable even through interpreters of expressing their will:
  - EMPHASIS ON ; UNDERSTANDING
  - VOLITION
  - EXPRESSION OF WISHES

- DEFECT OR INJURY OF ANY TYPE – PHYSICAL AND/OR MENTAL

- You will note the first hurdle is capacity of understanding and volition, and the second hurdle is expression of wishes. So the defect or injury we're talking about here is not defect of injury or injury effecting volition and understanding, it is a defect or injury which is effecting communication a person can be perfectly sane and capable of volition and be trapped in his body not being able to express those wishes.

- In that case if these wishes cannot come out externally and be passed on to the notary, then of course the will cannot be made.

- There was this case where these parents had a handicapped son, and this person he was an only child and they were worried about what would happen to the child's estate after they died. Later on, in lectures in the future we will come to this point because the law binds for this situation but what these parents tried to do, they filed a request before the civil court second hall asking the court permission for their son to make a will along the lines dictated by the parents. They wanted the court to say look we want the son to make a will on these lines a), b), c), and d) because he is mentally incapable and he cannot express his wishes and therefore we want to cater for the situation. The court threw it out, if the person cannot make a will they cannot make a will the court can't substitute wishes.

- But over here in this article of law we're looking of someone whose possibly capable of understanding and wishing but is having difficulty of communicating those wishes.

  - Law Changed in 2004

  - Previously the CIVIL CODE prohibited congenital deaf-mutes who did not know how to write.

  - "Some Defect or injury" could be physical or mental or both

  - What if a person is Blind, Dumb, Deaf or illiterate?

  - Can such persons UNDERSTAND and EXPRESS THEIR WISHES?

  - How can the law protect them from abuse?

- Keep in mind when looking at case law especially old lecture notes that the law was changed in 2004, so if we're looking at notes before 2004, Caruana Galizia notes would be different, the concepts as concepts would be ok but facts, the

particular issues will be slightly different. In Caruana Galizia notes it is stated as deaf-mutes whilst in the law now it says some defect or injury.

- What if a person is blind, dumb, deaf or illiterate. These are physical attributes not mental attributes. Such persons of course would normally have an understanding and they're also capable of wanting something but they are having difficulty expressing and communicating that wish or maybe they have difficulty in ensuring that the person drawing up the will, is doing so correctly.
- if I'm blind I can't see what's written I have to rely on the integrity of the honesty of the notary, who may not even be a notary, so I'm making a will thinking I'm doing a will but in fact it's a piece of paper with no legal value.
- So how does the law protect people from abuse and what additional requirements are stipulated in the law.
    - LITERACY – READ and/or WRITE???
    - On their own – not an issue but
    - a)is relevant if the person is either totally deaf, dumb or both deaf and dumb
    - b)there are limitations when it comes to Secret Wills – Art 663
- First of all illiteracy, reading and writing. Must you be able to read or write in order to make a will? It is not a requirement as far as a public will is concerned. To make a public will you don't need to be literate, there are provisions in respect of secret wills, we'll come to that later on when dealing with secret wills, as far as secret wills are concerned the issue of being able to write is irrelevant.
- What about people who are deaf, dumb or both deaf and dumb, if you have again people who have diminished power of communication they can't hear, they can speak, or they can speak but they can't hear.
    - Interpreter under the CIVIL CODE?
    - Who decides?
    - What are the qualifications?
    - Is this always the case?
    - See special provisions under Chapter 55 re persons who are deaf/dumb or both
- Now, before we move on to specific situations of people who are dumb and deaf the law says if person has difficulty has a difficulty in communicating, the notary

can resort to the use interpreter. Provided that a will can only be made through an interpreter, provided that the notary receiving the will is satisfied after making a note that the interpreter and such interpreter can interpret the wishes of someone. So when talking about an interpreter here, the law leaves it to the discretion of the notary, the notary has to be satisfied that the person is a competent interpreter. It's the notary who evaluates the communication skills of the interpreter.

- For example you have someone who can't talk whose dumb, but can communicate with sign language and the notary doesn't know sign language, someone can come along, who knows sign language and they can communicate.

- That's an easy example.
  - Chapter 55 – Notarial Profession and Notarial Archives Act which deals with ACTS received by a Notary:
  - Makes special requirements for persons who are
  - Totally Deaf
  - Dumb or Deaf and Dumb
  - See Also Arts 597, 668 and 669 of the Civil Code
- If you look at chapter 55, the notarial profession and the notarial archives act, this law goes into more detail. It makes special requirements for people who are totally deaf, dumb or deaf and dumb. So these are the three categories, totally deaf dumb or deaf and dumb.
  - Article 37. – when a person appearing on a public Deed is TOTALLY DEAF
  - A Public will is a PUBLIC DEED
  - (1) Where any of the appearers is totally deaf, such appearer shall read the act, and a mention of the fact shall be recorded therein.
  - A) important that the person making the will can READ
  - B) Must be TOTALLY DEAF
  - C) Mention MUST be made in the will.
  - See also Section 669 Civil Code if he can read.

- If someone is totally deaf he can make a will, a public will, but it's important that this person can read. So literacy comes in here. The notary must put a note and state this person is deaf but he can read, it has to be recorded in the will. So as far as someone being totally deaf that will can be done and why do you think the issue of reading is important? Because when a will is done like any public deed, the notary will read it out. Then you sign, you can exempt the notary from reading if you've read the will and the notary writes I have been exempted from reading this contract because the person has read the contract themselves. There's a declaration.

- With a will, if the person is deaf her cannot hear the reading and therefore if he can read it is recorded that this person is deaf, he read the will it's recorded and signed.

  - If the Totally Deaf person is ILLITERATE

  - (2) If such appearer is illiterate use shall be made of the services of an interpreter to be appointed by the Civil Court (Voluntary Jurisdiction Section), possibly from among the persons accustomed to communicate with him, and who can make himself understood by signs and gestures. The interpreter shall be present at the execution of the deed, saving as regards wills, the provisions of article 669 of the Civil Code.

- What if the person is illiterate? Cannot read? Then in that case it's not any normal interpreter that interpreter must be endorsed by the civil court second hall, so there's an added hurdle and the law says that this interpreter must have had good communication with the person making the will, accustomed to communicate with him. It could be a parent, it's no problem and in fact, this will happen, mothers with toddlers, a one year old or two year old they can't even speak and yet the mother can understand what the child wants. The father is a hopeless case but there's a wavelength in this communication. It happens in all forms of life and the people who communicate most are the members of the family, the parents and the children especially and the law allows the parents to be interpreters its not a problem.

  - Here we note that it is not every person qualifies as an interpreter.

  - The Person must be appointed by the 2nd Awla

  - (3) Such interpreter must possess the qualifications required for a witness and shall take the oath as provided in article 36(3), and a mention of the taking of such oath shall be recorded in the act.

- (4) Such interpreter may be chosen from among the parents or relatives of the deaf person, but shall not, at the same time, act as a witness or as one of the attestors.

- (5) The interpreter shall sign the act as provided in article 28(1)(k) and (l).

- Art 669 – also applies if he cannot read – Notary must “enter, at the foot of the will, a declaration to the effect that the will is in accordance with the will as declared by the testator.”

- Of course if the interpreter is a parent that parent cannot also act as a witness in a will. Under the law as it stood till last year, because the law has been changed, in order to make a public will normally need two witnesses; they have to be independent, not be related the notary and not be related to the person making the will and not getting benefit of the will. The witnesses have to be total outsiders who have no interest in the will either direct or through marriage and they will witness the signature of the willI. If the parents are interpreters, they cannot act as witnesses, they cannot act as witnesses in any case but law makes extra provisions that if the persons or if they’re related to that person, they cannot act as witnesses to the will, the law was changed because nowadays its no longer a requirement for a public will to be witnessed. (We will come to it later on and Dr. Borg Costanzi disagrees with it).

- If the person cannot read the notary must also put a deceleration at the end of the will when he says this person making the will is deaf, cannot read, I've used an interpreter, the interpreter was approved by the sekonda Awla and therefore this is how the will was made. It’s important to note that here the law is talking about reading not writing and later on we’ll come across a case when dealing with secret wills which, where this problem arose. In a secret will under the maltese text of the law, the law requires writing and under the English text of the law the law requires reading and writing, the two versions of the law don’t agree with each other and there was a lawsuit because of this. The court went into what is writing, what constitutes a person’s capability of being able to write, here we’re not talking about writing we’re talking about reading so if this person cannot read, for instance he is deaf and blind, he cannot readnot unless the will is written in brail, which may not be possible but if he cannot read then a special interpreter has to be chosen.

- It’s reading and not writing a person so if there’s a person who can sign his name if it’s shown that he cannot read despite the fact that they are able to sign their name, there are some people who cannot read but can sign their name it’s on their identity card. That’s all they know how to do but here the law is talking about reading not writing.

- Here we note that it is not every person qualifies as an interpreter.
- The Person must be appointed by the 2nd Awla
- (3) Such interpreter must possess the qualifications required for a witness and shall take the oath as provided in article 36(3), and a mention of the taking of such oath shall be recorded in the act.
- (4) Such interpreter may be chosen from among the parents or relatives of the deaf person, but shall not, at the same time, act as a witness or as one of the attestors.
- (5) The interpreter shall sign the act as provided in article 28(1)(k) and (l).
- In the case of a TOTALLY DEAF person who is illiterate, the interpreter cannot be the Notary, even if the Notary fully understands the person.
- Interpreter to have same qualities as witnesses:
- Must not be blind or be deaf or dumb
- Must not be related to Notary or be spouse of Noary
- Must be able to sign
- It seems however that heirs, legatees or relatives can act as interpreters.

- If the person is totally deaf and is illiterate the interpreter cannot be the notary himself. It has to be an outsider, in the sense a third party even if the notary fully understands the deaf person.
- Now the interpreter must have the same qualities as the witness, mainly must not be blind or be deaf or dumb, must not be related to the notary or be the notary's spouse and must be able to sign. That is someone who is deaf.
  - Art 38: When the appearer is DUMB, or DEAF AND DUMB.
  - 38. Saving in regard to wills, the provisions of articles 597 and 668 of the Civil Code, where any of the appearers is dumb, or deaf and dumb, besides the rule laid down in the last preceding article as to the presence of the interpreter the following rules shall be observed:
- What is the person is dumb or deaf and dumb, the law states this in article 38, we have an additional requirement in the case of people who are dumb or both deaf and dumb

- Art 38: When the appearer is DUMB, or DEAF AND DUMB.
- 38. Saving in regard to wills, the provisions of articles 597 and 668 of the Civil Code,
- Art 557: We already saw. Which is the general rule stating who is incapable of making a will
- Art 668: Special additional requirement if such a person wants to make a Secret will

- First of all the law says saving article 557 and 668.
  - Article 597.
  - **597**. The following persons are incapable of making wills:
  - (a) those who have not completed the sixteenth year of their age;
  - (b) those, who, even if not interdicted, are not capable of understanding and volition, or who, because of some defect or injury, are incapable even through interpreters of expressing their will:
    Provided that a will can only be made through an interpreter if it is a public will and the notary receiving the will is satisfied after giving an oath to the interpreter that such interpreter can interpret the wishes of the testator correctly;
  - (c) those who are interdicted on the ground of insanity or of mental disorder;
  - (d) those who, not being interdicted, are persons with a mental disorder or other condition, which renders them incapable of managing their own affairs at the time of the will;
  - (e) those who are interdicted on the ground of prodigality unless they have been authorized to dispose of their property by the court which had ordered their interdiction:
  - Provided that a person interdicted on the ground of prodigality may, even without the authority of the court, revoke any will made by him prior to his interdiction.
- Article 597 deals with incapacity, people who don’t have volition, don’t have understanding and are incapable of communicating. If they don't’ communicate in any way they are stuck.
  - Article 668.

- **668.** (1) A person who is deaf-and-dumb, or dumb only, whether congenitally or otherwise, may, if he knows how to write, make a secret will, provided the will is entirely written out and signed by him, and provided he himself, in the presence of the court or of the notary to which or to whom he presents such will, and of the witnesses of the delivery, writes down on the paper which he presents, that such paper contains his will.

- (2) The notary in the act of delivery, or, as the case may be, the registrar, in the note of particulars referred to in article 662, shall state that the testator wrote the declaration mentioned in sub-article (1) of this article, in the presence of the notary and the witnesses, or in the presence of the court

- Article 668 deals with secret wills.

  - Art 38: When the appearer is DUMB, or DEAF AND DUMB.

  - (a) the appearer who is dumb, or deaf and dumb and can read and write shall himself read the act and write at the end thereof, before the signatures, that he has read it and found it to be in accordance with his will;

- Other than those two cases there are additional requirements, first of all if he can both read and write. If you can both read and write then he has to write down in his own handwriting that he has read it, so the testator besides signing actually writes I have read this will with his own hand. Dr. Borg Costanzi has never come across this but it is protecting people who have a diminished communicating skill to ensure the integrity of the will to ensure that no one is taking advantage of the person making the will and to ensure that the will is the original will and not a substituted one.

  - Art 38: When the appearer is DUMB, or DEAF AND DUMB.

  - (b) if such appearer does not know how to or cannot read and write, it shall be necessary that his sign-language be understood also by one of the witnesses, or, otherwise, that a second interpreter be present at the execution of the act in accordance with the rules laid down in article 37(2), (3), (4) and

- If he cannot read and write then sign language can be used. He can not sign language as one would do like formal sign language even normal gestures are enough as long as he can make himself understood and in that case there has to be a second interpreter. There have to be two interpreters not just one. Again the rules previously laid down have to be followed. So any case of someone who is dumb, deaf and dumb, who is illiterate, who cannot read and write. Then one of the witnesses can act as an interpreter and there's also a second interpreter.

There are two interpreters one of whom can be a witness, but the other has to be totally independent. This has to be all recorded in the will. You have to actually state the names of the persons who acted as interpreted. So you'll say this will was done.

- What if you have a will with no witnesses, that's valid, what if there's a will done by someone who is deaf and dumb, there's an interpreter, that's valid. If it is done by someone who can't read or write he needs a witness otherwise there's a conflict between two parts of the law, you have to give them both affect. The civil code has not been amended, it's chapter 55 that has been amended so the civil code says one thing and chapter 55 says another. You have to jigsaw the puzzles together, so where there is the case of someone who is deaf or deaf and dumb and he's illiterate there has to be an interpreter by force and at least a second interpreter at least because the civil law requires two interpreters. You don't need a third witness because chapter 55 exempts you from that hurdle.
    - The Interpreter under Chapter 55
    - 39.If interpreter is not named the act is voidable.
    - 39. (1) Where, in the publication or the drawing up of an act an interpreter has been employed, the notary shall, before the act is signed, state that such interpreter was chosen with the consent of the appearers, or as the case may be, by the Civil Court (Voluntary Jurisdiction Section), and that he took the oath to perform his duties faithfully.
    - The Interpreter under Chapter 55
    - This applies for all situations, not merely when the person is deaf or deaf and dumb.
- We're not going into the technicalities of interpreters.
    - The Interpreter under Chapter 55
    - (2) In default of compliance with the provisions of sub-article (1), the act is voidable on the demand of the person in respect of whom the employment of an interpreter was required.
    - (3) The said demand shall no longer be competent after the lapse of one month from the date of the publication of the act, or if the said person shall have given execution to the act.
    - Another presumption in favour of VALIDITY,

- VOIDABLE and nor VOID

- One last point, void or voidable. In our studies we'll come across this from time to time. Something that is null or something that is annullable and something that is null, it's null you don't need a court judgement, it is null from day one. It never existed. Something that is annullable, requires a court judgement and the same thing with void and voidable. If you don't mention the interpreter the will is voidable it is not void so someone has to challenge it. If no one challenges it it's a valid will. It is not automatically null. It is a valid will it's not like the case of somebody interdicted doing the will at the moment of his interdiction, someone who is interdicted doing the will at the moment of his interdiction that will is null you don't need a court judgement, it's null that's it.

10th March 2023

Lecture 7.

- Law of Succession

- Part 6 - Capacity of Disposing under a Will

- (Finalised)

- Part 7- Capacity of Receiving under a Will

- Today, we'll be concluding the part dealing with the capacity to make a will and also starting with the capacity to inherit.

  - 597 (e) Interdicted Prodigals

  - (e) those who are interdicted on the ground of prodigality unless they have been authorized to dispose of their property by the court which had ordered their interdiction:

  - Provided that a person interdicted on the ground of prodigality may, even without the authority of the court, revoke any will made by him prior to his interdiction.

- Were talking about capacity to make a will and we are speaking of interdicted prodigals, there has to be a decree of interdiction, that is the first element there. Has to be an interaction

  - 597 (e) Interdicted Prodigals

- Prodigality involves a person who, because of his inability to appreciate his financial situation squanders his assets in an irresponsible and negligent manner.

- A prodigal is not considered to be insane or mentally deficient but he displays a serious lack of judgement which results in the reckless wasting of his own assets.

- Eg: persons with Addiction or fixation issues or persons who have no sense of value " –jonfqu bl-addoċċ"

- The interdiction must be based on prodigality, a prodigal is a person who has no control over his spending, there are people who are born like that they have no value of money, as soon as money is in their pocket it goes out. Whether it's €100 or €10 it has no value to them. If they want something they'll pay the price, they don't care no matter what the price is. There are people who become prodigals because of something that's happening maybe they're addicted, they want a fix so the fix becomes so important taht no matter of the price of that fix they'll pay because the fix is more important than the value.

- Usually the interdiction of this basis usually results from children having an addiction they're gabling, drinking, on drugs and the preteens are afraid that the child, husband or the wife will squander the assets and they will apply for a decree of interdiction on this basis. So at least the wife/husband/child/relative is protected from himself.

- In that case the person is not crazy, they will just have a severe lack of control over their assets, we're not talking about insanity but something that affects that person's frame of mind when dealing with his own assets.

  - 597 (e) Interdicted Prodigals

  - Roman Law – Emperor Leo – different point of view – Valid unless shown to eb a result of prodigality

  - If a Judge's intervention is sought, what role will the Judge carry out?

  - Revocation of a will – no need for court intervention.

  - Why?

  - What is the Punctum temporis to determine validity?

- Under roman law, a prodigal could make a will there's no problem at all and the validity of the will would be examined if it was shown that it was made out of a

sense of prodigality. If there was no valid reason or the will was so out of sync that it indicated recklessness so the presumption of validity of a will under roman law was really really strong and it was not easily overturned, this rule by Emperor Leo highlighted this point, of course or law is a bit different.

- Our law requires prodigality plus interdiction, it's not just a prodigal but there has to be a formal degree issue by the civil court second hall. If a person is a prodigal but has not been interdicted it may fall under another ground of incapacity, maybe they can say that at the moment the will was made that person was unduly influenced, not in his right frame of mind but it will not fall under this ground so there has to be a decree.

- However a prodigal can make a will with a consent of a judge, so the incapacity is not absolute, if a prodigal wants to make a will has to go speak to the judge and the judge would say your honour I'd like to make a will.

- Obviously, a prodigal isn't going to do it on his own motion, if he's a prodigal and he's totally reckless he's not going to even think of taking advice he doesn't even realise he's being reckless. He just couldn't care so it's inconsistent that the prodigal voluntarily knocks on the door of the judge, takes bother, waits about half an hour for the judge to turn up and when he turns up the judge says what do you want? Okay you can speak to me in my chambers. Who would want, if you were in this position and you want to make a will and to make this will you have to speak to a judge, how would you go about it? You wouldn't even know where to start, you say I go ideally to the family court because there's a judge there in the Sekonda Awla and you'll speak to the staff. You go there wait in the queue, you can't speak to the judge, you have to explain to the person behind the counter that you're a prodigal and probably they wouldn't even know what a prodigal is and then eventually his or her boss will come, they will say come to my office and you'd have to explain and they'll ask the judge and I'll let you know come back tomorrow and we'll see what to do.

- It's very uncomfortable and inconvenient to seek the advice of the judge, you can't just walk into the corridors of the court and speak to a judge.

- In practice if this had to arise, if you go to a notary, the notary would say hang on you're interdicted you'd need intervention of a will so in practice what will happen is that the notary will make the arrangements for this meeting with a judge, hopefully the prodigal will turn up for this appointment, because if the person's on drugs, today he's here and in ⅔ weeks he may be no where to be found, and until the person comes down to earth until they start reasoning. In practice it's difficult to organise this meeting but the law allows it under the right circumstances.

- What role does the judge carry out? If you were the judge and this prodigal came in front of you, you've interdicted this person and it's already been established that this person is reckless and this person wants to make a will so you already have a preconception about this person, that whatever this person is going to tell you already you are going to suspect that they are going to be reckless, because it has already been shown that they are reckless.

- So the judge is going to assess the reasonableness of what the testator wants to do, if the judge isn't satisfied can the judge say no? Is the judge allowed to impose his wishes on the wishes of the person making the will, can the judge say no? This contradicts the liberty, the freedom of being able to make a will.

- In the sense that you want to make a will and yet your wishes are dependant on someone else saying yes, of course the judge has to give an answer and the will cannot be done unless the judge says yes and for a judge to say yes he has to be convinced you're not going to tell the judge to merely rubber-stamp a request. Otherwise what is he there for?

- So the signature of the judge has to come at a price, and the price is the evaluation made by someone in office having a degree of understanding, knowledge, independence, impartiality, someone who by law is seen to be a reliable person who has a balance, who is not being pulled one way or another by family constraints.

- So if this prodigal wants to make a will because his sister is pushing him, his mother is pushing him, his girlfriend or his father is pushing him to make a will the judge will try to put a balance, or make sure there is a balance. So the judge carries out a value judgement, he evaluates the wishes of the testator and if the wishes are not the result of prodigality he will say yes so the evaluation by the judge is whether the wish is reckless or whether it is not, whether it is made because the person is a prodigal or whether it is made when he is not being influenced by this prodigality.

- What if the judge says no? You're stuck. There doesn't seem to be a process of appeal, you have to try again, if the judge says no you go again have another discussion with yourself and someone else maybe, go back and discuss the matter again you don't give up. If you want to make a will and you're a prodigal you have the right to make a will but you need advice, and if the person giving you advice doesn't agree or is stopping you, you have to reevaluate, reassess and try again. It's not final, you can always go back and knock on the door.

- Now, the law also allows a prodigal to revoke a will and in order to revoke a will he does not need the approval, authorisation or consent of a judge. He is treated

like a normal person so, even though he has been incapacitated because of prodigality he has a right to revoke a will, with no problem at all so he can't make a will but he can revoke a will.

- One can say that this is a bit strange, how come he's deemed to be that his mind is incapable to making a proper value judgement and yet at the same time he can have enough brains to cancel a previous will?

- The reason being at least what Dr. Borg Costanzi can understand from the law is that to revoke a will requires less maturity kind of thing, if you revoke a will if there's an earlier will and you revoke it most probably the rules of intestate succession will apply because you made a will changed your mind you want to cancel it and there's no will left. So the rules of intestate succession will apply the law is presumed to be reasonable so at least you have a just solution there.

- What is the point in time the Punctum temporis (we will go through this phrase again) to understand validity?

- So say for example a person is a prodigal, is interdicted and he makes a will without the approval of the court, he makes a will when he shouldn't have, later on that decree has been removed and he passes away, is that will valid? No it's not. The point in time to examine the validity is the moment the will is made. So if the will was made before he came interdicted, or if later on the interdiction was removed then in that case it's not relevant, what is relevant is the moment the will was made was the person interdicted? Was the person interdicted? Was he interdicted on the basis of prodigality. If he was, and if that will was done without the approval of a judge, then that will is null it's null not annullable it's null.

- When you're interdicted and you're a prodigal (because you're a prodigal) you can always revoke your will always, there's no need for consent. So there's a will you go to the notary and say I revoke the will I made five years ago. Yet that's as far as it goes, it has to be a simple revocation. The part of revocation is valid the second part is not.

  - For example, normally if you see a will, the will will say the first clause the testator revokes all previous wills. Normally it's a standard phrase, the second part would be the testator hereby provides as follows. So first there is the first article revoking previous wills and then the testator saying what they want. Now if you have this type of will without the consent of the judge, article 1 will be valid, the revocation, articles 2 onwards will not. So you have a will which is partially valid, partially not because the revocation is valid the new dispositions were not because they were done without the consent of the judge.

  - 611 – Members of Monastic Orders

- 611. (1) The members of monastic orders or of religious corporations of regulars cannot, after taking the vows in the religious order or corporation, dispose by will.
- 2 conditions:
- a)Membership of order/corporation of regulars
- b)Took a vow in such order.
- What type of VOW?

- Now another set of people who cannot make a will or sometimes cannot make a will are members of monastic orders. As we'll see later on in this lecture, they're also incapable of receiving, they cannot make a will or receive a will.
- Members of a Monastic orders, it's a bit complicated but can they make a will? There are two conditions first they have to be members of the order, or cooperation of regulars. Some types of priests and some types of nuns, not all priests and all nuns. It depends on what vow they have taken.
- This part of the law has to be cross related with the code of canon law, there are sections dealing with regulars, vows, vows of poverty, vows of chastity etc.
- What type of vow are we we looking at? The law doesn't say, after taking the vows in the religious order or corporation. So obviously you've got to see the order and the rules regulating that order and the nature and extent of the vow.
  - 611 – Members of Monastic Orders
  - (2) Nor can such persons receive under a will except small life pensions, saving any other prohibition laid down by the rules of the order or corporation to which they belong.
  - This effects such person's CAPACITY TO RECEIVE
  - Intrinsically it means that a person taking such vows is "legally dead" with the potential of revival.
- Now, later on we'll see that the rule is that when taking a vow that person is deemed to be legally dead, doesn't exist anymore and a dead person cannot make a will so it's as though that on the taking of the vow, his succession, his estate is inherited from that moment onwards.

- Of course you can't see what he has until he dies, so he took the vow on 1st January of died on 31st of December, on 31st of December you'll see what he owned on the 1st of January and at that point in time his estate is regulated. If there was a previous will that previous will will apply, if there was no previous will the rules of intestate succession apply.

- Normally when a person is going to take a solemn vow of poverty, the novice, this does not happen overnight, you don't expect the church nowadays as someone to walk in and say I want to become a member of the order and take the vow immediately. They won't allow you to do it you have to go through a process and it takes time and 60 days before you take your vow, the church will tell you to make a will, they will insist on its part of the right of passage they don't ask you to state what is in the will but you will be pushed to make a will, if you don't make a will, the administrative process of taking the vow will be stalled. It's not easy at that point.

- So, when you're going to take the vow and here we're talking of the vow of poverty, so you're going to say I don't want to own anything in my life, I am going to be poor, I don't give any value or importance to material things, whatever comes to me I don't want whatever I have I want dispose of. I came to the world naked and I want to leave the world naked like St. Francis of Assisi said.

- In this case, once the will is done his estate is not signed yet, the legal regime is set, how inheritance will be regulated, is determined. The moment he takes the vow that is a line, a line is drawn and from that moment that priest cannot make a will, that nun cannot make a will and if a will is done it's null.

- He cannot change his mind unsells he renounces to the vow, if he's released from his vow, now it's easier. In the past it was really difficult nowadays it's slightly easier but there have been many cases and people have left, got married and had children, once you are released from your vow you require your right.

  - 611 – Members of Monastic Orders

  - (3) Where such persons are lawfully released from their vows, they shall again acquire the capacity to receive under a will, as well as to dispose of such property as they may have subsequently acquired, and any disposition made in favour of a person who at the time of the testator's death was a member of a monastic order or of a religious corporation of regulars shall remain suspended until such person is either released from his vows as aforesaid or dies while still a member of such order or corporation, and shall be ineffectual if the person, in whose favour it is made, dies while still such a member.

- 611 – Members of Monastic Orders
- Any bequest in favour of such person is held in abeyance:
- Until he dies or if he is released from his vows.
- Normally one cannot during his lifetime be debarred from changing his will (Art 781) but once a person takes such vows he cannot do so. If he leaves the order, he re-acquires such a right.
- Wills made by novices before taking vow –
- If no will done – ab intestato.
- 599: GENERAL OVER RIDING PROVISION
- 599. Any will made by a person subject to incapacity is null, even though the incapacity of the testator may have ceased before his death.
- Vide Rosario Mallia vs Louis Mallia
- (PA 585/10 MCH dec 2/5/2011)
- Moment to examineis moment will was made and not when testator passes away – even if the incapcity has been subsequently removed

- In line with what we've been saying is article 599, an important section in the law. We saw this in the Rosario Mallia case we dealt with last week, the moment to look is when the date the will was made. If it was done by a 14 year old it's null, if it's done by someone whose interdicted it's null, if it's done by someone whose interdicted and is a prodigal without the consent of a judge it's null, if its done by someone bound with a solemn vow of poverty it's null. Even though the ground of nullity is later on removed. So if a will is done by a 14 year old and that person grows up and comes of age his old will is still null even though he hasn't changed it, unless he makes another will the one he did when he was 14 has no legal value, it's totally null. Null not annullable. When dealing with issues of nullity in order to get legal certainty it's important to get a court judgement, the court judgement will give you the seal of approval, the proof, that it's null.
- The difference between something null and something nullable is the passage of time, if something is null on day one it is null on day one so even a hundred years later, that null will, was never legally affective it had no value at all, it gave no rights and created no obligations. It was null from the moment it was done, what we would say ipso facto, there and then as soon as the fact was done it was null.

- If it's annullable, annullability presumes validity, in other words something is presumed to be valid until it has been annulled and in that case, you could have a situation where something is annullable but has not been annulled.

  - A typical example is someone who has given invalid consent to a marriage. I get married and at the moment I get married someone put a gun at my head and made me get married. Clearly I am getting married because of undue pressure, but as time goes by I realise it wasn't a bad decision I was happy with it and I don't bother to challenge the validity of the marriage it is annullable but I'm happy with it, if it's not challenged that marriage is valid. Whereas in this case with wills we're saying that if there is a legal incapacity under one of the grounds listed in the law, that will no matter how happy you are with it. How reasonable it is, no matter how much it makes sense, if it is null it is null and no matter what you do or say it cannot be validated not unless a new will is done in the right way so if the incapacity has been removed then you need a you can't just rely on the old one and say okay now I'm of age, now I'm no longer a prodigal, I'm no longer a priest therefore that will is valid. You have to do a new will.

  - CAPACITY TO RECEIVE UNDER A WILL

  - Part 1

  - Children

  - Members of Monastic orders

  - Those not yet conceived

  - Foundations

  - Persons who are unworthy

- Now change of subject, till now we've dealt with the right to make a will. I want to dispose, I want to give now we're going to talk about the right to receive under a will. So we're still in the rules regulating testate succession we're not dealing with intestate succession even though eventually we'll see that these rules or some of them also apply to intestate succession. There are some rules apply across the border both when there is a will and when there is no will and here we're dealing, at leat this part of the law it is written down in the rules dealing with cases when there is a will, but when we come to intestate succession there's a cross section which say that the rules of testate succession also apply

- 596. (1) Any person not subject to incapacity under the provisions of this Code, may dispose of, or receive property by will.
- Presumption in favour of one's capacity to receive under a will
- Burden of proof will rest on the person wanting to prove otherwise.
- Incapacity can only result from one of the limited grounds established by law.
- Incapacity may be absolute in the sense that a person would not be entitled to inherit anything from anyone or it may be relative in that such person cannot inherit specific persons or property

- So we're going to deal with children, members of the monastic orders, those not yet conceived, foundations and persons who are unworthy. We won't do them all today or have time but let's start.
- Now, in the case of children, we already saw this section in the very beginning, the opening section dealing with capacity to make a will and it shows you how the drafters of the law, how clever they were, how concise they were and how they could say it all in one simple sentence. We've dealt with the rules dealing with incapacity to make a will. This section says it, any person not subject to capacity. It shows how deep and profound these sections of the law are.
- Modern laws will take pages not just short sentences as the legislators are not so knowledgeable in the law and they don't spend much time drafting and you have differences in translations between Maltese and English and yet this law written in 1868 without computers or internet, hand written, and yet you have something so deep.
- Now, here we have the general rule any person is entitled to receive, so the general rule is you are capable. Capacity is presumed both to make a will and to inherit, everyone can inherit that's the rule so incapacity to inherit is the exception which means it must be proved. Unless there is evidence of incapacity, you are capable. You have to prove it, and the burden of proof is the person alleging incapacity and it has to be proved on a balance of probabilities not like in the criminal code.
- Another important aspect is that the grounds of incapacity are limited, they are the ones only stated in the law, you cannot make new grounds. The law provides a specific list of grounds of incapacity and it's only those grounds which apply. The incapacity has to result from grounds stated by the law and incapacity may be absolute, the person can inherit nobody, or it may be relative, I can't inherit my

father/I can't inherit that thing. We'll eventually explain these points later on as applied to specific situations.

- 1.Children
- 596 (2) All children and descendants without any distinction are capable of receiving by will from the estate of their parents and other ascendants to the extent established by law.
- 602. All the children of the testator whether born in wedlock, out of wedlock or adopted or whether or not the presumption referred to in articles 102 to 112 applies to them may receive by will from the testator.

- Let's start with children, with children and descendants (children, grand children, great grandchildren) The law presumed that children are capable without any distinction.
  - Children
  - no longer distinguishes between legitimate and illegitimate children.
  - children born outside marriage, from successive marriages and adopted children and children acknowledged in the will. All are considered equally capable.
  - This applies not only to the children of the deceased but also to all descendants
  - Includes children who are considered so by legal presumptions
  - All children born "Viable" are capable of inheriting.
  - Relevant for example when calculating the reserved portion
- In the past there was a distinction between children born in wedlock and outside wedlock. Legitimate children and illegitimate children. Legitimate children and illegitimate children were not treated in the same way, nowadays that distinction has been removed, all children are treated equally. Whether they're born inside marriages, outside marriages, from successive marriages (so children born from the first marriage and the second marriage are treated equally), whether they're adopted or whether they're acknowledged in the will or not. All children are capable, equally. The same rule applies not only to the children of the deceased, but even to the grand children, and the great grand children, the descendants so its' across the board.

- It also includes children who are considered so as a result of a legal presumption. What does this mean? The law presumes that any child born to a married woman is presumed to be the child of her husband. So even though people may say “isma dak mhux minn tiegħu ta’ għax qalbitielu. Unless someone challenges the birth certificate and there’s a court judgement that child is presumed to be the husband’s and if the husband is happy with it no problem, these things have happened and they still happen there are situations where women have affairs, married women have affairs they get pregnant, the husband and still agrees to bring up this child as his own. There was this particular case where the woman had an affair, the husband didn’t want to give her a separation she wanted to leave him and the husband said no and the wife purposely got pregnant from her boyfriend and she had triplets and the husband insisted that his name is written on the birth certificate and he didn’t want to give them up and it was a huge legal battle for the wife and the boyfriend to correct the birth certificates and to get custody. It took years for the issue to be decided. It includes children who are considered by legal presumptions.

- Again we come to the word viable. Of course we’re talking about children who are born viable, only viable people can inherit and this may, you can say but how can a newborn child who dies 2-3 days later be even considered as capable of inheriting what practical situation is there? This child has died, they haven’t even spoken, gone to the notary or a lawyer he’s only a few days old so how can this situation ever arise? What practical effect can there be? If you have a child who passes away a few days after being born, or maybe one month or maybe six months after being born.

- It may make a difference, when dealing with rules of for example reserved portions.

  - Say for example a married couple have three children and then have a fourth one and the fourth one dies one year later. So the fourth one has lived for a year, and then an accident happens and the fourth one dies. Then the parents pass away and of the three surviving children they leave one out, so the one left out claims the reserved portion, do you include that child? There was a child this child was viable so it may have an effect on counting the number of children and calculating the reserved portion, may not saying it will but may.

- Dr. Borg Costanzi thinks if you have a child and they pass away soon after death with the parents still alive he cannot visualise where this situation may have an effect but hypothetically it may arise. So keep in mind the issue of viability.

  - Members of Monastic Orders

- 611. (1) The members of monastic orders or of religious corporations of regulars cannot, after taking the vows in the religious order or corporation, dispose by will.

- (2) Nor can such persons receive under a will except small life pensions, saving any other prohibition laid down by the rules of the order or corporation to which they belong.

- (3) Where such persons are lawfully released from their vows, they shall again acquire the capacity to receive under a will, as well as to dispose of such property as they may have subsequently acquired, and any disposition made in favour of a person who at the time of the testator's death was a member of a monastic order or of a religious corporation of regulars shall remain suspended until such person is either released from his vows as aforesaid or dies while still a member of such order or corporation, and shall be ineffectual if the person, in whose favour it is made, dies while still such a member.

- We come to member of monastic orders and whether they're capable of inheriting.

- When dealing with members of monastic orders, the presumption, the old rule was that it's as though this person died. This person is deemed to be legally dead at the moment they took the vow, and in fact this is not something new.

  - Baudry-Laucanterie (Vol 1 Successioni Pg 139) states that once a religious member takes the vow of poverty such person is deemed civilly dead – "constituendo la professione religiosa nel morire al mondo".

  - There wasa total exclusion – as though such person did not exist.

  - (French decree 7th July 1715: includes Jesuits but not those re-united with France and does not include the Knights of Malta -)

  - Our law is more flexible

- Baudry mentioned a case where the French parliament passed a decree in 1715, so that is before Napoleon's times and said that Jesuits are incapable of inheriting but not those Jesuits who are working or practicing in countries which have been reunited with France.

- France was a coloniser, it had many colonies so if you have Jesuits try to convert to the roman catholic religion and they're out there representing France and the Roman Catholic Church then they did not lose the capacity to inherit.

- So if some Indian chief, left his estate to the Jesuits, then it came part of French patrimony and of course the French being colonisers didn't want to lose out what they could inherit from the colonies and so they passed a rule saying that Jesuits forming parts of colonies reuniting with France can inherit. They also made an express provision in the case of the Knights of Malta because there was the French Auberge in Malta, there were the French knights, of course they were rich and therefore the French again did not want to lose out on that potential patrimony for the French state.

- So there were exceptions which highlighted the rule. The rule was that once you took the vow of poverty, as the knights of Malta did they were incapable of inheriting except the French knights of Malta as a result of this rule.

- Our law is a bit more flexible and it was change not so long ago.

  - There was this guy, his nickname was il-fatat. He used to work at the Evan's library in valletta, at the time tal-Qroqq didn't exist as a university and the university of Malta was split up in two places, there was the science part which was at the bottom of Republic street where there used to be identity Malta, and the part of the university dealing with arts and law was in St. Pauls street which is the Valletta side of university today. The university was built in the late 60's and this guy used to work in the Evans building and he had two children, his wife passed away and he was left with these two children. One of them became a priest and took solemn vows, and his other son was run over and killed so filli he had a wife and two children suddenly one son was gone and the other son was legally dead because he took a solemn vow.

  - He was very worried, he said if I die what is going to happen to my son if he leaves the order? I don't mind giving my property to charity but I want to make sure that if my son ever changes his mind he will find something that he is able to live with, and he lobbied and lobbied and spoke to every single member of parliament that he could think of and every single lawyer, wrote in news papers and eventually the law was changed.

  - 1. Punctum temporis.

  - the date of death of the testator.

  - In France there was an old case in the 1600's where a father and son when to battle and were killed the same day that the daughter joined the nuns and took her vows. Matter decided by the French Parliament.

- Now it provides that if the member leaves the order he acquires the right to inherit so it takes us again to a number of points. First the Punctum temporis, the time, at what point do you examine if a person is able of receiving? The point is the date of death of the testator. When the person making the will dies, that's when you see.

- When a person making the will dies is the priest still bound by a solemn vow? If he is he can't inherit, that's the moment, even if he leaves two days later. The moment in time is the moment of the death of the testator.

- In France there's an old case, 1600's where a father and a son went to war and the daughter took it so badly that she went to the Sorijiet tal-Klawsura and took the vows, she didn't want to be left alone at home, so she took the vows and the father and son died in battle. When the nun took the vows, at the time, the rule was that if you took the vows, anything you inherit goes to the order that you took the vows with. So, your succession, you lost your right to succeed and the right to succeed passed on to the order. The dispute arose between the heirs at law of the father and son and the order, and the French parliament which was the authority which used to decide those things these days had to decide whether it was the order which inherited or not and the issue arose as to who died first. Was it the father? Was it the son? Or was it the sister/nun when she took her vows? Which occurred first? By some form of reasoning the French parliament said that as soon as the daughter went to the cloisters, she got there first, so she took her vows first so she was legally dead first. So when her father and her brother died she was already legally dead and when she was legally dead she was not capable of inheritance, of inheriting and therefore the estate went to the other heirs of the father and the son. The issue of who died first whether it was the father and the son did not become relevant any longer. That's the time frame.

  - 2. What type of order or congregation?

  - The law does not define the Order or Congregation to which the religious person is to be a member nor, for that matter, does it mention the Religion.

  - 3. What type of vow?

  - Thirdly, the law does not stipulate which type of vow and whether it is a simple vow or a solemn vow of poverty

- The second question is what type of order or congregation, the civil law doesn't say, and again what type of vow? This issue has been the subject of some case law.

- case Padre Antonio Maria Buhagiar vs Felice Galea et" decided on the 13thNovember 1908.

- The Court started by stating that under Roman Law (L.L. 55 and 56 C. De Episcopis et Clericis – Novella 123 Cap 41) and also to Canon Law (De Regolaribus Disc 46 No 10) members of the order who took their vows ("monaci professi") were not capable of inheriting and any inheritance devolving in their favour passed on to the order of which they formed part and it was discussed whether this rule applies in this case

- One party argued that the incapacity was relative in that it was the individual member who did not inherit but that, since his own inheritance was "fictitiously" opened at the moment when the Member took his vows, then the Order of which he formed part would keep inheriting anything which that member might be entitled to inherit - the Member being merely considered as a vehicle transporting the estate from the deceased to the Monastry.

- The Court unequivocally ruled that the law made no such distinction. Once the member could not inherit, he had nothing to transfer. Nemo dat quod non habet.

- Just look at these judgements we won't elaborate on them.

  - case Gioacchino sive Jack Galea vs Suor Mansueta Farrugia et (Rik 196/98 VDG App 27/6/2003)

  - 1)what was relevant that the Member, apart from being a member, also took the vows of the order

  - 2)Vows may be simple or Solemn. It was only the solemn vow of poverty which relinquished the member from his civil right to inherit

  - "…..Tajjeb ukoll li jigi rilevat li skond il-ligi kanonika minn dak li jemergi mill atti l-voti li jittiehdu minn dawk li jissiehbu fl-ordnijiet religjuzi m'humiex kollha ta 'l-istess portata ghax fil-fatt jirrizulta li hemm dawk li jissejhu voti semplici u dawk li jissejhu voti solenni, u li huma dawn ta 'l-ahhar li jwasslu biex l-imxierek jirrinunzja formalment mid-dritt civili li jircievi beni.

- However in this case decided in 2003 when determining what type of vow the court said that it's not any vow. It is only the formal vow as a result of which one renounces to the civil right to receive property. The vow of poverty it's only that vow which applies.

- Over here the court presided by Judge Vincent De Gaetano relied on canon law. He used to be a member of the catholic guild, so it had a strong influence on him and in some of his judgements he has referred to canon law as a means of interpreting civil law, he's done it with the marriage act and he's done it again over here where he referred to the code of canon law.

- Dr. Borg Costanzi thinks that when interpreting this section of the law you've got to look at the law regulating the order whether it's the roman catholic church or any other religious set up, you've got to see what that religion provides in its' own law and if in that religion it is stated that you took the vow of poverty and you can't own anything the civil law is respecting religion, it's respecting canon law and the law of the congregation or of the order.

- So the civil law and the law of the religion have to be seen together not just the civil law on it's own. Not just because the law doesn't define the congregation, or it doesn't define the vow you ignore the religion. You have to see the religion, see what that religion states and apply that religion in the context of civil law, they have to be married together.

  - also "Francesco Sammut vs Grazia Sammut" (Qorti tal-Appell, 21 ta' Novembru 1937):

  - "le suore (del Buon Pastore), nell'emettere i voti anche perpetwi, si spogliano dell'amministrazione e dell'uso, ma non del dominio radicale delle proprie sostanze, delle quali possono disporre reciprocamente per atti tra vivi e di ultima volonta`."

  - 4. Fourthly, one asks whether this incapacity is absolute.

  - The answer is no. The law itself provides for two exceptions:

  - small life pension

  - legally released from his vows

- Now when we're dealing with members, priests and nuns, the fourth article is the question is whether the incapacity to inherit is absolute, it is not absolute and there are two exceptions. One is that the priest or nun can receive a small life pension, of course what is small is relative but for example a parent can leave a usufruct to the nun or the priest which will generate an income of €100 a month or €500 a month, in today's day and age it's not considered great but if they leave a pension of €20,000 a month it's not small so it's relative, what is the amount of the pension is excessive, it can be challenged, it is valid until it is challenged. Secondly what happens if the priest later on leaves the monastery and is released from their

vows it is valid until it is challenged, and earlier on we said the that the punctum temporis is the date of death of the testator. That is the general principle but there's an exception. If the principle is look of the date of the death of the testator if the person is still bound he is incapable, however the law makes one exception and this is where the Bonnici person, il-fatat had an impact on the change of the law.

- The law now provides that if that person subsequently leaves the order he acquires the right to inherit. This is found in 611(3). They have to be lawfully released, there has to be authorisation from the church.
- The right to inherit for a priest is suspended, you have to wait. So if you have a situation where you're dealing with an inheritance where one of the beneficiaries is a priest who took solemn vows, you're going to have a situation where that inheritance is stuck because until that person, priest or nun is still alive, they may leave the order and get released from their vows.
- If that person passes away you've got to cater for that right that ¼,⅕,⅓ share that that person has is to be kept apart and protected, when they die it either goes to their rules of inheritance if they've been released from the vows or to the original heirs minus the priest depending on whether he left or not, so that share is suspended, it's frozen.
    - 4.Those not yet conceived
    - 600. (1) Those who, at the time of the testator's death or of the fulfilment of a suspensive condition on which the disposition depended, were not yet conceived are incapable of receiving by will.
    - (2) The provisions of this article shall not apply to the immediate children of a determinate person who is alive at the time of the death of the testator, nor to persons who may be called to the enjoyment of a foundation.
- Another issue that we've seen is that to inherit you have to be born and you have to be born viable. What happens if the child is conceived but not yet born? So the wife is pregnant, and the husband passes away and the child is born six months later.
- Clearly that child is the child of the husband in this particular example so does that mean because that because this child was born after her husband died this child cannot inherit. No, and the law provides that children who are conceived at the moment of the testators death are capable for inheriting if they're not born but they're conceived so technically you have to wait 300 days after the testator's death because the law creates this legal fiction of 300 days as being the maximum

period after which a child is born. The gestation period is anything between 180-300 days, if the child is born after the 300th day it's presumed that that child is not the child of the deceased person. If the child is born before the 300th day then this presumption kicks in.

- The same rule applies to children of the children because it's possible to make a will and say I'm leaving my estate to the children to be born of my children, too all the children, to all my grandchildren who are born or yet to be born so I am deferring the inheritance by one generation, instead of leaving my inheritance to my children I'll leave it to my grand children, it is possible and in this case you have to wait till the last icidl dies to establish the number of grandchildren.

  - It is possible for unborn persons to benefit from a will as heirs or legatees if:
  - 1.They are already conceived at the moment of testator's death or the fulfilment of a condition stated in the will.
  - or
  - 1.They are eventually born from the immediate children of the testator who were alive at the time of the testator's death
  - or
  - 1.Are called to the enjoyment of a foundation.
  - For example a testator may wish to leave his estate not to his children but to his grandchildren who have been or may be born.
  - 1)If all his children pre-deceased him, the grandchildren who have been born by then will be the heirs.
  - 2)If all his children pre-deceased him but the wife of one of them is pregnant from her pre-deceased husband, that child as yet to be born will inherit.
  - 3)If any of his children are still alive you have to wait till all of them die and possibly 300 days after that to establish who are his heirs.
  - For example a testator may make a will stating that he leaves his estate to all or any grandchildren he may have from his only son A and if there are none, to the children of his (the testator's) maid.
  - At the moment of the testator's death one must see if A is still alive and whether the testator had any grandchildren. If there were any it would be these grandchildren and any other siblings they may eventually have who will inherit.

- If the son had no children at the moment of his father's death, you have to wait till A is dead as that is the only way to be certain that there were no grandchildren

- One has to see how many children she had " at the moment of the fulfilment of the condition" ie when the son (A died)

- People make funny wills and all sorts of conditions and these situations are invented, but they actually happen so don't think we're just picking up some weird example to make a point situations like this have happened.

- Dr. Borg Costanzi remembered one judgement delivered by Judge Meli in 2013, this was a case of an inheritance started in 1698, of a certain Archangelo Calleja and this Archangelo Calleja was married twice, he had children from two marriages.

- When he died, he left his estate to the blood line of his second marriage, he created what we call an entail, in other words the property will be inherited from generation to generation always coming down to the bloodline and he also said that if the blood line of the second marriage dries out, it goes to the bloodline of the first marriage. The bloodline of the second marriage dried out and when it dried out the bloodline of the first marriage had already dried out there were no descendants.

- In his will he went one step further, he said if both bloodlines dry out then my inheritance goes down the bloodline of my siblings, my brothers and sisters, so he died in 1698 and over 100 years later, about 200 years later the bloodline of his family dried out, of his children died out and the dispute arose between the heirs at law of his last descendant and and the children of his sister. The heirs at law of his last descendant had all the records of the property, all the registers, in those days there wasn't the same access to information as we had today.

- If there was a register, a katast you had an inventory of what you owned, you had your books, what you owned, whose paying rent and this was a huge inheritance, lots of properties and the heir of the descendant didn't want to disclose this information and wanted to keep it to themselves. And said our family has held this property from generation to generation for 200 years, how come this 5th or 6th cousin is now claiming the share of inheritance? The claim is time barred and we're not going to give you information. As luck would have it, this heir of the last descendant was also related to the bloodline of the sister. Kien jigi kugin. In actual fact, if the sister was right, he would have half, and if the sister was wrong he would get all. It worked that way.

- It went to court in 1903, and the court case was filed, and this court case turned on for 27 years, 1903 to 1930, and there the judge got fed up, same thing happens today and he said I've had enough of this case i'm getting rid of it no progress has been made and the case was struck off and cancelled. The people who were in the court case started to fight against themselves (the plaintiffs), they said we've been in court all these years and we've gotten nowhere, some wanted a new case some didn't.

- Eventually only some of them filed a case and a new case was filed in 1931, after 2-3 years of this case being struck off a new case was instituted not by all original plaintiffs but by some of them against the ones who had the registers/books. This new case continued and was decided in 2013. So from 1930, it was the longest running case that we had till now and in this case the court appointed a legal referee. Someone to determine the family tree, to find out who the right heirs were. So from 1698, from 1930-1940, the generations grew and dispersed, they have family living in Morocco, families living in France, families emigrating, there wasn't the facility of a public registry they had to go through the parochial registers. Today if you want to find out if someone died in Italy it's almost impossible to find out unless you know where he died. If you knew the comune or town where he died you'll find him but if you don't it's difficult to find it out as they don't have a central registry.

- This guy Dr. DePiro who knew his own rights (kien min ta' ġewwa) he was a different line of nobility, he wasn't one of the beneficiaries. He was tasked with establishing the family tree and trying to find out what property there was and he did a preliminary report, he said (this is not complete till now). War broke out and since he was a supporter of the Italians he was interned and sent to Kenya. He was a lawyer by profession, so he was a lawyer, a nobleman and he was interned. He didn't want to practice as a lawyer when he came back, and so he never went back to this case and this case stopped from 1940 till it came before judge Silvio Meli in 2012/2013. Judge Silvio Meli got fed up of this case, around seven volumes, six of them just defermenti, nothing happened and if they weren't going to change something he was going to decide it at his own will, they all panicked. So when he said niddeċidiha kif naf jien, it was taken seriously, it was a threat that did something. So the family rallied up, they did their homework, complied a family tree and they drafted an agreement and the judge decided the case on the basis of the agreement.

- In this case, what was relevant over here was the rules of inheritance. In this case the inheritance was regulated by the bloodline until 1952. Because in 1952 the law was changed. In 1952 the law said that if there's an entail which is the precursor of the trusts that we have today that entail is no longer valid. The rules

of succession will apply, so it's not the will made by Calleja in 1698 which will regulate the inheritance but the will made by the beneficiary today. When you have an entail if I am the recipient/beneficiary I couldn't say I leave this to my maid, the estate will only go according to the original will made in 1698 that was the rule that regulated the whole property and inheritance it kept on going from generation to generation whatever the beneficiary's wishes had no value. In 1952 the law said the beneficiaries can dictate and for the next generation half will go down the bloodline and the other half goes by the rules of inheritance. In 1972, 30 years later when it was presumed that the generation had elapsed it was closed off and said now there's more entails completely and those ½ have disappeared and because of this going down the bloodline, the issue arose as to children and great-grand children being capable of receiving because clearly in 1698, the people born in 1930/1940/1950 were not alive and yet they were capable of inheriting. They were capable of inheriting under the will made in the 1600's not on the basis of the will made later on. This explains the rule of course this is farfetched, because today entails don't exist anymore but going down the bloodline if you have a condition in the will which gives you the moment in time when the estate is going to be determined any child who is conceived at that moment is entitled to inherit.

- If I say I leave my estate to any great grand children that I may have, so I'm going down two generations not one so I'm going down 60 years time it is valid and in 60 years time, I'll have to wait till my grandchildren die, wait 300 days at that moment I know how many great grand children I have and that is when my inheritance will be divided, until then there will be someone to protect the estate, a curator, an administrator, so my estate will be held in suspense.

- You have to wait, until the fulfilment of the condition to determine the number of children.

    - Finally one cannot forget the provision in respect of foundations. In the scenario the law is envisaging the possibility of a Foundation having been set up in terms of the will whereby the founder provides that the person or persons entitled to benefit under the foundation are persons born or yet to be born and who satisfy the terms of the foundation.

    - Set up for a long time

    - Binds successive generations

    - Even those not yet conceived can benefit.

    - Were it not for this exemption???

- Now, the law earlier on makes an exception for foundations (as seen in article 600) when you have a foundation which can be set up for 100+ years, clearly today the persons who will born in 100 years time are not even dreamt of. They're not even conceived but you've set up a foundation and in your foundation you say that the beneficiaries are my children and my descendants born or yet to be born and that yet to be born will apply for the whole period for which that foundation is set up.

- It's an exception they're not yet conceived and the condition is today so I've set up the foundation today, and you keep on checking to see whose a beneficiary for the whole period of the foundation. It's an exception to the will.

- Where it not for this exemption, if there wasn't this exemption there would be an EU problem with this foundation because the effect of the foundation would stop at the moment the settlor set it up, passes away. When the settlor sets it up and the condition of the foundation kicks in that would be the moment to examine the beneficiaries and you don't look at the successive generations. But because of this exception you do look at successive generations and keep on going down the line from generation to generation until the time period has expired.

  - Lecture 8

  - Of Capacity of Receiving under a Will - continued

  - Dr Peter Borg Costanzi

- Now we're going to deal with unworthiness. People who are unworthy of the will. Unworthiness is not a ground that is written in the will, we're not talking about disherison, disherison is when you write it in a will. The grounds of unworthiness are not written in the will. There are situations where the law feels that the person who made the will has been offended or hurt and it was not possible for him to make a will and cater for that injury, and therefore the heirs exceptionally can say it's true that in the will you're named as an heir but you did this to my father. You are not worthy of inheritance, you killed him so you should not inherit. It is important to distinguish between unworthiness and disherison.

- Unworthiness is a ground that is raised by the heirs it's not a ground raised by the person making the will it's raised by the heirs. The person making the will has not mentioned it, if he has mentioned it it falls under the rules of disherison. It's not mentioned in the will it's a right given to the heirs.

- In the past there were other grounds of unworthiness.

- For example one example that used to exist many years ago is the case of a widow who remarries very shortly after her husband's death. The husband dies today and two months later she marries her lover, that was seen to be an offence to the memory of the deceased spouse and the law at the time said because she has married so soon after her husband passed away why should she use what she inherited from the husband to share it with her new husband. It was deemed to be offensive and it was one of the grounds of unworthiness if she got remarried within one year she risked being declared as unworthy of inheriting her predeceased husband.

- Another ground was that if I was a material witness in the murder of the testator. I wasn't an accomplice, a witness, I saw it happen and I said nothing, I didn't speak up. If I was a material witness and I didn't speak up, come forward, tell the police isma I know who killed him and I'm a witness if I didn't speak up I was deemed to be unworthy of inheriting. Again it is offensive to the memory of the deceased.

- These two grounds don't exist anymore and it is not possible to invent new grounds. The grounds of incapacity are limited and you cannot invent new ones, the law gives a defined list and it's only that list which applies.

- Last point, Dr. Borg Costanzi explained that the grounds of unworthiness are to protect the honour, dignity, memory and reputation of the person deceased. It's kind of giving the heirs a right to protect someone who could not defend himself or his reputation, or his honour or life because he was murdered. But what if the testator knew about it and did nothing.

  - For example one of the grounds of unworthiness, we're not talking about murder here because you can't do anything about it, is if someone forces you to make a will and pressurises you to such an extent that you give in. You are a capable person but because of the pressure you do it.

- We mentioned a case last time by a woman who was harassed by her daughter. That is one of the grounds of unworthiness, if the testator knew about the situation you would say why didn't this person make another will and disinherit this person because it is a ground of disherisment, what if the testator said I know about this but I forgive them and does this ground of unworthiness still arise? Yes it does because the fact that the testator has forgiven could come out as a result of further pressure.

  - But then there are situations where for example if a person has unjustly accused someone of a crime, a daughter accused her father of raping her and she knows it's not true it's a lie, a total lie and the father is sent to jail, that is a

ground of unworthiness but when he comes out they make up so the fact has occurred, it happened, she accused him of something that didn't exist she knew he was innocent and he went to jail and later on they patched it up, later on can the heirs challenge this daughter's right to inherit the daughters rights of unworthiness knowing the father forgive her?

- Dr. Borg Costanzi doesn't know of any caselaw at this point and the law is silent, the law seems to say if there's a ground you have to prove it but you can't ignore the fact that this reason behind this law is to protect the testator or his reputation or his memory. It's like defending someone who can't defend himself. It is exceptional, it is not normal that an heir can challenge a will and protect someone from the terms of the will. The will is sacrosanct so it is an exception that the children can challenge it and because of this exceptionality of the law, Dr. Borg Costanzi thinks that in the right circumstances the law will use a sense of justice.

- In fact, in one of the cases, Psalia vs Aquilina decided by the Judge Francesco DePasquale said aħna qrati tal-ġustizzja, u rridu nagħmlu ġustizzja. So the court, any judge worth his salt, is strongly motivated by a an inmate sense of justice, equity, it's inbuilt, it's an inbuilt mechanism inside him and this sense of wanting to do justice and an equitable solution will be an encoding thread running right through his working life. It should be at least.

- Therefore if you have a situation where you have a judge who is faced with a case where one of the heirs is challenging a will on grounds of unworthiness and it is shown that the testator knew of this ground forgave the child of this ground and was happy to live with it Dr. Borg Costanzi thinks that in that case the judge will not honour the claim but of course this is a question of evidence, proof and opinions of the judges.

- Next time we will go into the substantive laws.

13th March 2023

Lecture 8.

- Lecture 8

- Of Capacity of Receiving under a Will - continued

- Dr Peter Borg Costanzi

- We're going to continue dealing with the capacity to receive under the will, the capacity to inherit. Last week as a preamble Dr. Borg Costanzi explained that in the past there were other traditional grounds of incapacity, we mentioned the case of a

widow remarrying within one year of her husband's demise, that ground doesn't exist anymore, and mostly in the case of someone having witnessed murder of the deceased and that witness has come forward, these were two grounds that used to exist under roman law, not always under roman law, some parts of roman law, which were grounds for incapacity to inherit.

- Grounds when a person is unworthy
- 605. (1) Where any person has -
- (a) wilfully killed or attempted to kill testator or his or her spouse; or
- (b) charged the testator, or the spouse, before a competent authority, with a crime punishable with imprisonment, of which he knew the testator, or the spouse, to be innocent; or
- (c) compelled, or fraudulently induced the testator to make his will, or to make or alter any testamentary disposition; or

- The rules of incapacity are to be kept distinct from the rules of disherison, disherison is a ground which is stated in the will where the testator actually wrote it down, incapacity is a ground which is not written in the will. It is a right given to the heirs to challenge the right of another heir or legatee to benefit from the will.
- The grounds of unworthiness have to be interpreted strictly, there is a numerus clausus, it's only the grounds listed in the law which apply and they have to be applied also immediately so it either fits and fits in properly or doesn't fit in at all.
- The proceedings for unworthiness are filed by the heirs, they are the plaintiffs and they will sue the beneficiary and say you are unworthy to inherit our father, you are unworthy to inherit this person and they have to list the ground of unworthiness and prove it. So it is a case where either there's a will and the heirs are challenging the right of the beneficiary under the will to inherit, So they're going against the wishes of the one making the will. In the will the testator said I'm leaving my four children equally, three of the children sue the fourth one and say you are unworthy they are overriding the wishes of the testator.
- So it is not an issue of whether the will is valid or not it's totally irrelevant, it is not an issue of whether the testator wanted or not because the testator made his will, his will is going to be over ridden because of this ground of unworthiness. If there's no will these grounds also apply. These grounds apply both to testate and intestate succession.

- But the point Dr. Borg Costanzi wants to make is that whereas normally a will is considered to be bible and the wishes of the testator are to be protected and applied as much as possible in this case there is something which is so strong and so injurious that the law allows the heirs to challenge another person's right to inherit, overriding the wishes of the testator.
- The first case, the first ground mentioned is where any person has wilful killed or attempted to kill or his spouse.
  - (d) prevented the testator from making a new will, or from revoking the will already made, or suppressed, falsified, or fraudulently concealed the will,
  - he shall be considered as unworthy, and, as such, shall be incapable of receiving property under a will.
  - (2) The provisions of this article shall also apply to any person who has been an accomplice in any of the said acts.
  - 1.In the past there were other traditional grounds
  - (a)a widow remarrying within one year of her first husband's demise or if during the period of morning, she conducted herself immorally.
  - (b)if the beneficiary witnessed the murder of the testator or knew who the murder was and failed to come forward.
  - 2.However the grounds of unworthiness are now legislatively stated
  - 3.To be interpreted strictly
  - 4.Unworthiness is different from disherison
  - a)Proceedings filed by the heirs/other heirs
  - b)Consequences are different
  - c)Which facts need to be proved
  - 5. One must look at the raison d'etre behind this part of the law dealing with "unworthiness"
  - 6.Not an issue of "capacity" or "volition" of the testator.
  - 7.Conceptually different from "incapacity" to inherit
  - (a) (a)wilfully killed or attempted to kill testator or his or her spouse;

- “offender” Must there be a conviction?
- Old Italian Law
- Applies to “murder”and “attempted murder”:
- Mens rea + actus reus + beyond reasonable doubt.
- Are ground for mitigation of punishment relevant?
- State pardon?
- If he serves his conviction?

- Wilfully killed, or attempted to kill the testator or the spouse, it doesn't’ say found guilty of having killed so conviction isn’t necessary. It’s enough if the person is the offender so in practice it means that you don’t have to wait for the trial by jury to finish, if you want to challenge this person’s right to inherit you can challenge it immediately.
- This ground will only apply if someone sues, it’s not automatic, the unworthiness isn’t automatically applied, there has to be a court case. The heirs have to sue the beneficiary and the court has to say you are unworthy. If there’s no court case you inherit, so even if a person actually killed the testator, if the other beneficiaries don’t sue me, I will inherit, so it has to be a court case.
- Keep in mind that this also applies not to just murder, but even attempted murder. So you’re going to find the civil court applying the criminal law, what is murder or what is attempted murder? The heirs will have to prove both the actus reus and the mens rea.
- The law doesn’t mention mitigations for punishment so if you have a defence, which will mitigate punishment, say you were provoked that is not a defence which locaters put over here, if you’ve killed a person, you intend and actually did it, or you attempt it of course you’re not going to inherit. It doesn’t apply to manslaughter which is accidental death, where there is no mens rea or the mens rea is different to the mens rea required for murder.
- What if there’s a state pardon, he’s still murdered the guy, even if you’re pardoned, the offence has occurred, what happens if that person serves his conviction? What happens if the right to prosecute has become time barred, it doesn’t count. If the fact has occurred or if the murder has taken place, then that person can be declared unworthy by the court.

- Say for example, a husband kills his wife and there are children and the husband is in jail serving his time and the children have physical possession of the house, they're living there, the father serves his time and comes out and says I want my share of inheritance at that point the children can say you have forfeited your right, because you're unworthy. It's no problem as long as the children had possession of the property, they can bring forward a claim for unworthiness. The claim can always be brought forward.

- 16th July 1676, it was held that the Marie-Madeleine d'Aubray, Marquise de Brinvilliers could not inherit her father and her younger brother whom she had poisoned (Baudry-Lacanterie -Successioni para 329).

- The case of the promiscuous wife:

- Had 7 children

- Also had a long standing affair with a certain Captain Godin de Sainte-Croix

- About to proceed with legal separation.

- Father outraged and had Capt G imprisoned

- ……..

- There was an interesting case and this will help us understand this section, this idea of murdering and inheriting is not something new, there was the sole case of 1676, it's a bit old, where the d'Aubray family were part of the French Court (noble) and they were elite and the daughter was having an affair, it was no problem having an affair it was something that happened and people tended to close an eye if not encouraged it in France, in fact if you were a noble guy and you had an affair on the side it was considered to be a sign of manhood, it wasn't looked down upon but what was objectionable in this case was that this affair got serious and the daughter wanted to separate and her father thought this would have been very bad for his reputation in the French court, forget today, but if you go back 20 years in Malta, it was scandalous but in the 1600's this would have been scandalous for her father, it would have been something that would have really effected his reputation in court, and he took it very badly, he ordered her to stop seeing this guy, she refused and so he had this guy arrested and sent to Bastille prison on trumped up charges.

- He went to court, he was noble, they had power, u bgħatu l-ħabs għal xejn b'xejn hoping that this affair would fade away, and it didn't he came out they reconnected the only snag was that whilst he was in prison he learnt about alchemy, he learned about poisons from prison mates and he told his girlfriend the daughter of this

nobleman how to use poison. She poisoned her father and brother, and eventually she was tried and in her defence she said she was molested by both her father and her brother since she was 7 years old, but the courts said it was not a valid defence and she was still executed.

- The issue arose as to whom inherited the father? In this case, the court ruled that she did not inherit her father because she was declared unworthy and the inheritance went straight to her children, if it went to her she made a will disposing of her estate in a different way but in her case since she did not inherit it skipped her and it went to the grand children and this is what happened this case.

  - Consiglia Degiorgio vs Roger Agius (Rik 157/2010 CFS) 20/4/2012

  - It is to be pointed out that even though this a ground which is mentioned under the part of the law dealing with TESTATE succession, this provision also applies to INTESTATE succession in terms of Article 796 of the Civil Code.

- There was another case in Malta, Degiorgio vs Roger Agius, this was quite a recent case, Roger Agius was a had an addiction, he used to gamble and he used to drink a lot and when he was under the influcence of drink he used to get violent, in the end his wife had enough and she wanted to separate and she wanted the matrimonial home.The husband couldn't take it, so he knew she was coming back from work, he waited on the bus stop in Hal Tarxien, x'kumbinazzjoni he had a knife in his pocket.

- He waited for her and he wanted to speak to her to try and convince her not to take the house she walked away, he grabbed her and he stabbed her and he stabbed her so hard that the handle went into her, she didn't die there and then, there were other people at the bus stop she was taken to hospital and eventually she passed away. He was found guilty and sent to jail for 31 years in appeal it was reduced to 30 years, so eventually the conviction was for 30 years and the care and custody of the minor children, three minor children was awarded to grandmother, to the wife's mother. She sued Roger Agius for the court to say he was unworthy and the court said so without any hesitation. This was a case where there was no will, it was intestate and the court said that this ground of unworthiness also applies to intestate succession.

  - b. charged the testator, or the spouse, before a competent authority, with a crime punishable with imprisonment, of which he knew the testator, or the spouse, to be innocent

  - § For this ground of unworthiness the offender must have:

  - i.Charged the testator or the spouse before a competent authority

- ii.with a crime punishable with imprisonment
- iii.Knowing that the testator/spouse was innocent

- Another ground, charged the testator or his spouse, so keep in mind that the fist ground was the testator or his spouse, so it applies not only to the husband but to his wife, if someone kills my wife that that person becomes unworthy. And again this charged the testator or his spouse, before a competent authority, with a crime punishable with imprisonment, of which he knew the testator, or the spouse, to be innocent. This is close to what we did two years ago in calumnious accusations.
- What does charged the testator or his spouse before a competent authority mean. When somebody is charged, normally it's the police who prosecute, so does charged mean I become a police man and I file the prosecution myself? No before a competent authority, so I would have made a charge, an accusation before the appropriate body that will eventually issue the prosecution. If I go to FIAU and I report money laundering or I go to the police and say you've molested your younger children, but before an authority which has the power to prosecute, so the word charged here means made a report which can lead to a prosecution.
- The report has to be of a crime punishable with imprisonment, not any crime. It has to be one which if found guilty can lead to imprisonment.
- The third element is the knowledge that the person charged or accused was innocent. So I do it maliciously, I know you're innocent and I still file this.
- Conviction is not necessary it is enough if I charge you, if you're acquitted it's not important, if the police do not prosecute it's not important. If I made the change and reported you it's enough if you look at Italian law, Italian law is different under Italian law it requires that that conviction/charge that I make led to a prosecution and led to a conviction. In this case it doesn't have to be like that if I simply file the report even if the police don't take action about it that is still a charge. It is still a charge before a competent authority it is still a charge that can lead to imprisonment, it doesn't have to lead to the person accused being taken to court.
  - 1.A Crime
  - "crime" – Maltese text "delitt"
  - Criminal Code (Chapter 9) the law clearly distinguishes between crimes (Delitti) and contraventions (kontravenzjonijiet).
  - The law here is not dealing with contraventions but with crimes.

- 2. Imprisonment
- Crime must be one where, if the person accused were to have been found guilty, would lead to imprisonment - does not actually have to be the case.
- 3. Innocence of the testator/spouse
- Must be proved that
- a. the deceased testator/spouse IS innocent
- and
- b) the “unworthy” beneficiary knew of such innocence
- Ie pressed forward despite being aware of the person’s innocence

- The difficulty is, that the person who is considered to be unworthy must know the accused is innocent. So I know you’re innocent and I still charge you with it. The daughter goes to the police and says her father molested her and she knows it’s not true, it’s a total lie in that case of course it’s clear but you have to prove it, you have to prove that the person making the charge knew of the innocence. So you have to prove the mens rea of the person making calumnious accusations. If you don’t prove the mens rea, this ground annulment will not be proved, you have to show not only that that person was wrongfully charged but that the person making the accusation genuinely believed that person to be innocent and still you made the charge.
  - 4.Charged
  - Who brings charges for Crimes?
  - Maltese text “akkuza”
  - Being formally charged is not enough. It must be shown that those charges were brought to bear as a result of a direct action of the unworthy person
  - Dr Mark Chetcuti vs Dr Mark Busuttil (Rik 808/05 TA) 17/9/2018 sub judice pending in appeal.
  - Children of 2nd marriage vs children of 1st marriage accusing the latter of having reported their father to the Metropolitan Police.
  - The Court stated that this ground of unworthiness mirrored the same wording as Article 101 of the Criminal Code dealing with “calumnious accusation”

- 101. (1) Whosoever, with intent to harm any person, shall accuse such person before a competent authority with an offence of which he knows such person to be innocent, shall, for the mere fact of having made the accusation, on conviction, be liable -…"

- There was this case, Dr Mark Chetcuti vs Dr Mark Busuttil, still pending in appeal it was decided in 2018. Look up this judgement, (when Dr Borg Costanzi mentions a judgement please look it up as in the judgements you will find much more information and you can look at the reasoning, first of all when looking up case law, when eventually you will start practicing you will realise that judges have different methods of writing a judgement and the information you find in judgements is valuable and it will help you not just in that particular cases but in others, so study caselaw as it will help you a lot)

- This case, there's a lot of stuff in it, the judge was very analytical, what happened in this case there was a father who was married to an English woman, they lived in England, in London, the sale was bonavia and the marriage came wrong and divorced, came to Malta and married again when he was in England it didn't end up very well and there were issues and one of the children of the first marriage actually reported the father of having been violent with his wife.

- So there was a charge made to the metropolitan police, alleging that the father was violent with the wife so it was a charge to a competent authority on a crime which could be punish with imprisonment, the issue arose not whether he was innocent but whether the daughter making the charge believes him to be innocent or not. In this case the police did not prosecute so the children of the second marriage said look the police didn't prosecute, he was innocent and you know he was innocent so much so that you didn't even push them to prosecute the court of first instance wasn't impressed in this argument and you have to bring evidence to show it was done voluntarily, and that you voluntarily made a report which you knew to be false. And coming to this conclusion the judge relied heavily on caselaw in the criminal field.

  - Must charges actually be brought to bear ?

  - This is what the Court said:

  - " Minn hawn titnissel id-definizzjoni ta 'l-artikolu 605(1)(b) tal-Kap. 16 u cioe` li sabiex dan jikkonfigura jridu jesistu tlett elementi sabiex persuna titqies mhux denja li tiret tahtu cioe`:-

  - 1. It-testatur irid ikun akkuzat quddiem awtoritá kompetenti u

- 2. Ta ’delitt li jgib il-piena ta ’prigunerija,
- 3. Min akkuzah jaf bl-innocenza tat-testatur
- As to the Nature of the accusation, the Court stated as follows:
- Rigward l-ewwel element, gie ritenut hekk mill-Qorti tal-Magistrati (Gudikatura Kriminali) fis-sentenza il-Pulizija vs Josianne Giusti:
- “Ir-reat tal-kalunja kif previst fl-artikolu 101 tal-Kodici Kriminali titratta dwar informazzjoni, rapport jew kwerela kemm jekk maghmula verbalment jew bil miktub, liema kalunja hija imsejjha bhala verbali u diretta. ... Il-Professur Mamo ighid: “such crime is completed by the mere presentation of the information, report or complaint to the competent authority.”
- (

- Now here it is interesting to refer to the note by Professor Mamo, and they referred to the Mamo notes, and the word charged was interpreted to mean information, report or complaint so the person providing the information to the competent authority would have done any one of those three either report, or filed information or filed a complaint anyone of those three processes was sufficient in this case.
  - ……. x-xjenza propja ta ’min ghamel ir-rapport li fil-mument li ghamlu, kien jaf li r-rejat ma sehhx jew kellu kull prova li tindika li l-persuna rapportata hija innocenti jew u qatt ma setghet tinsab hatja”.
  - Is it necessary for the “offender” to be actually charged before the Criminal Court?
- It also emphasised that the knowledge of innocence must be known to the one making the complaint or providing the information. Innocence alone isn’t enough there must be knowledge of the person being innocent at the moment the charge was made not what happens later, when you make the charge. Not later on as facts can change and I realise that I could have made a mistake but at the time I provided the information did I know you to be innocent that is the moment to be examined.
  - (c) compelled, or fraudulently induced the testator to make his will, or to make or alter any testamentary disposition; or
  - COMPELLED
  - FRAUDULENTLY INDUCE

- The validity of the will is not in issue here. What is the relevance is the unworthiness of the beneficiary
- Link between the acts of the offender and the action by the testator
- Not necessary to prove that the offender gained a benefit from such will

- Another ground, for this, this is the third ground of unworthiness, compelled or fraudulently induced the testator to make his will, or to make or alter any testamentary disposition.
- We've already seen a case where this has happened, (Bonnici vs Mifsud) the case of the unscrupulous daughter and the issue arose as to whether the will was valid or not and the court had said that the mother said yes to everything, just nodded to everything but she was so scared that the daughter would lock her out of the house and not look after her, and the court said that this will was null.
- Over here we are not talking about the capacity to make a will we're not saying the person who made the will did not know what they are doing, the person making the will did so validly, the will was valid but you are unworthy to inherit because you have bent the wishes of the testator or maybe frustrated them. You have put so much pressure on the person making the will that that person says okay I will give it to you but because of the pressure I will give in to the pressure, beżżajtni, xebbajtni, dħaka bija, so there's an element of fraud, fraudulently induced, compelled or fraudulently induced.
- There are two separate terms, either you force someone to do a will in one way or another or stop someone from doing a will in one way or another or fraudulently induced.
  - For example, you stop your siblings from visiting your mother and you tell your mother they don't care about you they never come in fact you phone your siblings saying don't you dare come to my house. So they are not allowed to come and you tell your mother they don't want to come, you're giving a fraudulent picture which is not true.
-
  - The imputed action must result in distorting the testator's wishes
  - In some cases, concurrently with this ground the court will be asked to examine the mental state and will power of the testator

- See Pellegrini vs Rossignaud case where it was alleged that the testator was bullied

- Also Vassallo vs Sammut: Contents of the will were reasonable and reflected the testators wishes

- Josephine Camilleri vs Joseph Camilleri 28/2/2018 the question arose whether a secret will made by a mother which was very favourable to her son was the result of coercion and undue pressure by that son.

- We've already quoted this in the Pellegrini case. In this judgement the daughter alleged that her father was being forced by her siblings to make the will as he did and in actual fact the court concluded after listening to his best friend Judge Said Pullicino, that in fact it was plaintiff herself that was being such a pain and in the end he couldn't take it anymore, he said all she's interested is my money and my property and she doesn't care about me and he said I'm going to do this in my will and he changed the will so in actual fact the bully had the nerve to fight the lawsuit.

- In assessing whether this compulsion has taken place or whether there's fault, the court will also took at the wording of the will itself, remember the one who made the will is dead, his last words were the will that is his evidence what he wrote in the will. Now, there were judgements which say that the wording in the will isn't bible, if I make a will and say that my children did this to me, that is not taken to be sacrosanct proof it is only proof if I said it, but whether it actually occurred or not has to be proved. The courts on the other hand saying look at the contents of the will, are the contents reasonable? Is there something out of sink? In the Vassallo Sammut case which we quoted earlier the court explained this and check out Camilleri vs Camilleri. In fact in the Camilleri case the issue arose whether the son put extra pressure on the mother to make the will.

  - Id-dghjufija fizika ta 'Antonia Camilleri, iz-zmien u l-vulnerabilita taghha, kienu tali li holqulha impediment biex tfisser ir-rieda u x-xewqa ferma u determinata taghha jew li tirrezisti ghal xi suggeriment, talba jew sahansitra theddida li seta ' ghamililha xi hadd biex tibdel il-fehma taghha"

  - Kan. Dekan Francesco Camilleri et vs Salvina Camilleri, App 19/05/1947

  - Biex tirnexxi dina l-azzjoni huwa mehtieg l-ewwelnett li jigi ppruvat li ttestatur kellu volonta ferma u determinata li jaghmel testament jew li jbiddel dak li gja ghamel. L-atti imbaghad iridu jkunu jikkonsistu fi vjolenza, fisika jew morali, jew f'ingann, u dawn iridu jkunu tali li jimpedixxu lit-testatur li jaghmel it-testment

- The court said in this case that this woman was so weak and vulnerable that she just couldn't fight back, she just didn't have the physical and mental strength to fight back the bullying of her son and therefore concluded that when the will was done it was done as a result of pressure by the son.

- The pressure or the fraud has to be proved. It has to be proved clearly and without doubt you can't just imply it and in fact in this 1947 case the court said not only must it be true but it must also be shown that the pressure or the fraud has the visage to have distorted the testators wishes. So how do you prove that the wishes were distorted? Okay someone has compelled someone to make a will but does it mean that whatever is in that will is wrong, just because she's made the will? No. You have to show that what is written is not what the testator really wanted that his wishes were distorted. How do you find out whether the wishes were distorted? it's not easy, but you have to look at the surrounding circumstances, you have to see previous wills, the will itself may give a clue. But this element of distortion has to result, for example if there was a previous will where the father left all his children equally and suddenly there's a later will where he leaves to one daughter, if there's a second will and he leaves everything to just one child if you compare the two wills there's a big difference, what happens in between? Maybe that parent is living only with that one child maybe that one child stopped, maybe this one child stopped the other siblings from visiting, you've got to see the surrounding circumstances and of course if the evidence is strong enough the court may say yes that will was done in that way.

  - In respect of "Fraud" reference is made to the judgement in the names Vincent Cachia vs Emanuel Cachia deciza fil-15 ta 'Frar 1957 – fraud as consisting as

  - "f'dawk il maniggi frawdolenti li bihom jigi imqarraq it-testatur u bihom tigi karpita disposizzjoni testamentarja illi diversament huwa ma kienx jaghmel ... biex iwassal ghall-vizju tal- qerq u tan-nullita relattiva tad-disposizzjoni testamentarja il-qerq irid ikun ingust gravi u determinant".

- We're dealing with the issue of fraud, the court said that the fraud has to be unjust serious and determining. So it's not ant type of pressure, of fraud, it must have the effect of distorting the wishes of the testator. We have tried to trick him and he may have seen right through it, we may have tried also some tricks to fool him and he wasn't impressed and he still stuck to his wishes and wrote to the weird will, someone is say this was a weird will and it wasn't what he wanted but perhaps it was what he really wanted it was that maybe he was just a weird guy, and someone was trying to pressurise him, trick him, fool him, lie to him to get him to change his mind or write the will in a funny way but maybe that's what he wanted in the first place so you have to prove that the fraud had the effect of deviating the

genuine wishes of the testator. It's easy to say deviating the genuine wishes of the testators but how the hell do you prove it? It's not easy, there have been cases where this has been done but the evidence has to be really strong.

- Of course the longer you wait, the harder it will be to prove. If someone dies today, and you file a court case in 10 years time the neighbours would have moved on, they'd have died, they'd have forgotten, they'd have a vague recollection, even the siblings wouldn't remember properly, the evidence gets weaker and weaker with the passage of time so if a will is going to be challenged, challenge it as soon as possible. Strike whilst the iron is hot.

  - "kull kura, zeghil, attenzjoni, suggerimenti, insistenzi li ma jkunux akkumpanjati minn 'mala arte', minn artifizi ripremevoli, ma jikkostitwixixi il-qerq".

  - Ghaliex biex l-impunjattiva tirnexxi jehtieg jirrizulta li r-rieda tat-testatur giet imdawra minhabba tali qerq u li t-testatur ma kienx jiddisponi kif iddispona li kieku ma kienx ghall-qerq li twettaq fuqu

- Our courts have said, not every type of zeghil, attenzjoni, suggerimenti, insistenzi, will constitute fraud, say you have this schemy little snake, being really nice, even though some people are genuinely like that, some people are and they care and they pamper you, there's nothing wrong with that, but when this pampering is done to trick/fool you, and there are people who do this.

  - Say for example you have this old woman, living alone in this house, and all she has is her cats, she has a number of cats in her house and her neighbour comes and tells her let me help you clean the house, and in the back of her mind she says let me be nice to her so she leaves everything to me. If there's an element of fraud in other words this woman instead of just being nice is stopping the family from coming to see her then of course there's a problem.

  - Take the case of Cassar vs Naudi where this carer initially was acting as a genuine carer, and she used to go to their house, clean and all that stuff, and maybe do some shopping for her but then it went one step further. She took them to her house and hid the spouses Naudi from the family, and one died after about a week and another was on her death bed because of insulin manipulation and it went beyond that.

- The courts said that in this case the will, said nothing because it was actually superseded by a second will but if the second will was not done the court would have said that this first will was done, was done in circumstances where there was fraud on the part of this carer. But not every type of care is fraudulent, some care is genuine, and its a question of degree and how this care has deviated the

wishes of the testator in a bad way. Just by looking after someone and then being awarded by being appointed as an heir is not wrong within itself, if it's done with an element of fraud and deceit and giving the testator a picture which doesn't exist in reality presenting a false scenario. Violence can be physical or moral violence, it doesn't have to be physical and in fact usually it's moral, it's mental.

- Violence
- In so far as violence is concerned
- "non si esige un timore capace di influire sopra un uomo vigoroso; basta che I fatti siano tali da poterne dedurre che il testatore non abbia disposto di sua piena volonta`, o che la violenza produsse un costringimento capace di obbligare il testatore a fare quello che non avrebbe voluto" [Laurent Principii di Diritto Civile (Vallardi Editore, 1881) Vol VIII, Cap. V, sez. IV, nn 4 e 2].

- There has to be an element of what we call the mess in scene, its not easy to prove. Now when it comes to violence it's not any form of violence, it has to be such that it can distort the testator's wishes. If you don't make the will I'll shoot you, something really serious.
  - (d) prevented the testator from making a new will, or from revoking the will already made, or suppressed, falsified, or fraudulently concealed the will,
  - A: Preventing a testator from expressing his wishes
  - B: Suppressed a will
  - Falsified a will
  - Fraudulently concealed a will
  - Relevance of EU Regulation 650/2012 – forms of wills
- Another ground is prevented the testator from making a new will or from revoking the will already made or suppressed, falsified, or fraudulently concealed the will
- These are different grounds all thrown into one, so it's not one and one and one, it's different ground, prevented from making a new will (that's one), prevented from revoking an already made will (that's another one) or suppressed, fortified or fraudulently concealed the will. Now you would say, take the last case, fraudulently concealed the will.
  - An example would be if you go to the if a notary, you do a will with the notary and the notary fraudulently doesn't record it in the public registry and hides it,

that's a clear example, but if a notary is not involved how can you fraudulently hide a will? How is a will made? A will can be either a public will done with the notary or a secret will which is kept in the safe in the Civil Court First Hall.

- Later on we'll come to cross border inheritances, under EC Regulation 650/12, under this regulation, incidentally it's a law which has created all sorts of problems for us, it regulates the rules of Private International Law and the choice of law from the form and essential validity of a will, so this regulation regulates the form and the contents of the will. Before this regulation came into being the rules of Private International Law stated that the formal validity of the will was regulated by the law of the country it was made in so if the will was made in Malta you have to see that it was done by the form required in Maltese law, if it was made in Italy you have to see that it was done by the form required in Italian law, and so on. Essential validity was normally defined by the domicile the testator and lex situs, depending on circumstances, now with this EC regulation it's different, the formal validity can be done according to the nationality or the place of residence of the individual concerned, not necessarily by the place where the will was done.

  - So if I have a German tourist on holiday in Malta he can make a will on a piece of paper and put it in his drawer, what we call a holograph will. He can write in this holograph will I'm German, I'm on holiday in Malta and this is what I want my will to be regulated by German law and this is what I want and states his wishes, under German law that will is valid, under maltese law under the EC Regulation that will is valid. If I happen to be the maid cleaning his house and maybe under any previous will I was going to benefit, and then I found out this will and he left me out of it and I hid it, then if that can be proved that maid will not inherit because she has fraudulently suppressed, falsified, or concealed the will, she has hidden it, tore it up or destroyed it but of course you have to prove it, in a hypothetical situation Dr Borg Costanzi can't see it happening, nowadays it's the only scenario where a fraudulent will will be concealed.

- Suppressed means stopping the will from being done. So I want to do a secret will and you physically stop me from taking my secret will to the court. If that happens of course I can render myself to be unworthy if it can be proved the person suing me can declare, get the court to declare that I don't inherit.

  - How can the offender be "rehabilitated"?

  - 606. Any person who has incurred any of the disqualifications stated in the last preceding article may receive by will if the testator has rehabilitated him by a subsequent will or by any other public deed.

  - MAY or MAY ONLY ???

- How is this done?

- Now, how can the offender be rehabilitated?
  - Say for example that person has to prove it
- Now if the testator has been hurt by something that happened he knows about it, if he wants to rehabilitate the offender he's got to state it, its not presumed and this can be done either in a will or a public deed it doesn't have to be a will, but it has to be expressly stated.
  - Now, for example, a child who has wrongly accused a father with a crime punishable with imprisonment knowing that the father is innocent, that is one scenario where the child is unworthy. The father is charged, acquitted and spends the first five years not talking to his son, eventually the child gets married, has a grandchild, invites the father to the baptism of this grandchild and some magic happens and they make up, that's not enough the fact that the father went to the reception of the grand child even if they're hugging and kissing it's not enough.
  - But if for example later on they do a contract and the father donates €50,000 for him to buy a new house, clearly the father wouldn't have donated the €50,000 unless they were on good terms so even though it is not expressly stated that unforgivably, the fact that there's a public deed and underlying this public deed is something gratuitous, a gift which should only have been given if there's a good relationship between the two, you can imply that that deed/contract of donation is an expression of forgiveness. The law doesn't say expressly, it says, has been rehabilitated him by a subsequent will or by any other public deed.
- So the question to ask is does the rehabilitation have to be done expressly or is a tacit rehabilitation sufficient? For sure you need a will or a public deed , for sure, whether you actually state yes I'm rehabilitating him or not, is an issue that can be discussed. If for example the father is charged and acquitted and later on he makes a will and leaves his son as an heir, one of his heirs, the father knows he was innocent, he knows the son has wrongfully accused him and yet he put him down as an heir, even though the father doesn't expressly state I'm forgiving you the fact the's appointed the son as an heir implies forgiveness, implies rehabilitation. So the wording, the law doesn't require something express you have to look at the circumstances.
  - Other consequences of unworthyness

- 607. Any heir or legatee, excluded as unworthy from receiving the inheritance or legacy, is bound to restore any fruits or revenues which he may have received since the opening of the succession.

- Time lag between opening of succession and court judgement

- What happens if the “unworthy” person takes possession of estate without objection from the other heirs?

- Judgement: 9th December 2021(1274/2018 GM Odette Abela vs Josephine Cassar).

- What are the consequences of unworthiness. If you are unworthy you don’t inherit, it doesn't stop the persons down the line from stepping in.

  - For example an heir or legatee excluded as unworthy from excluded as unworthy from receiving the inheritance or legacy, is bound to restore any fruits or revenues which he may have received since the opening of the succession.

  - So if for example there’s a will and I get my share from the will if there’s a subsequent court pronouncement, I have to give everything back including the interests that accumulated, everything goes back.

- These judgements here Abela vs Cassar and Cutajar vs Cutajar are slightly out of context. Now, the issue discussed in these cases is whether an act done by one of the heirs, we’re looking at someone being declared unworthy so the heirs sue one of the siblings/legatees and say you are unworthy. Now what happens.

  - For example, take this example the father dies all the children go to the notary and the notary says isma there’s money in the bank, fill in this form so I can collect the money and get it to you, and the notary gives the four children a paper to sign the four of them sign and the notary collects the money and gives out ¼ to the four so the funds have been distributed, later on three of them sue the fourth one for being unworthy and the fourth one would say hang on a minute why are you suing me now? We’ve already divided the money between four, you were happy, you gave your consent for the money to be divided by four. How can you now say that the money is to be divided by three when before you gave your consent. You expressly consented to a division between four, meaning the wrong that I have done was superseded by the fact that you gave the consent to divide.

  - So I’ve done something wrong which renders me unworthy. After my father dies, I go with my siblings and we divide equally, later on, my siblings sue me and they tell me I can’t inherit and I tell them of course I can if you wanted to

sue me you should have done so before we divided, now that we've divided you have given your consent to the situation and you can't change your mind it's too late you're committed.

- The courts have been faced with these situations and in the Abela vs Cassar case which was on a slightly different wavelength and then Cutajar vs Cutajar the court went into what constitutes a prejudicial act which will stop you from being able to sue or claim the reserved portion in those cases and the court saiid that the renunciation to sue has to be express and clearly proven not implied so when you went to the notary to divide equally did you know about the situation? Where you aware of it? Was it discussed? And was it agreed when we discussed it forget it let's divide equally if that's the case yes you've renounced it but if it wasn't the case, if it wasn't discussed or you didn't know about it and you got to know it later than in that case yes. So if when you met before the notary and the notary told the four children sign this paper so I can divide it between the four and one says le, ghax dan ghamel hekk, they settle and sign and if they sign I don't think that any of the heirs can later on say we've changed our mind you did something that is conflicting with you suing to make a person unworthy but if it was never discussed at all then of course the circumstances are different.

- Cutajar vs Cutajar decided in 2003 PS

- Atto di erede /rinunzja

- Biex din id-difiza jew att taghhom kellu jitqies accettazzjoni tacita` "dan ried ikun tali li certament, necessarjament u univokament, minnu ma tkunx tista 'tigi nferita konsegwenza ohra hlief dik li min ghamlu ried jaccetta l-eredita.

- see also The case Dr Mark Checui no vs Dr Mark Busuttil no decided by Judge Toni Abela.

- 608. The descendants of a person excluded as unworthy shall, in all cases, be entitled to the reserved portion, which would have been due to the person so excluded:

- Provided that such person shall not have, over the portion of the estate vested in his children, the right of usufruct and administration which the law grants to parents.

- It is only the offender who is punished. His children can still claim the reserved portion.

- But if children are minors, cannot claim the usufruct.

- This clause is interesting, the descendants of a person excluded as unworthy shall, in all cases, be entitled to the reserved portion, which would have been due to the person, provided that such person shall not have, over the portion of the estate vested in his children, the right of usufruct and administration which the law grants to parents. So this is how it is punished, if I am unworthy, my children are entitled to the reserved portion and if my children are under age, their minors I will not have the usufruct over the estate, I will not have the right to administer my children's inheritance from my father. So the person unworthy can't touch anything to do with the estate, he is totally excluded but the grand children.
    - 609. (1) A tutor or curator cannot benefit under a will made during the tutorship or curatorship by the person under his charge.
    - (2) The same rule shall apply where the will is made after the termination of the tutorship or curatorship, but before the rendering of the final account, even if the testator dies after the approval of such account.
    - (3) The disability laid down in this article shall not apply to the tutor or curator who is an ascendant, descendant, brother, uncle, nephew, cousin or spouse of the person making the will.
- Another ground for incapacity is tutors and curators, they cannot benefit from a will of a person under their charge, it doesn't apply to them.
- This law is there to prevent the strong taking advantage of the weak, if someone is interdicted or incapacitated or a minor or absent, the tutor has a position of strength. It's not new if I have power and you need something you'll do all sort of things, if you're under age where you're totally dependent, and you want to go to a holiday and parents have the power of the price, so for you to go you'd have to get an A in exams but if the father says you have to do special favours, there's a position of strength, or powers used badly, these things happen. Where there is money, where there are assets if the child happens to be a child of a multi billionaire and someone looks after their interests.
- The law here is looking after the situation and it's stating in black and white taht the tutor or curator cannot inherit, except if that person is the parent, grand parent or the daughter, or the brother, nephew, cousin or the spouse. So relatives, immediate relatives can inherit, and rightly so because in a genuine situation, who is the person best committed and capable of looking after the person, if my child is mentally incapable or physically incapable and I'm his tutor, who will look after him best? The mother, again in the same situation if my father becomes incapable, who can take care of him best?

- What is interesting, is that the law says that this disability of the tutor and curator from being to inherit will remain until the tutor and curator submits their accounts for approval and they have been approved. So it's possible for a person to be rehabilitated, and after being rehabilitated he makes a will, if the tutor hasn't rendered accounts he can't inherit. The law says even if the testator dies after the approval of such account, what does this mean? It means that if the will is made, the moment the will is made the accounts are not yet concluded, that disability will remain. You've got to see the moment the will was made, the person could be habilitated by the accounts are not ready yet, until the accounts are ready that rehabilitation remains. Until I finished the accounts I still have the power of the person, I haven't given up control yet my control disappears once the accounts have been concluded, and I can tell you ok you've been rehabilitated and I can tell you you're not a junky anymore, and I can say make the will leave me everything and then I'll give in the accounts. So until the accounts have been approved you cannot inherit.
- It's not only the termination of the ground for incapacitation or interdiction but also the rendering of accounts.
    - 1.Of a temporary nature
    - 2.Key moment is WHEN THE WILL WAS MADE.
    - 3.Not all types of curator. One to manage his affairs and not merely a curator ad litem
    - 4.The law specifically exempts ascendants, descendants, spouses, siblings and cousins who have been appointed as tutors from this exclusion.
    - 1.Of a temporary nature
    - 2.Key moment is WHEN THE WILL WAS MADE.
    - 3.Not all types of curator. One to manage his affairs and not merely a curator ad litem
    - 4.The law specifically exempts ascendants, descendants, spouses, siblings and cousins who have been appointed as tutors from this exclusion.
    - Persons assisting in drawing up the will
    - Public and Secret Wills:

- 610. Saving the provisions of the Trusts and Trustees Act and of article 12 of the Notarial Profession and Notarial Archives Act, the notary by whom a public will has been received, or the person by whom a secret will has been written out, cannot benefit in any way by any such will.

- There are cases where people are incapable of inheriting, and this relates to the persons who are interested in drawing up a will, a notary cannot inherit a person whose making the will in front of him so if someone comes to me and I'm a notary and I do a will, for that testator to do that they have to go to another notary, neither me nor my spouse. Not even the person helping in the writing of a secret will.

  - (The exclusion also extends to the spouses of the notary and persons related to the notary by consanguinity or affinity up to the degree of uncle or nephew in the collateral line (3rd degree).

  - Notary receiving but not drawing up the secret will?

  - In terms of the Trusts and Trustees Act (Chapter 331) a notary receiving a will or notarial trust deed is not precluded from being appointed as the trustee, subject to the limitations and procedures contained the said Act - Vide Art 43A.

  - Witnesses:? heirs and legatees or their relatives cannot be witnesses to a will (Trapani vs Hili APP 6/10/2000)

- If you look up at Chapter 55, you will find that this exclusion applies to the notary, his spouse, and persons related to the notary, both by consanguinity and affinity so both his own blood and spouses, up to the degree of uncle or nephew. So the notaries father's brother or the notary's sibling's children, those people can't inherit in the will drawn up by that notary.

- The same applies to witnesses, as we will see later on you don't have to have a witness for a will, but in the past you had to have two witnesses. Dr Borg Costanzi would always recommend a notary to have a witness, because if there is a dispute the notary has the comfort of the witnesses. But notaries complained saying sometimes it's inconvenient to find two witnesses and therefore we don't need it we leave everything to the responsibility of the notary, but if you choose a witness you have to make sure that they are competent and capable in terms of law (we'll come to it later on). Witnesses cannot be beneficiaries and they cannot be related to the beneficiaries. So for example if my wife is inheriting I cannot be a witness to that will. This happened in the Trapani vs Hili case.

  - Privileged wills

- 681. (1) Any testamentary disposition made in favour of the person receiving any of the wills referred to in article 673 and the articles following, or in favour of the witnesses, or, in the case of a will made at sea, in favour of any member of the crew, shall be void.
- (2) Any disposition in favour of any one of the parents, the child or other descendant, or the spouse of any of the persons referred to in sub-article (1) of this article shall likewise be void.
- Privileged wills are temporary in nature
- Made in unusual circumstances
- 1.The person receiving the will
- 2.The witnesses
- 3.Or the parents, spouse or child of such persons
- Persons rendered incapable as a result of a condition in a will
- Patto committorio vide Abela vs Cassar case
- INTERMEDIARIES
- 612. (1) Any testamentary disposition in favour of a person who is incapable in terms of articles 609 and 610 is void, even if such disposition is made in the name of intermediaries.
- (2) Where the incapacity is partial any such disposition shall be void only in part.
- 613. Any one of the parents, the descendants, and the spouse of the person under any such incapacity, as the case may be, shall be deemed to be intermediaries.
- The contra scriptum testimonium non scriptum non fertur 'principle - but this is not an absolute principle and the Court is empowered to look behind the appearances Carmelo Morana v. Dr. Joseph Spiteri et, (Kollez. Vol: XXXVI.i.119):
- Spouses ect presumed to be intermediaries.
- This is more of a control on the Testator trying to go round the impediments of Art 609 and 610 (Curators, Tutors and Notary Public)

17th March 2023

Lecture 9.

- Law of Succession
- Lecture 9
- Reserved Portion
- Dr Peter Borg Costanzi

- Today, we will be dealing with a totally new topic dealing with the reserved portion.
  - 614. (1) Where the testator has no descendants or spouse, he may dispose by universal or singular title of the whole of his estate in favour of any person capable of receiving under a will.
  - No Descendants
  - No Spouse
  - May dispose of his estate to whoever he wishes – by singular or universal title
  - No restriction either on the QUANTUM or on the BENECIARY
  - The Moment this is examined is the moment of his death.
  - Recognises the absoluteness of the right of ownership
- Now, normally the general rule with property is that you have absolute rights of ownership over your property in section 320 meaning you can dispose of it as you like you can abandon it, you can plough it up, you can give it to whoever you want, sell it, whatever.
- The notion of absoluteness means or implies that no one should control what you do or don't do with your property. So if you want to give it away during your life or upon your death ideally there should be no restriction, and the general rule is that under the civil code section 320 that if I want to give all my estate to someone who is not related to me why should I be stopped? I have absolute rights of ownership, in some countries it is like that.
- In Malta however there is restriction when it comes to inheritance and there is what we call a reserved portion, in the past it used to be called a legitim but the name was changed in 2004 and it's now called a reserved portion. The notion underlying the reserved portion is the general obligation of a married person or a

person who has children even though not married towards his children and his/ her spouse.

- There is an obligation of maintenance and care during lifetime, and that obligation has an impact on succession. The law restricts what one can dispose of and how much one can dispose of and to whom. So, the limitation is by person and by quantity, there are two limitations.
- The reserved portion is reserved only to children and spouses, nowadays. In the past there was a reserved portion in favour of ascendants, of parents and grandparents but that was removed and now the reserved portion is only in favour of the children and spouses. Of course, if the person is unmarried and the person has no children the issue of reserved portion does not arise. We can't say if we have no children I can give the property to whoever I want I can leave my family out entirely. The law does not protect or give any reserved portion rights to siblings and to and/or parents.
- The second point is the issue of the reserved portion and whether it arises is examined at the moment a person passes away. So hypothetically speaking if a person was married and had children and his spouse and all his children and grandchildren predeceased him then there's no reserved portion.
- We will start off with section 614.
  - 614 (2) Where the testator has descendants or a spouse, the disposable portion of his estate shall be that which remains after deducting such share as is due to the said descendants or spouse under any of the provisions of articles 615 to 653.
  - If there is a Spouse and/or Descendants
  - The estate is divided between :
  - the DISPOSABLE - the portion which is free from restrictions
  - and
  - The NON-DISPOSABLE portion – the portion reserved by law to the spouse/descendants
- So if there are no descendants nor spouses, no problem he can do whatever he likes. When there is a spouse or there are descendants, so descendants; children if they're pre-deceased grand children and great grand children, there is a portion which is reserved.

- When examining the reserved portion, the courts will normally see whether the testator has given more than he should. There's a portion that is reserved, can be ½, ⅓, ¼, it can be. If the deceased has bequeathed in an imbalanced way more than he's entitled to, then the person claiming the reserved portion can ask for part of that bequest to be reduced to ensure that he gets his portion.

  - Say for example a married person has two children and he gives all his estate to one child and nothing to the other. When he dies, there's nothing in the estate. Zero property inherited because he gave it all away by donation to one child during his lifetime, the surviving child says hang on a minute where is my inheritance, the donation is calculated in the reserved portion (we'll come to it later on) and that one child who received that donation even if that child renounced to the inheritance, has to pay the reserved portion. The donation is abated, it's reduced, so that the portion that could not have been disposed of, is fictitiously re-entered into the estate, into the inheritance, it's a calculation and fictitiously it is said that that percentage/amount is part of the estate and goes to the person claiming the reserved portion and the heir or the donee, will have to pay the reserved portion from the part of the property that has been disposed of.

  - If the property happens to be an immoveable property, you will be given a choice, either to pay from his own money or else he'll have to sell the property and provide sufficient liquidity.

- This is how strong the reserved portion is.

  - The two portions are fictitiously calculated and we shall be examining:

  - a)What property is taken into consideration

  - And

  - b) How it is calculated

- Two of the biggest headaches when calculating the reserved portion is what property is included and how is the property calculated and valued? There are other issues of course, there are other problems but these are the two main ones.

- Usually if someone is making a will and leaving a child a reserved portion or maybe leaving a child out completely, it is normally done purposely. Not always, but it is normally done purposely. So the person making the will wants to give as little as possible to that heir/son/spouse, than the minimum. If you can give less than the minimum, they'll try and find ways and means of doing so.

- All sorts of strategies have been used, to try and go round the law to avoid paying the reserved portion or avoid paying the full amount of the reserved portion.
- The law and case law has reinforced consistently the right of the reserved portion, it will look behind appearances and we will see that.
  - Pre 2004 - Also Included ascendants
  - Raison D'etre: Caruana Galizia:
  - "when a testator has persons who are closely related to him by consanguinity or affinity, his duty towards them is a positive and not a hypothetical one founded on social and domestic relationships: this duty is therefore, raised by law to a legal obligation".
  - Two-Fold Limitation
  - Maria Wismayer et vs Ruggiero Wismayer et (PA 22/5/1950 Vol XXXIV.ii.574)
  - Illi d-dritt assolut tad-disposizzjoni tal-propjeta 'huwa limitat mill-fakolta 'ta xi disposizzjoni b'titolu gratuitu, meta d-disponenti jkun ħalla superstiti ċerti parenti. F'dana s-sens il-kapaċita 'tal-bniedem li jiddisponi b'testment mhix illimitata, l-għaliex id-decujus ma jistax jiddisponi mill-beni kollha, izda parti minnhom biss. Fi kliem ieħor, apparti l-limitazzjoni dwar ċerti persuni, il-kapaċita 'u l-fakolta 'tad-disposizzjonijiet per mezz ta 'attijiet ta 'l-aħħar volonta ' hija wkoll limitata għall-kwantita 'tal-beni.
- Here we are going to quote some caselaw, then we can read it in peace and quite. Incidentally when reading cases, we will not quote all the judgement as they are long, one judgement which we may quote either today or in the next lecture was delivered yesterday by Judge Robert Mangion 47 pages long.
- When quoting judgements, look it up and read it through when we read the judgements we will come across other issues not just the issue mentioned in the quotation and by reading the judgement you'll get a broader understanding of the subject. The judgement will teach you other parts, so it is a learning process, some are better than others but we'll always learn something.
- In this judgement, Wismayer vs Wismayer it's an old case, of course under the old law but the principle remains the same and here the court emphasised that when dealing with the reserved portion, the limitation is twofold, namely it's restricted in favour of a specific number of persons so only (nowadays) the children and spouses and the quantity, there's a limit, not everything is stuck, there's only a percentage. But that percentage is guaranteed.

- No Matter How the testator makes out his will, the spouse/child will always be entitled to the reserved portion:

- Saviour James Vella vs Antoinette Carmen Barbara (App 13/4/2007)

- “Dan ifisser li, irrespettivament mill-mod kif it-testatur jiddisponi minn ġidu għal wara mewtu, d-dixxendent huwa dejjem intitolat għal-dak is-sehem hekk imsejjħa“ ’legitima portio”.”

- Another point, the court said no matter how the testator makes out his will, the spouse/child will always be entitled to the reserved portion, as we explained before, people have used devious means of trying to avoid having this paid out and calling it trying to go round the law, the court will see right through it and say there’s a right to the reserved portion.

  - 615. (1) The reserved portion is the right on the estate of the deceased reserved by law in favour of the descendants and the surviving spouse of the deceased.

  - (2) The said right is a credit of the value of the reserved portion against the estate of the deceased. Interest at the rate established in article 1139 shall accrue to such credit from the date of the opening of succession if the reserved portion is claimed within two years from such date, or from the date of service of a judicial act if the claim is made after the expiration of the said period of two years:

  - Provided that the Court may, if the circumstances of the case so require, decide not to award any interest or establish a rate of interest which is lower than that stipulated in article 1139.

- This section, section 615, is the section that starts giving problems. This law is a new law, it was changed in 2004, and if you see judgements dealing with the old law, and we’ll come to that. The interpretation is different. The opening phrase is “The reserved portion is the right on the estate of the deceased” the second part is the “The said right is a credit of the value”. The credit of the value is a big shift, and it changes everything. First of all, in earlier lectures and throughout the law of succession when dealing with testate succession, the law and even judgements make a strong emphasis on the wishes of the testator. Why? If there’s a will what the testator wishes and writes in his will, that is the gospel truth and that is what will be applied.

- The courts will bend over backwards to protect the will and the integrity of the will. When interpreting the will it’s the will which has to speak. The testator is dead he

can’t speak, his last words are the words written in the will and the court will very very reluctantly allow outside evidence.

- So the will is given a lot of power, a lot of strength, but here the reserved portion is even stronger, it overrides the wishes of the testator. In some countries, you don’t even need to make a will because the law is so strong that no matter what you write in the will the law will apply, it over rides everything. In Malta it’s not like that, there’s at least some limit.

- The reserved portion is not only guaranteed but the courts will dismiss in whole, or in part or this applies in whole or in part the wishes made in the will or even in donations during the testator’s life, so this reserved portion is something that a child and a spouse is entitled to. It is your right. If it’s not given to you you can claim it.

- You can lose it of course if you forfeit it or disinherit it but otherwise under normal circumstances that is your right and it can’t be taken away, you can’t even renounce to it during your lifetime, if your father or mother are still alive you can’t do a contract and say I don’t want the reserved portion, you can do that after the person dies.

- The reserved portion is ad fault protective mechanism, the law is saying the wife and the children this is the minimum they’re entitled to, in a normal will, in normal circumstances there are no wishes in the family, the parents will say either we leave everything to each other and when we both pass away, our estate will go to our children equally between them, so there, there’s no problem. If there is a problem with one or more of the children, they can say we are leaving our estate to two of the children and we are leaving the reserved portion to our third one or they can say only we give everything to our two children and not mention the third. The right of the reserved portion comes out of law not from the will.

- There are some wills for example where the testator said, I'm leaving my third or fourth son, the reserved portion but he gets the reserved portion five years after I die, you can’t do that, you can’t change what’s written in the law dealign with the reserved portion it’s a guaranteed right and it’s guaranteed by law, you get it by operation of the law not because of the will. It’s not given to you in the will its given to you by law. So it’s the law which will apply, it’s automatic. Of course you have to claim.

- It also applies if the child or the spouse has a benefit in the will. What does this mean? So a person makes a will and says I’m leaving my children €10,000 each, as a legacy. Then he goes on to say I’m only appointing two of my three children as universal heirs. So, this third child is only going to get a €10,000 and not going to get a share in the villa. The child will say hang on but I have my reserved

portion, he will claim the reserved portion and that €10,000 will be taken into consideration. So even though there's something mentioned in the will you don't lose your reserved portion you can still claim it, not only can you claim it but you have a right to claim the gifts given to you in the will itself.

- So if in the will for example my father says I'm leaving you a car and I have a reserved portion off €50,000 I will get the car plus the difference in value up to 50,000. Of course to claim the reserved portion you can't be an heir and claim the reserved portion at the same time you have to choose, you either are going to accept the will in its entirety or else you can say no I'm renouncing the inheritance and I'm claiming my reserved portion. You have to renounce to the inheritance to claim the reserved portion. If you stick with the will without doing so you're bound by the will and you have to obey it. If you want to go against the will and you claim your reserved portion you file a, you do a deed of renunciation or go to the Second Awla there are two ways of renunciation, you renounce, and in the deed of renunciation or in the act of renunciation you declare I am renouncing and I'm claiming the reserved portion.
    - It is a right granted by the law and over-rides the wishes of the testator
    - Applies both to Testate and Intestate Succession
    - Applies even if the child/spouse already benefits under the will
    - But see: Gio Maria Debono vs Carmelo Licari – PA 16/12/1954
    - Art 861 and 862 – Renunciation and reserving such right
- First of all in earlier lectures,
    - The Spouse: May not necessarily be entitled if there has been forfeiture of inheritance rights under Art 48 (1)(a) Chapt 16 – Caruana vs Caruana Verbystska (App 150/10 dec 24/6/2016)
    - Descendants: Right goes down the line and even passes on to the grand children of pre-deceased children or children who have been disinherited or declared unworthy
- One point Dr. Borg Costanzi would like to make is this Caruana vs Caruana Verbystska case, now, in this case, we've mentioned it before, the husband was suing the wife for legal separation and it was alleged that the wife wasn't nice to her husband, was adulterous and so on.
- During the pendency of the case the husband died, so, the issue of personal separation didn't arise anymore. He is dead so there's no point in separating. The

right to separate has been extinguished. However, the law reserves the right for the heirs of the deceased spouse, to continue in so far as the patrimonial aspects are concerned. The patrimonial aspects consist in the division of the community of acquests, and succession rights; forfeiture or not.

- Now in this case, the court concluded that the wife, had forfeited her rights to succession, under article 48 of the Civil Code and therefore because she forfeited her right to succession she forfeited her right to the reserved portion. so yes the spouse is entitled to the reserved portion, there are the grounds of forfeiture stated in the law dealing with succession but there are other ways that you can forfeit and one of them is if you forfeit following a separation case, and this is what happened in this case.
- As far as ascendents are concerned, the right of a reserved portion keeps going down the line so if, for example my father was unworthy to inherit his father (my grandfather) the grandchildren can claim the reserved portion, my father can't but I can.
    - It is a PARS BONORUM but is it a CREDIT or can the child/spouse ask that it be paid IN KIND?
    - Before 2004 it was called a LEGITIM
    - "Wismayer Et Vs Ruggiero Wismayer Et" (First Hall, Civil Court) (22/05/1950):
    - "il-legittima skond il-ligi taghna hija biss kwota mill-beni li jhalli d-decujus; u ghalhekk dana jista' jiddisponi kif irid mill-beni tieghu, minghajr distinzjoni ta' l-ispeci taghhom, imma biss bil-limitazzjoni tal-kwantita'. Jigifieri illi sakemm id-decajus ma jeccedix il-kwota disponibbli hu mhux obbligat ihalli lill-legittimarju determinata speci ta' beni."
- Now the headache is what is a reserved portion? Up till 2004, it was considered as a part of the estate, pars bonorum, bonorum is coming from the word bonora meaning goods, property. It was a part of every single item forming part of the estate.
- The person claiming the legitim, had a right to be compensated in kind. So if there were a hundred objects, they calculate what value this person was entitled to, look at the property and say okay you're entitled to €10,000's worth, there is this garage which is worth €10,000, take the garage, and you get the garage you get an object forming part of an inheritance.
- So when it came to value an estate it didn't make that much of a difference because the measuring tape was the same in the sense that the estate was

valued, your share was quantified and then with the same valuation you chose an object so whether the objects were worth 10,000 or 10,000,000 it doesn't make a difference. You have ⅕ of 10,000 or ⅕ of 10,000,000 and you choose an item worth ⅕ of 10,000 or ⅕ on 10,000,000 depending on the value, and you measure it.

- The measuring tape was the same, and caselaw, has come across these various headaches and we'll be mentioning some judgements especially if there has been a substantive change in value between the moment of death and the moment when the court case is decided.
- Sometimes years pass, there was. A time where the property values were doubling every year between 1979-1989 you could say every year the property doubled in value. So property worth €1,000 in 1979 was €2,000 in 1980, €4,000 in 1981, €8,000 in 1982 so the increase in value was crazy. It was as though the values of immoveable property was a let loose.
- If you had a case which took 10 years to be decided, this isn't unusual unfortunately, between the moment the person died and the moment the case was decided the value was so different that people claimed there was an unjust result. Of course if you use the same measuring tape to value the property it didn't make a difference but if you valued the property in the year 2000 and you want to be paid in money rather than in kind then of course there's a big difference, you got the price value of 2000 when the value in 2023 is two or three times as much.
- The value of money of course has not gone up but it has gone down, and because of these differences in value there has been litigation.
    - Legitim – a share in each and every single item and was therefore entitled to receive it in KIND
    - Was not without problems..... Because it left the division of the estate in abeyance
    - Reserved Portion: A Credit. Paid in money unless the parties agree otherwise.
    - "Maria Ellul vs Joseph Axiaq" decided by the late Judge Lino Farrugia Sacco on the 3rd December 2012 - 898/09).
    - In this case the plaintiff sued for the reserved portion.
    - The estate consisted solely in immovable property of substantial value.

- The defendant being the heir stated that he was not in a financial position to pay the reserved portion in money or pay any owelty of substance and declared that he preferred that this be paid in kind.

- The case that we mentioned, the powerpoint mentioned some cases.
  - Interestingly the court added the reserved portion and the interests to date at €454,628, awarded plaintiff immovable property worth €460,000 and ordered plaintiff to pay the defendant an owelty of €5372.
  - This was only possible because of the express wishes of both parties for the reserved portion to be paid in kind with as minimum an owelty as possible
  - How is the estate valued for the purposes of calculating the reserved portion?
  - What is the “punctum temporis”?
  - moment of the opening of succession
  - Or
  - Moment of liquidation and payment of the reserved portion?
  - There are arguments in favour of both.
  - It has been argued that a person claiming a reserved portion is
  - neither an heir nor a creditor,
  - he is a person entitled to a “porzio rei” – a portion of the estate –
  - and therefore the value should be that at the time such portion is assigned
  - Case law:
  - In the past the general rule was that the estate of the deceased was valued as at date of death, even if years passed between the moment of death and the date of eventual judgement liquidating the legitim. With property prices increasing sharply the value date can make a substantial difference in estimating the reserved portion. This does not make much of a difference when the legitim is being paid in kind but it would make a big difference if it is paid in cash.

- This issue was examined in the case Mifsud vs Mizzi mentioned hereunder and more recently in the lawsuit Raffaele Vella vs Salvino Vella et (Rik 440/10)(JZM) decided on the 29th February 2016

- The main one we have to look at is this one.
  - Qorti tal-Appell fl-14 ta` Dicembru 1973 fil-kawza “Emilia Mifsud et vs Eleonora Mizzi
  - Which Dates?
  - Date of Opening of succession:
  - or
  - Date when giving/paying the reserved portion,
- Emilia Mifsud et vs Eleonora Mizzi, this is the landmark judgement that most cases even today will start off with, they’ll look at this case, and in this judgement the court said at least if interpreted correctly because even in interpreting this judgement there has been conflicting case law, some judges have interpreted this judgement one way, and others in a different way but the prevalent view which is deemed to be the correct interpretation, is that since the legitim consists in a portion of an object, if you’re going to get an object, paid in kind, the issue of value is the date you receive the object which is the date of the judgement. So if you had a right to be paid in kind, the property’s valued, your object is selected and you’re going to get that object. So since you have a right to be paid in kind you have the right to have the value updated as close as possible with the date of the judgement if you’re going to be paid in money.
- If you get paid in kind you get the object, no problem but if you’re going to get paid in money then the values are going to be updated as close as possible to the date of the judgement.
- There are cases which decided differently but this version was the prevalent view.
  - Date of Opening of succession:
  - This is the date which is taken into consideration to establish whether the testator has exceeded the disposable portion
  - li ghall-valutazzjoni tal-beni in konnessjoni mad-determinazzjoni tal-porzjoni legittima, u ghar-rikostruzzjoni tal-patrimonju kollu tad-decuius, wiehed irid jirriporta ruhu ghall-valuri fiz-zmien ta` l-apertura tas-successjoni.

- In fact in the Mizzi case the discussion came a bit further, it became more complicated because in the first exercise that the court had to do was to see if the testator exceeded the disposable portion. If in my will, if for example the child is entitled to ⅙ of the estate as a reserved portion and I leave my child ⅙, that's fine because I've given a percentage equivalent to the reserved portion.

- When dealing with the reserved portion if there are children. If there are four or less, the non disposable portion is ⅓, so if there are three children, the reserved portion is ⅓ of ⅓, ⅑ so I leave two of my children 4/9 and I leave my third child ⅑, no problem. I'm giving the child whose getting the least the minimum right reserved by law so I have not exceeded the reserved portion, the child will get ⅑ and that's it but if I leave my child less, or if it is alleged that I leave my child less, the court will value the estate at date of opening of succession, and to a rough calculation to see whether I've given out more than I can and say ok you haven't given out more than you can the will applies no problem. If you've exceeded the disposable portion then you go to the second part of the calculation, how much the beneficiary has to receive so the exercise is twofold. First you value the estate at date of opening of succession to see if the non disposable portion has been exceeded, if it has been exceeded then you start calculating the value of the reserved portion itself and to make it even more confusing, the court said to calculate whether the disposable portion has been exceeded the operating date is the date of opening of succession but to calculate the entitlement of the person claiming the received portion, the opportunity date is the date as close as possible to the date of judgement.

- There are two value dates, even judges have confused this and even if you read the Marlene Mizzi case you get confused, it takes a while to understand it.

- The court will first examine whether the testator has given out more than he can, or whether the will is safe. In order to do so they will see the valued of all the estate at the date he dies. Okay this is what's in the box let's see how much it's worth, the day they die. How much did you leave to your children? Did you go beyond what you could leave?

- The court will see whether the rights of the children and the spouse were safeguarded according to those values. In other words whether you've given out more than you can or not, if the reserved portion is ⅓ of this, and that ⅓ goes to the children the court will say has ⅓ gone to the children, if it has then you are safe. If the reserved portion is ½ of the estate, the court will say has ½ gone to the children, if it has then the will is safe. If it hasn't and you've given out more then the court will say that we have to do abatement principle, we have to get back the extra to safeguard the reserved portion. So, when valuing the first exercise to see if the reserved portion has been exceeded the value date is the

date of death, the date of opening of succession. On that day the court will do a value and say okay the values are these this is what's disposable this is non disposable and the court will see how the disposable portion was disposed of, and whether there's sufficient property to safeguard the rights of the person entitled to the reserved portion.

- If the court finds that you've gone more you've given more than you can so you've exceeded the disposable portion, you'e given out more, then there's a second valuation and the second valuation of the estate is a date as close a s possible to the court judgement and the reason being that since the person claiming the legitim was entitled to be paid in kind, if there was an appreciation in value of the object in kind that went to his benefit across the board. If the whole estate went up and he's going to get an object he will get a benefit of it.
- That situation has changed, at the moment we're in a state of conflict. We have judgements which say that the Marlene Mizzi rule applies and judgements that say that it doesn't.
  - Date when giving/paying the reserved portion,
  - li meta llegittima ma tigiex sodisfatta u trattandosi ta` beni in natura id-dritt tal-legittimarju ghandu bhala oggett"un bene reale" u l-"aestimatoria rei" ghandha tkun riferita ghall-zmien tal-konverzjoni,u cioe` fi zmien l-iktar qrib possibbli ghall-pronunzja gudizzjarji
  - In will the testator left the house worth €250,000 to one child and appointed all 5 children as heirs. Value of Estate at date of Death (say 2012) - €300,000 (House worth €250,000 and € 50,000 in movable assets)
  - Non disposable portion say there were 5 children: 50% = €150,000.
  - Meaning that one child got house + €10,000 and the others got €10,000 each.
  - If Case is being decided in 2022 where the house is now worth € 1,000,000.
  - If one of the children claims the reserved portion:
  - Possibiity A: ½ x 1/5 of €300,000 = €30,000
  - Possiility B: ½ x 1/5 of €1,000,000 + €50,000 = €105,000
- Now here in this example, Dr. Borg Costanzi has given us an example of how a difference in value can have a real effect, so we're talking about a case where someone has a house which was worth €250,000 and money in the bank worth €50,000 so total value is €300,000 and he gave the house to one child, he has

give children, so if there are five children the non disposable portion is 50%. So €150,000 worth is reserved for the five children. In this case if he has already given the house to one child it's clear that he has gone beyond the 50% mark. The estate is worth 300, the non disposable portion is 150,000 but he gave a house worth 250 to one child, so he has gone beyond the non disposable portion, so the other children have a right to claim the reserved portion.

- How is the reserved portion calculated? If you see the value at date of opening of succession, they will get ½ of ⅕, ⅕ of 50% so that's €30,000 per child claiming the reserved portion but what if the value went up? And the value of that house is now worth €1,000,000 instead of €250,000 under the old law, that child being entitled to get paid in kind would get 105,000 and the personal debate is under the new law do you get 30,000 or 105,000? This is where the difference in values have a material effect. The material effect is the result of delay, the longer you wait the bigger the problem and in fact the delay, the advice one would give is if you're claiming the reserved portion claim it as soon as possible.

  - Law of Succession
  - Part 9 (ii)
  - Reserved Portion…. contd
  - Dr Peter Borg Costanzi
  - 615. (1) The reserved portion is the right on the estate of the deceased reserved by law in favour of the descendants and the surviving spouse of the deceased.
  - (2) The said right is a credit of the value of the reserved portion against the estate of the deceased. Interest at the rate established in article 1139 shall accrue to such credit from the date of the opening of succession if the reserved portion is claimed within two years from such date, or from the date of service of a judicial act if the claim is made after the expiration of the said period of two years:
  - Provided that the Court may, if the circumstances of the case so require, decide not to award any interest or establish a rate of interest which is lower than that stipulated in article 1139.

- Coming back to how the reserved portion is calculated, the value.

  - Raffaele Vella vs Salvino Vella et (Rik 440/10)(JZM) decided on the 29th February 2016 which held that the value date was to be the date closest as

possible to the date of judgement liquidating and ordering the payment of the reserved portion.

- Din il-Qorti tibqa` tal-fehma illi l-argument tal-eredi tat-testatur ma jregix u li l-valur li ghandu jigi kkunsidrat huwa dak taz-zmien meta tkun sejra tigi likwidata l-kwota spettanti lil-legittimarju

- Look at Vella vs Salvino Vella by Judge Zammit Mckeon, this was quite an elaborate judgement, and the court took into consideration the fact that the law was changed. So whereas before it was a right to a payment in kind now the reserved portion is a credit. Under the new law, the reserved portion is no longer an entitlement to be paid in kind, you get a cheque, it's a credit, you're treated as a creditor of the estate. So we're talking about payment in money. The estate is going to be revalued and someone will give you cash or a cheque or bank transfer and, in this case in Vella vs Vella, Judge McKeon said the value date is the date closest to the judgement, however and in Calleja vs Grima decided in July 2021, the court of appeal said that this is even more so now that the law has been changed so not only didi they reinforce the Marlene Mizzi case, but they actually said that now that it is a credit, you should get paid at the value as the date of judgement.

  - Court of Appeal 21st July 2021 (203/13) Carmelo sive Charles Calleja, et vs Saviour Grima

  - 20. Illi din il-Qorti tqis li fi kwistjoni li tolqot il-likwidazzjoni tas-sehem riżervat huwa ġudizzjarjament stabbilit li l-kriterju tal-valutazzjoni tal-ġid kellu jkun dak ta 'kemm kien jiswa tali ġid fiż-żmien li ssir il-likwidazzjoni . Dan jgħodd kemm jekk is-sehem riżervat jingħata fġ'id mill-wirt u kif ukoll jekk jitħallas fi flus għaliex, "jekk il-leġittima ma ġietx sodisfatta u, trattandosi ta 'beni in natura (mhux flus), ikkonvertiet ruħha, fil-każijiet fejn dan hu konsentit mil-liġi, fi dritt ta 'kreditu fi flus, id-dritt tal-leġittimarju għandu bħala oġġett "un bene reale" u l-"aestimatio rei" għandha tkun riferita għaż-żmien tal-konverżjoni, cioé ż-żmien l-iktar qrib possibbli għall-pronunzja ġudizzjali u tenut kont għalhekk ta 'xi sopravenuta svalutazzjoni monetarja". Ladarba llum, bil-liġi li tgħodd għall-każ, is-sehem riżervat sar kreditu tal-wirt, din ir-regola tgħodd aktar u aktar;

  - PA 594/13 JRM of the 31/10/2019 Josephine Farrugia vs Jasmine Baldacchino

  - Fl eżerċizzju tal-likwidazzjoni tal-assi ereditarju għall-finijiet li jiġi stabilit issehem riżervat, wieħed ma jistax iqis il-potenzjal jew il-possibilitajiet ta 'dak il-ġid fil-ġejjieni (ikun kemm ikun probabbli li jiżdied il-valur tiegħu). Bl-istess mod lanqas ma jista 'jitqies l-iżvalutar illi xi investiment setaġ 'arrab minn wara l-mewt tat-testatur. Dan joħroġ ukoll mill-fatt li l-jedd għas-sehem riżervat jitnissel

mal-ftuħ tas-suċċessjoni u huwa marbut sfiq ma ’dik il-ġrajja fil-qafas taż-żmien li tkun seħħet;

- However Judge JRM Joseph Mangion, in Farrugia vs Baldacchino was not of the same opinion and he said that since this was a credit and a right to the credit arises on the opening of succession, it is the date of opening of succession that applies. So if your right to claim the reserved portion arose today, you take a snapshot today, see what it consists in today and value it today. Today establishes your credit. He said that the only acceptation to this was if there were donations or if the property was disposed of. He said if the property was disposed of, between the moment of opening of succession around the date of judgement then the disposed of property was valued at the date of succession.
- Let’s say someone made a will and there are five things, three children are heirs and one child is claiming the reserved portion. There’s a court case. Those three children sell one of their properties, that property is re-valued at the date of judgement. So it’s not the selling price or the donation value but the valuation as a date of trial.
- Dr. Borg Costanzi personally thinks that even this is not correct.
  - Illi dan il-kriterju iżda jinbidel meta ssir aljenazzjoni mill-werrieta ta ’parti mill-wirt wara l-ftuħ tiegħu u waqt li jkun għaddej is-smigħ tal-kawża. F’dik iċ-ċirkustanza, il-valur tal-ġid hekk trasferit għandu jitqies bħala dak taż-żmien l-iktar qrib possibbli għall-pronunzja ġudizzjali;
  - Illi fid-dawl ta ’dawn il-prinċipji u minn dak li ħareġ mill-atti tal-kawża, għall-finijiet tat-tieni talba attriċi, l-Qorti tqis li s-sehem riżervat li minnu jistħoqqilhom jieħdu l-atturi f’din il-kawża jrid jinħadem fuq il-valur tal ġid identifikat ta ’ missierhom fil-kundizzjoni li kien jinsab fiha mal-ftuħ tal-wirt tiegħu.
  - A CREDIT and not a AESTIMATIO REI
  - At what point should the credit be calculated?
  - Eg a Damages case; Date of Repair or date of when incident occurred?
  - Who was responsible for the delay?
  - Should the person claiming make good for the increased cost because of his own delay in proceeding?
  - Does this method of interpretation favour legal certainty?

- The debate is what is the reserved portion, is it a credit or is it an object? The legitim under rules of legitim before 2004, you got estimate of the thing, because you were paid in kind, and so it may sense that the value was as close as possible to the date of judgement but when the law was changed in 2004, that went out of the window and the legislator said you have a credit. Once your right to the credit is born when the person dies, so upon his death your right to the reserved portion is created. It's the moment that you look at the value.

- Normally the same discussion arises for example, say there's a car accident and someone smashes your car and you sue for compensation. A surveyor is appointed and he will value the damages at the date of collision, nothing is stopping you from repairing your car and that value will not change, if you delay in repairing your car and in the meantime the cost of spare parts has gone up drastically, that's not the person who caused the damage's fault, it's your fault because you delayed and your exception would be for example if you went to repair your car, the parts were not in stock and you had to delay, or if you didn't have enough money to fix your car, you are a student the damages are €10,000 you don't have €10,000 and unless these people pay you you can't fix your car, then of course you have a justification why you didn't repair your car but under normal circumstances the damages are valued at the date the damage was caused and the same with an inheritance, is that once your right to claim a credit arises when a person dies that is the date that should be valid.

- If you argue it in any other way, it will give room to one legal uncertainty, so you never know where you stand, secondly, it will encourage people claiming the reserved portion, it will encourage them to delay and wait instead of paying you today let me wait five years, then wait nine years because in nine years time the value will go up and I will get more, Dr. Borg Costanzi does not think that it is what the legislator wanted. He thinks that the legislator wanted to have legal certainty and that is why the law was changed it was no longer called a legitim, it is called a reserved portion and why the legislator put the words credit.

- The right to get paid in kind is not there anymore, its a value in a liquid amount. If you want to make up for the loss of value of money, the mechanism to make up this loss of value and its persisting power is the cost of living index. So, at most, if you want to create a fair conversational system at most perhaps you can increase the amount calculated for the reserved portion by the cost of living index to make up the loss of persisting power of money.

- In this respect look up the judgement Zammit vs Ellul, decided by the court of appeal 28th of January 2005. On a different point but where this issue of the cost of living index was discussed

- Having said all this, what is happening nowadays, and two judgements which are not quoted in the powerpoint are, one of them is Giovanna Grech Bianco vs Mensa Arciveskovili ta' l-Arcidjocesi ta' Malta et. case 231/18 decided 28th February 2023 by Judge Joanna Vella Cuschieri, where the court concluded that the value date was the date of opening of succession.

- More recently in the case of Maria Carmela Vella vs Joseph Vella, case 490/19, Judge RGM, Roger George Mangion, of the 16th March 2023. This judgement decided yesterday by Judge Mangion it is a whole issue of valuations and other aspects but one of them deals with in great detail is how is the property valued and how are donations valued and as far as the estate of the deceased, he valued the estate at the date of opening of succession and not the value date as a date of liquidation of the estate.

- So, Dr. Borg Costanzi thinks that it is what the law actually says today, the correct interpretation but of course having said this there's conflicting cases. As far as the value on the estate, what is left by the deceased (not donations made in his lifetime) but what is left in the inheritance and the date of his death that is valued at the date of opening of succession seems to be the prevailing opinion.

  - INTERESTS

  - ……..Interest at the rate established in article 1139 shall accrue to such credit from the date of the opening of succession if the reserved portion is claimed within two years from such date, or from the date of service of a judicial act if the claim is made after the expiration of the said period of two years:

  - Provided that the Court may, if the circumstances of the case so require, decide not to award any interest or establish a rate of interest which is lower than that stipulated in article 1139.

- What about interests? When it comes to interests, normally, when amount has to be liquidated no interests are given. Let's explain this, when you file a court case you can file a court case either for a specific amount of money, a determined amount of money, you say I want you to pay me €100,000, and I go to court to order you to pay me €100,000. The amount is stated, when you state the amount interests become due, you're entitled to claim interests. Then the law will distinguish whether it is a civil liability or a commercial liability, if it is a commercial liability, interest will run from the date the obligation arose. So, if you bought a car, a car hire company, so it's a commercial deal, you claim it for business, the balance of price is subject to interest of the date of sale but if an individual buys a car and there's nothing in the contract interest will not start running immediately,

for interest to start running you have to send a judicial act and a judicial demand, either an ittra ufficjali, or a court case or both.

- It is the judicial act that will kick in the commencement of interests, that is if the amount is specifically stated, so you have a fixed amount and you want someone to pay you a fixed set amount, interest to run. on the other hand wifi the amount is not stated, it has to be calculated for example someone damages the car, the amount has to be worked out because of parts, labour, loss of use, and all that stuff, then in that case the amount isn't quantified yet and you ask the court to quantify it for you.

- When the amount has not been quantified interest will start from the date of judgment and in fact the principle, there's a latin quotation which says in illiquidis (something not liquid) non fit mora. Which is interpreted to be that when an amount has not been liquidated, not been quantified interests would not start accruing and here we have in the reserved portion a section dealing with interests.

- If it wasn't for this section interest would not accrue normally and here the law is saying interest at the rate established in article 1139 shall accrue to such credit from the date of the opening of succession if the reserved portion is claimed within two years from that date or from the date of service of a judicial act if the claim is made after the expiration of the said period of two years. Provided that the Court may, if the circumstances of the case so require, decide not to award any interest or establish a rate of interest which is lower than that stipulated in article 1139.

- First of all the rate of interest in article 1139 is 8% per annum, it used to be 5% for civil liabilities and 6% for commercial but this was changed around 30 years ago and now the interest is 8%.

- Under the late payment directive it can go up to about 11 or 12% this doesn't fall under the late payment directive.

- So interests are at 8% and if you claim your reserved portion immediately, you'll get 8% from date of opening of succession, you have a 2 year window. If you claim your reserved portion within those 2 years, if you send an ittra ufficjali or file a lawsuit then interest will be backdated to the date of opening of succession, this ice discretionary, the court has a discretion it doesn't have to award interest. It doesn't have to award the full rate of 8%. It can give a lower rate of interest, so the hands of the court are not tied it can decide as it wishes.

  - INTERESTS

  - "Jinsab pacifikament affermat illi fuq il-beni li jikkomponu l-legittima tieghu l-legittimarju ghandu dritt ghall-frutti minn dakinhar ta 'l-apertura tas-successjoni"

(Vol. XXVI P II p 1; Vol. XXXIV P II p 568). “Di fatti dawn il-Qrati jgħallmu li l-prinċipju stabbilit minn din il-parti tal-liġi huwa eċċezzjoni ex lege għall-prinċipju ġenerali illiquidis non fit mora” (PA 3/12/2012 Maria Ellul -vs- Joseph Axiaq per Judge Lino Farrugia Sacco).

- This was an old case.
  - Power to award interests at 8% from date of opening of succession
  - If claimed within 2 years
  - If not, from date of claim
  - Court has a discretion
  - In Said vs Borg Grech (16/5/1951 Vol XXXIV.ii.568) the Court held that interests started to run from the date of opening of succession solely on the amount due to the person claiming the legitim and not on the total value of the estate.
  - The Court will look at the conduct of the parties but will not lightly exercise such discretion to reduce or deny such interests. (Michael Vella vs Salvu Vella (Magt Gozo 29/1/2021 RIK 64/12 BS) No interests were awarded because no Judicial letter was exhibited.
  - Filippa sive Phyllis Borg vs Sylvia Frendo (920/12 JVC dec 16/12/2021)
  - Illi s-sub-artikolu 2 tal-Artikolu 615 tal-Kodici Civili jkompli jiddisponi li l-Qorti tista ’fejn ic-cirkostanzi tal-kaz hekk jinhtiegu tiddeciedi li ma jinghatax imghax jew tistabilixxi rata ta ’imghax anqas minn dik stabbilita ’fl-Artikolu 1139 tal-Kodici Civili
  - Il-Qorti rat mill-atti li l-intimati dejjem kienu disposti li jhallsu lporzjon riservat tant li anke fil-mori ddepozitaw ammonti li sahansitra gew zbankati mir-rikorrenti (ara zbanek a fol. 517 u fol. 520 tal-process). Jirrizulta wkoll li sahansitra r-rikorrenti zbankat aktar mill-porzjon riservata kalkolata u deciza minn din il-Qorti.
  - Ghalhekk il-Qort f’dawn ic-cirkostanzi ser tezercita l-poter moghti lilha mil-ligi billi tiddeciedi li ma ghandu jithallas l-ebda imghax lir-rikorrenti.
  - THESE ARE EXCEPTIONS. THE RULE AND IN NORMAL CIRCUMSTANCES, INTERESTS WILL BE AWARDED.
  - DOES THIS TALLY WITH THE SYSTEM OF VALUATION?

- In the Michael Vella case it said the Court will look at the conduct of the parties but will not lightly exercise such discretion to reduce or deny such interests.
- Now in this case, no interests were awarded because there was no judicial letter. If you look at the judgement you'll find a more elaborate discussion.
- Now in this Phyllis Borg vs Frendo case, no interests were awarded either, what happened was that before the case or in the every early stages of the case the defendant paid the plaintiff, an amount which was accepted on without unprejudiced basis. There was to be 'X' amount to money, and they will take it with an unprejudiced basis, if the court gives you more we will pay the difference. As it happens, when the calculations were made they had overpaid him, he got more than what the court had committed, then the court said look this guy has been overpaid then no interests are due because the plaintiffs, the heirs, honoured their obligations, they paid you off and therefore they should not be penalised and in this case the court exercised the discretion. It felt that the person claiming the reserved portion was being a bit too cheeky.
- In the case we mentioned earlier of Giovanna Grech Bianco vs Mensa Arciveskovili ta 'l-Arcidjocesi ta 'Malta et the court also went into the issue of interests, and ordered them and from date of opening of succession.
- There was an interesting case as quoted in the powerpoint decided by Judge Farrugia Sacco where the estate consisted mostly 90% of the estate was consisted in property and the heirs agreed or the parties agreed hat since there was insufficient money, that the estate would be paid in kind. There was an agreement that the reserved portion was going to be paid in kind and they gave the court the power to do this.
- When calculating the reserved portion, the court quantified the portion itself, the portion is worth €100,000 it also calculated the interests, and added another €50,000 (this is an example of monetary value) and it gave this beneficiary property worth €150,000 so he was paid his credit and interests in kind. Again that was discretionary. Interessi daqsekk.
    - Law of Succession
    - Part 9 (iii)
    - Reserved Portion…. contd
    - Dr Peter Borg Costanzi
    - Reserved portion due to children.

- 616. (1) The reserved portion due to all children whether conceived or born in wedlock or conceived and born out of wedlock or adopted shall be one-third of the value of the estate if such children are not more than four in number or one-half of such value if they are five or more.
- (2) The reserved portion is divided in equal shares among the children who participate in it.
- (3) Where there is only one child, he shall receive the whole of the aforesaid third part.
- 1. All children without distinction are entitled to the reserved portion.
- 2. (a) If they were 4 or less children: reserved portion is 1/3 of the estate
- (b) If they are 5 or more children: reserved portion is ½ of the estate.
- This is the non disposable portion which is then divided by the number of children.
- Thus if the estate had a value of €30,000.
- If there were 6 children: 1/3 of €30,000 = €10,000
- €10,000 x 1/6 = €1,667 – share due to any child claiming the reserved portion
- If there were 3 children: ½ of €30,000 = €15,000
- €15,000 x 1/3 = €5,000 – share due to any child claiming the reserved portion.

• How are the portions calculated? The benchmark to look at is the number of children, if there are four or less, the non disposable portion is ⅓ so if there are three children, they are each entitled to ⅑, ⅓ of ⅓ if there are four children it's ⅓ of one quarter, 1/12. If there are 5 or more the reserved portion is ½ with respect to the children, so if there are 5 children, one claiming the reserved portion gets ½ of ⅕, so it's ⅒, if there are 10 children, it's ½ of ⅒, so 1/20, but if there is only one child he will get the full ⅓ its less than 5, ⅓ of this so ⅓.

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- €15,000 x 1/3 = €5,000 – share due to any child claiming the reserved portion.

- When calculating the reserved portion, you have to count how many children there are, you have to count all the children. Those born in wedlock, those born outside wedlock, those who are adopted, even those who are disinherited, even those who are unworthy, even those who are incapable. So if there is a priest, he's counted. If someone has been disinherited, he's counted.
- If one of the children has pre-deceased the testator and are grand children that child is counted as one even if that child has five grandchildren the five grandchildren together count as one not as five.
  - Rules for determining the number of children for regulating the reserved portion.
  - 618. (1) Children or other descendants who are incapable of receiving property by will, or who have been disinherited by the testator, or have renounced their share, shall also be taken into account in determining the number of children for the purpose of regulating the reserved portion.
  - (2) Saving the provisions of articles 608 and 626 the portions of the children or other descendants who are incapable, or who have been disinherited, or have renounced their share, shall devolve in favour of the other children or descendants taking the reserved portion.
  - 3) A child or other descendant who has been instituted heir, who had he not been so instituted would have been entitled to share the reserved portion, shall also be entitled to share therein notwithstanding that he was so instituted.
- Interesting in section 618 'Children or other descendants who are incapable of receiving property by will, or who have been disinherited by the testator, or have renounced their share, shall also be taken into account in determining the number of children for the purpose of regulating the reserved portion'.

- We have a situation where one of the children has renounced the inheritance and has not claimed the reserved portion. That person is counted in order to calculate the percentages, say for example someone passes away and its suspected that they have left a lot of liabilities, so all of the children say isma I don't have anything to do with my fathers' liabilities, I'm just going to renounce and I'm not going to claim anything. That person is calculated if someone else claims the reserved portion.

  - Michael Buhagiar vs Mary Hampton pro et noe (35/2004 - App 15/12/2015: the Court of First Instance did not include the person claiming the "legitim". This was reversed in Appeal:

  - Illi l-interpretazzjoni li tat l-ewwel Qorti u li jrid jagħti l-attur hija manifestament ħażina. L- ewwel Qorti u l-attur waqgħu f'dan l-iżball għax ħasbu illi t-"tfal li jmisshom" mil-leġittima huma l-leġittimarji u mhux l-ulied kollha, kif juri ċar l-art. 618(3). Hekk kif it-"tfal" imsemmija fl-art. 616(1) huma t-tfal kollha tal-mejjet u mhux biss il-leġittimarji, hekk ukoll fl-art. 616(2) it-"tfal" huma t-tfal kollha, u mhux biss il-leġittimarji. Bl-istess mod, l-art. 616(3), meta jsemmi "tifel wieħed", qiegħed jifhem wild wieħed u mhux leġittimarju wieħed. Naturalment, meta hemm wild wieħed hemm ukoll leġittimarju wieħed u għalhekk dan jieħu s-sehem riżervat kollu.

- And in fact in this Michael Buhagiar vs Mary Hampton case, the court of first instance in calculating the number of children did not include the person claiming the 'legitim'. The court of appeal reversed it saying that the person has to be included.

  - To calculate the number of children you also include those who:

  - A) are incapable of receiving

  - B) are unworthy

  - C) have been disinherited

  - D) who have renounced

  - E) pre-deceased – if they have issue

  - F) you also include the nominated heirs

- In order to calculate the number of children there's a check list of who is included.

- This part is a bit complicated what do you put in the basket to calculate the reserved portion? What items are put in.

- Of course what the person has of the moment of his death is thrown in, if there are bank accounts in his name see what money there is, if he has a house, planned property, wherever it is in the world, if he has a flat in New York that is calculated as well. So whatever belongs to that person at the moment of his death its calculated so that's clear but that's not all that is calculated you also have to calculate property that has been donated.
- Both property that has been donated and its shown to be a donation and also property which on paper may look as though it was sold but in fact it is a hidden donation. For example I sell my boat for €1, when the boat is worth €200,000. That is a vailed donation so that will be taken into consideration.
  - Thus if there are 6 children and one of them has taken the Monastic Vows and was not included in the will, such person is still nonetheless counted. You still divide the ½ share by 6 and reserved portion payable to one child will be ½ x 1/6 = 1/12th .
  - ---
  - If there were 4 children, one pre predeceased the testator (and had 3 children) and another had taken the Religious vows, then the share of the grandchild would still be counted as follows:
  - 4 children: reserved portion is 1/3
  - Divided by number of children (4) : = 1/3 x ¼ = 1/12 per child
  - Divided by the number of grand children (3) 1/12x 1/3 = 1/36 for each grandchild
  - When a reserved portion is claimed, the rest of the estate goes to the heirs.
  - EG estate worth €100,000 and there are 5 children
  - If all treated equally = €20,000 each
  - If the Testator leaves his estate to 4 and leaves one out, the child left out claiming the reserved portion will receive €10,000
  - €100,000/2 = €50,000 divided by 5 = €10,000
  - The remaining €90,000 is divided by 4 = €22,500 each child
  - What Components are taken into consideration in order to calculate the value of the estate?

- Reserved portion to be free from burdens or conditions.
- 620. (1) It shall not be lawful for the testator to encumber the reserved portion with any burden or condition.
- (2) The reserved portion is calculated on the whole estate, after deducting the debts due by the estate, and the funeral expenses.
- (3) There shall be included in the estate all the property disposed of by the testator under a gratuitous title, even in contemplation of marriage, in favour of any person whomsoever, with the exception of such expenses as may have been incurred for the education of any of the children or other descendants.

- Now, the important principle section 620(1), this principle has far reaching effects. And from time to time when dealing with the reserved portion you will come to it in practice and it will take you to different places but the principle remains the same. 'It shall not be lawful for the testator to encumber the reserved portion with any burden or condition.' So he can't if you make a will and say in order to pay the reserved portion you have to pay my doctor €10,000 that condition doesn't apply.
- And, when it comes to the reserved portion you get it clean, and the courts there are some judgements which have said that because of that principle you don't pay any succession duty and you don't pay any litigation costs because you get your sum/entitlement free of all burdens.
- The second point, 'The reserved portion is calculated on the whole estate, after deducting the debts due by the estate, and the funeral expenses.' The words debts due by the estate has given rise to problems. Earlier on we mentioned succession duty, succession duty taxes are not debts due by the estate they're debts due by the heirs so when calculating the reserved portion we do not deduct any taxes that are due arising from the inheritance. If the testator owed money as income tax, because they earned money, yes that they deduct it but succession taxes, are not deducted. If you have to sell the property and acquire an estate agent, that estate agent fee is not deducted. The only expenses you can deduct which arise after the debt are the funeral expenses. Otherwise the only liabilities you are allowed to deduct are the liabilities for which the testator was obliged to pay.
- So if he had bought a car and didn't pay it yes the balance of price has to be deducted, if he didn't pay taxes during his lifetime yes you deduct the taxes, if he had a Philippine who was looking after him and revokate her you have to deduct her wages, if one of the children looked after the testator and he promised to

compensate them and he didn’t then those services are deducted. But otherwise, the law is very strict you can’t deduct anything else. The things you can deduct are very limited. This is one of those areas where testators have tried to go round the wording of the law.

- For example my daughter is looking after me and in my will I say I'm leaving my villa to my daughter because she looked after me for the past 5 years. The villa is worth €2,000,000 and my daughter gave me €2,000,000 worth of services. The court will look into it and they will value the services. The value of the services will be deducted but the difference in value between the cost of the villa and the services will be considered to be a donation and will be added on to the value of the estate. So if the services are valued at €50,000 and the villa is worth €2,000,000 then €1,950,000 will be considered to be a donation.

  - (4) The person to whom the reserved portion is due shall impute to it all such things as he may have received from the testator and as are subject to collation under any of the provisions of articles 913 to 938.

  - (5) The person claiming the reserved portion shall take into account his share any property bequeathed to him by will and cannot renounce any testamentary disposition in his favour and claim the reserved portion, except when such testamentary disposition is made in usufruct or consists in the right of use or habitation, or consists of a life annuity or an annuity for a limited time.

  - The Person claiming the reserved portion is to receive this without any encumbrances.

  - Such burden or encumburance would diminish the value of the portion and potential benefits therefrom.

  - He is not liable for any of the debts of the inheritance.

  - Of course, the debts due by the testator are taken into account in computing the reserved portion but such debts will not be payable by the legittimarju.

  - If he files a lawsuit he will not normally have to pay for any of the costs and fees related thereto. The reserved portion is to paid unconditionally.

- Because the person claiming the reserved portion gets it free of any encumbrances he is not liable of the debts of the estate. So if the testator owed money he has nothing to do with that, the creditors can’t sue the persons claiming the received portion, in fact the person claiming the reserved portion is a creditor himself.

- The Reserved portion is calculated on the whole estate at the time of death.
- One must include all the assets and liabilities.
- Legacies are to be included , even remunerative ones.
- The only bill to be deducted is that relating to funeral expenses.
- Taxes payable on succession (causa mortis) are not deductible
- Any donations or legacies in favour of the person claiming the reserved portion are also included in the computation. (Vide Orazio sive Grezzju Cutajar vs Emmanuele Cutajar (PA – PS 3/10/2003 and judgements therein quoted).
- Tommaso Cortis vs Giovalli Dottrin (PA 17/11/1880) the Court held that a remuneratory legacy was NOT to be computed if it was shown that services were actually provided. It further added that the measure of compensation was left to the discretion of the testator unless it results to have been manifestly excessive:
- Vide the 2 cases Falzon vs Falzon decided by Judge Farrugia Sacco – Case 451/2005 decided 2/3/2009 and Case 572/2006 decided on the 13/2/2007) In this case the testators in a unica charta will bequeathed the matrimonial home by way of legacy to their unmarried daughter in compensation for the services she rendered to them by looking after them throughout their life. The Court acknowledged the validity of the legacy and ordered that the wishes of the testators be implemented. However when it came to value the reserved portion, the court included the value of the property (LM 85,000) and deducted the value of the services (LM 20,000).

- In the case we mentioned earlier regarding the compensation for services rendered there's an old case, 1880 so nothing new here, the court said that if it is shown that the gift exceeded the value of the services the excessive value is considered to be a gift and is calculated in the value of the reserved portion.
- Again a more recent case decided by judge Farrugia Sacco, and this was a case when a house was given to one of the daughters and the value of the house was higher than the value of the services rendered. The difference of value was added fictitiously to the value of the estate.
  - Emanuel Bonello vs Giuseppa Bonello (Magt Gozo 22/2/2013 Rik 52/09 JD
  - The Court will look behind the appearances

- Fl-ewwel lok huwa pacifiku li d-dikjarazzjoni li jaghmel testatur li l-legat huwa rimuneratorju, u l-kriterji tieghu fid determinazzjoni tal-kumpens, mhumiex insindakabbili, u l Qorti dejjem ghandha l-poter li tara jekk il-legat huwiex sproporzjonat ghas-servigi prestati mil-legatarju Giuseppe Pirotta et vs Maria Preca et, Appell Civili deciza fil-15 ta 'Mejju, 1939.

- The verification as to whether the legacy is truly remuneratory can be done in one and the same lawsuit:

- Hekk kif inghad fil-kawza fl-ismijiet Vincenzo Attard vs Michelina Agius et , Deciza 31 ta 'Ottubru, 1952 m'hemm xejn kontra l-ligi li provi dwar servigi jsiru fl-istess kawza li jkollha bhala oggett illikwidazzjoni tal-wirt, anzi mhux xieraq li l-provi biex jigi stabbilit jekk il-kumpens imholli bil-legat rimuneratorju kienx dovut, u jekk il-kumpens imholli hux proporzjonat ghas-servigi, isiru f'kawza ohra. Dan peress li fil-gudizzju 'familiae erciscundae 'jidhlu l-kwistjonijiet kollha li jkollhom x'jaqsmu mal-wirt; u dana sal-punt li m'humiex permessi procedimenti separati, lanqas preambuli jew preparatorji, fuq sustanzi komponenti l-istess wirt.

- Even more emphatically, in Bonello vs Bonello, where the court looked behind appearances, and the court said that it has the power to calculate the value of the benefit given in comparison with the value of the legacy. An issue arose, whether the court has th jurisdiction and power in a court case dealing with the claim for the reserved portion to value the servigi. Because they said the premiss of the case on the reserved portion and therefore they are not included the right to compensation for services rendered are not included in the premessi of the law suit. The court said this is rubbish, I'm calculating the reserved portion, I have to value the estate, I have to look behind appearances, to look behind appearances I have to value the services and any difference between the gift and the service is a gift, furthermore, if the testator has a liability which he had during his life time namely he had used the benefit of someone providing a service, that liability has to be deducted so if he had a Philippine helping him or a daughter looking after him those services were valued and they were deducted from the estate. The court said in this case, that in claiming the reserved portion the court has the power to value the services rendered.

20th March 2023

Lecture 10.

- Today we will continue with the reserved portion for children. Last time we stopped at the point dealing with donations.

  - Such legacies have an element or degree of liberality

- F’din il-kawza appena citata nghad ukoll li l-legat rimuneratorju huwa hlas ta ’ dejn, ammenokke ’ma jirrizultax li t-testatur ma kellux raguni tajba biex ihalli dak il-legat u li dan ikun intiz minflok liberalita ’u biex jeludi u jiddefrawda d-drittijiet ta ’l-eredi jew tat-terzi. Illi rilevanti wkoll dak li kkunsidrat il-Qorti ta ’l-Appell fissentenza fl-ismijiet Carmelo Sant vs Carmen Deguara et (Qorti ta ’l-Appell deciza fil-21 ta ’Gunju 1991) meta tenniet li fil-legati rimuneratorji bejn genituri w ulied, jekk mhux dejjem, kwazi dejjem, qatt ma huwa kompletament u esklussivament rimuneratorji ghaliex mhux koncepibbli li ma jkunx imhallat sewwa b’element ta ’liberalita’. Simulated donations/contracts during lifetime or in the will

- Court will first see if the disposable portion has been exceeded

- The Court will enquire into whether it was a ruise to avoid the disposable portion

- Giorgia Farrugia vs Lorenzo Farrugia APP 5/2/1936 and more recently in Dr Chris Said noe vs Mary Abela pe et noe – Magistrate Court Gozo 29/2/2008).

- When calculating the reserved portion, it is important to calculate the whole estate, both that which shows and is still there at the moment the testator has died, and also any property that may have been given away, donated. When dealing with the reserved portion you are dealing with an exceptional situations, you are going against the wishes of the testator. The testator has either left you out or else not treated you as you expected and you think that you are entitled to more. You think that you are entitled at least to the minimum portion reserved to you by law. So, you are going against the wishes of the testator. The testator, during his lifetime, would probably have done things to diminish the residual estate, the estate that is left at the moment he passes away, and he will use different strategies.

- When you are dealing with lawsuits and contestations, usually there is trouble and the trouble will lead that the testator would have tried to dispose of his estate either as a donation or under the appearance of a donation, or the appearance of something else to hide a donation,

  - Like for example if he sold a property worth €1,000,000 and he sold it for €10,000. On paper it is a contract of sale but in reality it is a hidden sale, it is in fact simulated and it is simulating a donation.

- You can have a situation where the testator says that he is going to compensate someone for the services this person rendered and instead of giving them money, I will give you a gift, or a house, i will give you something of value. If the service

this person received is much lower than the value of an object, there is an element of a donation.

- The law, in calculating the value of the estate to determine the extent of the reserved portion, will include the value of donations. So the value of the donation, or property deemed to be donated, is fictitiously added into the quantum of the estate.

- So the question to ask is how do you value a donation?

- If I donated a plot of land and later on this land was developed into a 25 storey building. Of course, the 25 storey building is worth much more than the plot of land. Alternatively, I donate a house, later on there is a change in scheme, the house is demolished and there is now a road. So we can have a situation where the value goes up or the value goes down.

- When dealing with donations, our law is inconsistent. There are two sections of the law which contradict each other. On the one hand, when calculating the reserved portion, the law says that the value date is the date of the donation, but when calculating what they call ‘collation’, the value date is the date of opening of succession.

  - For example my father donated me a plot of land in 1980 and in the contract it is said that this land is worth €1,000. So I received land in 1980 worth €1,000. Today that plot of land is worth €600,000. My father passes away. His estate is worth €100,000. When calculating the estate to see what my share is, I look at my father’s estate as it is today and I have €1,000, which is the value at the date of donation.

  - So in total I have €100,000 + €1000 = €101,000. But I received a donation, so in calculating my reserved portion, if there are 4 children, so four children, its ⅓ so ¼ of ⅓ so it will come up to 1/12 of €101,000 which is €8416.66. 1/12 because there are less then 5 children, there are 4 children so ⅓ so ⅓ of ¼ so its 1/12. So I’m entitled to €8,500. Till now it is clear but now I have to collate, I have to take into consideration what I received, my donation of €1,000.

  - When dealing with collation the law was not changed and it still reads ‘date of opening of succession. The plot is worth €85,000, so what happens? So I have the right to claim the reserved portion of €8416.66, but my land worth more, so I have been paid, so I get nothing.

- When dealing with the reserved portion we’ll do this again later on, when dealing with the reserved portion, first you calculate what you’re entitled to so in the example Dr Borg Costanzi gave us it came to just under €9,000. But then you

have to see what gifts you received as a payment on account so you have the right to the value of 85000 minus the value of the gifts. So if the gift is valued in 1980, it's minus €1,000, €7,500. That is if the value date of collation is the value date of the date of donation but when dealing with the appropriate section it doesn't say value date of date of donation it says value date date of opening of succession so the value is today's value which is €8,500. Mela I'm entitled to get 8500 but my donation is worth €85,000 so I get nothing and it makes nonsense of the reserved portion. It's total nonsense and for Dr Borg Constanzi there's a mistake, he's sure that if a dispute had to arise in the court the court would not do something so unjust. They amended the law, the left hand was amended but not the right hand it's a mistake.

- When calculating the reserved portion and in fact in the case we quoted last week by Judge Mangion, Mangion this was what actually happened, the judge valued the estate and also the item donated as at date of opening of succession. He valued them with the same ruler, and it made sense that they are both valued with the same ruler. If you value the reserved portion using one particular ruler to measure then when you come to collate you should use the same ruler, otherwise it is going to create a serious inconsistency.

- When dealing with the reserved portion you have got to keep in mind that this notion of reserved portion is a very strong protective mechanism so as to protect the children and the spouse. You cannot get rid of it easily. The law really protects it.

- So how come the legislator failed to amend both parts of the law? Was this a mistake or was this done purposely? If he did it purposely, can one believe that you left something in such a way as to obliterate the right to the reserved portion? In the appropriate circumstances the right of the reserved portion gets obliterated. That makes sense.

- When dealing with legacies with reserved portion, there is a clause which says that if you have a legacy, a gift, in the will you cannot refuse it. So you have a will and your father said that he is leaving you a house at St Paul's Bay and nothing else, and you claim your reserved portion. The value is calculated, and as part of your reserved portion you will receive the house at St Paul's Bay, you cannot refuse it. The only way you can refuse is by agreement. You can agree with your siblings, or with the heirs, to give you something else. The person claiming the reserved portion has no choice. The wishes of the testator, for me to get that object have to be respected. It is a payment on account.

  - Donations INTER VIVOS

- The law also states that any donations made by the testator during his lifetime no matter to whom they have been made, irrespective if whether they have been made to the heirs or to any third party is to be included.
- For the purposes of calculating the value of the reserved portion the law refers to Articles 913-938 dealing with collation.
- Art 931 (1) Value date – date of opening of succession
- Art 648 (b) – abatement of donations – value date is date of donation
- The value of same shall be fictitiously added up to the rest of the estate.
- To include:
- ALL Donations – no matter to whom made
- Value Date - date of donation
- Value: fictitiously added up
- Donations made in contemplation of marriage are to be included as well.
- Not include:
- Payments made by the testator for the education of the children/descendants
- LEGACIES in favour of the person claiming the reserved portion,
- Cannot be renounced to – to be taken as a payment on account -
- Il-persuna li jkollha jedd għas-sehem riżervat għandha tieħu akkont tas- sehem tagħha kull beni mħollija lilha b'testment u ma tista 'tirrinunzja għal ebda dispożizzjoni testamentarja favur tagħha u titlob is-sehem riżervat,……
- except if such bequest consists in a right of usufruct, use or habitation or annuity - presumably the reason being that it is difficult to value them

- There's an interesting provision in the law, which says that, usually it is a treasuree hunt, very often there would be a suspicion but not material proof, if it is a property it will be property there's going to be a contract and its registered in a publication so you're going to find out but if it is money, cash forget it, you can say there was a drawer full of cash there's no proof. In one of the cases Cutajar vs Cutajar, there was an allegation that there was a box full of gold, gold stuff not jewellery, gold coins of course it was taken and there was no proof the court said there was

insufficient proof, how can I value something without proof. If it's money in the bank, money in the bank can also be a problem, reason being that banks archive their stuff and after a number of years they delete the archives so you go to court you summon the bank representatives and they tell you before that date the archives have been destroyed so there was no record, if you want to find out what has happened if you suspect don't delay you have to go to court quickly because in time the records can be lost, people die, they forget, evidence disappears.

- If there are children, and there was an age gap, the first was married and at the time the first was given the second was born, they gave the first a house worth €10,000 the second came to get married and the house was worth €20,000. It's not the house, it's the nature of the object.

- When dealing with legacies with reserved portion, there is a clause which says that if you have a legacy, a gift, in the will you cannot refuse it. So you have a will and your father said that he is leaving you a house at St Paul's Bay and nothing else, and you claim your reserved portion. The value is calculated, and as part of your reserved portion you will receive the house at St Paul's Bay, you cannot refuse it. The only way you can refuse is by agreement. You can agree with your siblings, or with the heirs, to give you something else. The person claiming the reserved portion has no choice. The wishes of the testator, for me to get that object have to be respected. It is a payment on account but, what happens if your reserved portion is lower than the value of the object?

- For some reason, you did your maths badly, your reserved €10,000 and you calculated €20,000 what do you get? The reserved portion is a credit, it is an amount which has been calculated and therefore you will get up to the value of your credit. So if the object is worth €20,000 and you are entitled to €10,000 you will get half that object in satisfaction of your credit. You cannot get more. The law is clear that the reserved portion is a credit.

- There is an exception when it comes to the right of use, usufruct and habitation. If the legacy is a right of use, usufruct or habitation you have a choice. You can either choose to take the usufruct or you can choose not to.

- What happens if you choose it? If you choose the usufruct that object is not valued in the calculation of the reserved portion. So if you have the usufruct of the house, and you choose the house, that house is not valued when calculating the quantum of the reserved portion. It is taken out of the estate, it is standalone. Your rights over this property equivalent to the usufruct.

- Why choose the usufruct? That will depend on two things:

  - The age of the person

- The value of the object.

- When talking about age if the person is 95 years old, so his life expectancy is very short, that usufruct does not have a huge value, it is a few years occupying the property. It's cheaper if that person goes out and rents a room. Of course, it will depend on the age and the health. If you have a healthy 20 year old then the life expectancy is much higher. You are looking at another 60-80 years. So, of course, if you are young the usufruct may work to your advantage because you are going to occupy the house.

- If you look at section 495(3) and 495A of the Civil Code dealing with selling of common property, the other heirs cannot sell the property, they cannot even sell their share. So the usufruct has not only a value to the usufructuary but it also has a strong negotiating factor.

- If the other heirs want to sell your property, they need your signature. The majority rule does not apply and they cannot even sell their share to the property. So they need this usufruct to disappear and that comes at a price. So they need this usufruct to disappear and that comes at a price so in the right circumstances the usufruct will have a value which is even stronger and more valuable than the intrinsic value of your reserved portion. If you have 1/12 in the property, the usufruct may be worth more than 1/12. So it is an issue of calculation and strategies, but the choice is only yours.

  - Where subject of testamentary disposition is a usufruct or life annuity.

  - 621. (1) Where the subject of the testamentary disposition is a right of usufruct or a life annuity, and it appears to the persons entitled to the reserved portion that the value of such usufruct or life-rent surpasses the disposable portion of the estate of the testator, they shall only have the option either to abide by the testamentary disposition or to take the share due to them by way of reserved portion free from every charge, on abandoning in favour of the disponees of the usufruct or life-annuity the full ownership of the disposable portion.

  - (2) Where any of the persons entitled to reserved portion elects in his own interest to abide by the testamentary disposition, it shall, nevertheless, be lawful for any other of such persons to elect to take the reserved portion on abandoning, as aforesaid, the disposable portion.

- You may have another type of disposition where you are not left as an heir but you receive what is called a life annuity and in the will your father says that he is leaving you a life annuity of €25,000 a year for as long as you live. So, at least

you are going to have enough money to live with for the rest of your life and being able to live with the bare minimum. If you work of course, you have a supplement.

- Now in that case, if you have a life annuity, you have a choice, you either take it and that's it, or you refuse it or take the reserved portion. There is no in between. This situation can arise, for example, in the case of someone who is a priest or a nun and has taken the vow of poverty. When dealing with capacity to inherit, we saw that a person taking a vow can exceptionally receive a small pension or annuity. This is the maximum that these people are entitled to receive. In that case, if that person is still bound by her vow then of course he cannot do anything, he is stuck, but if that person leaves, we saw that that person is entitled to inherit, he or she re-acquires capacity.
- In that case, what happens to the life annuity? Can that person change his/her mind and claim his reserved portion?
- Once you have made your claim and you have taken a decision you are stuck with it. So if this priest or nun took the pension and left priesthood that person, unless there is something else stated in the will, will be stuck with that pension. Of course, the will may provide also that if the priest leaves, instead of getting the pension, he receives a share from the inheritance. It depends on the wording; but if there is no other wording, it is purely a life annuity in satisfaction of all your rights, once you claim it, you cannot change your mind.
  - In this scenario, the person inheriting a usufruct of a life annuity has a choice:
  - He either takes such usufruct
  - or
  - he takes the reserved portion.
  - This right is available under 2 circumstances:
  - a)If the beneficiary is of the opinion that the usufruct/life annuity is less than his reserved portion or
  - b)If he so elects on his own motion
  - In either instance he cannot keep the said usufruct/life annuity and top it up. It's an either or situation.
  - In Melanja Calleja vs Angiolina Cutajar (PA 30/3/1949) the court stated that such a decision was one to be made solely by the person claiming the reserved portion. It was his arbitrary choice and it was therefore not necessary for the

court to appoint architects to value such usufruct. (See also Depiro vs Micallef (28/11/1888 – Vol XII pg 90).

- kalkolu li hu għal-arbitriju tagħhom li jagħmlu – huma ghandhom id-dritt jagħzlu t-triq li għażlu bir-regola stabbilita fl-artikolu imsemmi mil-leġislatur, maħluq għad-dispensa tal-inċertezzi derivanti mill-istima ta 'l-uzufrutt u renditi vitalizji

- There's a section in the law dealing with life annuities and they are considered, to be gifts, which are dependent on what they call a alleatary factor, Alea, is the latin word for something which is unknown and uncertain so a life annuity is dependant on uncertainty. An annuity is dependent on something uncertain, the life expectancy of a person. If you have a very overbearing life annuity you may come to the conclusion that it is too burdensome. it's a calculation you make, but here we're talking of the situation where the beneficiary has a life annuity, if they have a life annuity its either all or nothing.

- Under the succession duty ordinance there was a schedule of how to value usufruct, it was by age but in practice it is a fictitious calculation, it's something you don't know. Even if you're a usufructuary how do you make a choice.

  - Law of Succession

  - Reserved Portion- SPOUSE

  - Dr Peter Borg Costanzi

- Now we're going to deal with the rights off the reserved portion off the surviving spouse.

  - OF THE RIGHTS OF THE SURVIVING SPOUSE

  - Right of surviving spouse, if there is issue.

  - 631. Where a deceased spouse is survived by children or other descendants, the surviving spouse shall be entitled to one-fourth of the value of the estate in full ownership.

- You will say how come he's married he has a will and doesn't leave enough assets to the surviving spouse, these things happen and the spouse will put in a claim. The right of the surviving spouse arises out of the mutual obligation of spouses to maintain and look after each other; and the right of reserved portion consolidates the obligation of maintenance from the other spouse.

- Owes its origin to one of the new laws codified by Peter S. Justinian. This was not part of the original Codex, Digest and Institutes but formed part of the Novelle – new laws – which came about after that.

- The raison d'etre was to provide a deserving surviving spouse who was indigent to ¼ of the estate. This also came to be known as the quarta uxoria.

- Initial basis Deserving + Indigence

- Later :Reciprocal rights and of obligations of spouses.

- They are building a life and family together and it is only right that on the demise of one of that the survivor gets a benefit from the deceased's spouses estate.

- This right owes it origin to Justinian, so it goes back ages, and it used to be called the quarta uxoria, the right of the wife to ¼ of the estate. When claiming the reserved portion, this portion again is considered to be a credit. The wife is not liable for the debts of the estate, at least not from the share she inherited from the husband. The surviving spouse, if the liability forms part of community of acquests, has to pay from his or her share of the community of acquests, so ½ is carried over but in respect of the other ½ of the pre-deceased spouse, if the spouse is claiming the reserved portion, that spouse is not liable for that other half.

- So take for example, the husband and wife buy a car, the husband passes away and there is still €10,000 left to pay. If the wife claims the reserved portion she has to pay €5,000 of that €10,000 because it community of acquests, she has an undivided half of that liability, but in respect of the other half, if she is claiming the reserved portion she does not pay it. That obligation to pay falls on the heirs, not on the wife is claiming the reserved portion.

  - The right being discussed here is NOT the right which the spouse would inherit in INTESTATE succession. Since we are dealing with TESTATE succession we are discussing the minimum rights which are reserved for the surviving spouse no matter what has been written in the will.

  - Initially the means and financial standing of the surviving spouse were taken into consideration when computing the wife's share.

  - Hereiditas portio and not a simple creditor.

  - (Debono vs Licari 16/12/1954 Vol XXXIII.ii.620)

  - Ranking?

- Debts of the estate?
- Right of surviving spouse, if there is no issue.
- 632. If there are no children or descendants as stated in article 631, the surviving spouse shall be entitled to one-third of the value of the estate in full ownership.
- Value of deceased's estate: €12,000
- If there are no children/descendants: 1/3 €4,000
- If there are children/descendants: ¼ €3,000

- If there are children her share is ¼, if there are no children it is ⅓ of the estate.
- If there are children the wife is entitled to ¼, if there are no children she is entitled to ⅓ we are talking about reserved portion not intestate succession.
  - Right of habitation.
  - 633. (1) The surviving spouse shall be entitled to the right of habitation over the tenement occupied as the principal residence by the said surviving spouse at the time of the decease of the predeceased spouse, where the same tenement is held in full ownership or emphyteusis by the deceased spouse either alone or jointly with the surviving spouse.
  - (2) The extent of the tenement subject to the right of habitation shall not be limited on the grounds that, after the death of the predeceased spouse the surviving spouse requires a lesser part of the tenement.
  - (3) For the purposes of articles 631 and 632, the tenement subject to the right of habitation under this article shall be excluded from the estate of the deceased over which the surviving spouse has a reserved portion.
  - (4) The provisions of article 395 shall not apply to the right of habitation granted under this article.
- What happens if in the will the wife is given the right to habitation? If she has been given this right then of course it is a legacy but if she has not, she has the right of habitation but by operation of law, it is a right that is given to the surviving spouse by law. We are not talking about legacies here. The law says that if husband and wife are living in the house, if one spouse passes away, the surviving spouse has the right of habitation in the matrimonial home. By law, the surviving spouse claiming the reserved portion is not going to be kicked out of the house. He or she

can stay living there. This applies both if the house is owned by the deceased or even if it is owned by both of them. So if it is paraphernal property of the husband, the wife still has a right of habitation in that property. They cannot kick her out if she is claiming the reserved portion.

- The law here talks about ownership of emphyteusis. Ownership includes emphyteusis. It includes any real right. When you talk of ownership, you are talking of any ownership of any real right, no matter how big or small that right is. It is a word that signifies and includes with it servitudes, usufruct, habitation, any real right established by law falls under the umbrella of ownership. So here when the law says full ownership or emphyteusis it seems to imply that either the property is fully owned, liberu u frank, free and unencumbered, or else if it is held by title of emphyteusis, seemingly excluding any type of ownership.

- Dr Borg Costanzi's interpretation is that any form of ownership is covered here, any form of ownership which entitles you to have physical possession of property. Any type of ownership that entitles a spouse to live in the house is protected.

- Disputes or arguments have arisen where it was said that how come this right of habitation is granted when this house is so big and the woman needs only one bedroom when there are ten bedrooms in the house for example? It does not matter. If there is this right, it is over the whole property, no matter how big or small the house is, even if you are arguing that the surviving spouse does not need such a huge estate.

- If the right of habitation is claimed, that property is not valued when calculating the reserved portion. So if we are talking of a villa worth €10,000,000, and the surviving spouse is in his 80's, and life expectancy is not that great, so we have a property that is worth millions, the person is entitled either to ⅓ or ¼ as a reserved portion, ¼ of €10,000,000 is €2,500,000 – so what do you take? The €2,500,000? Or do you take the habitation of the property for the rest of your life? Calculation wise, it does not make sense, financially to claim the right of habitation, unless there are strong sentimental issues involved, where the sentimental issues are so strong that money is not important anymore. That decision is only done by the surviving spouse.

- What happens if there are liabilities to the payment?

- The person who died owed money and there is not enough money in the bank, and the only asset is the matrimonial home. The law says that if it comes to a sale, the matrimonial home has to be left for the very last. All the other assets have to be liquidated first. If there is a matrimonial home, and the right of habitation has been claimed, that is the last item to be sold.

- Even more, if as a result of the sale the spouse is evicted, the spouse can sue the heirs for damages, which means that the spouse can request that the heirs provide suitable accommodation.

- If however, there are no assets left and the house has to be absolutely sold the creditors cannot be prejudiced. Their right to credit arose before the right of habitation. If the spouse was alive, the house would have been sold to pay off the liabilities. Now, since the spouse has passed away, those creditors cannot be prejudiced, and if there are no assets left and the house is sold, then it is sold, the liabilities are paid and then what is left is calculated when evaluating the reserved portion.

  - Take the scenario where scenario A, you have a creditor who is owed €100,000. There is a house worth €200,000 and there is money in the bank, another €200,000. So you have assets worth €400,000, there is enough money to pay creditors and so the heirs are bound to use the money to pay the creditor and protect the right of habitation. If they do not pay, and the creditor goes to Court does a subbasta and the house is sold, the surviving spouse can sue the heirs for damages, because there were other assets which would have paid the creditor. So if there were other assets, and the house was sold and the spouse is evicted, the spouse can sue the heirs for damages.

- On the other hand if there are insufficient assets,

  - So for example, the credit is €400,000 and the heirs pay the €200,000 from the bank. There is still however the €200,000 left, so the creditor sues and sells the house by auction. Instead of selling for €200,000, it is sold for €300,000 so there is €100,000 left as profit. The surviving spouse can get her ⅓ or ¼ from that €100,000, from what's left. What is left will be calculated to the benefit of the surviving spouse's reserved portion.

- These are all rights which were introduced mainly when the law was amended to protect women's rights, because they were considered to be the most vulnerable in separation proceedings of succession.

- It is a very detailed law which caters for various scenarios. The provisions of 395 shall not apply, so you have the right of habituation without any extra hassle. When the drafters were drafting this law they really knew what they were doing when they go into such details.

  - Right of habitation.

- (5) The right conferred in sub-article (1) shall subsist even where such right has the effect of reducing, during the lifetime of the surviving spouse, the reserved portion due to any other person.

- (6) Where a creditor of the deceased spouse enforces his right over the tenement subject to the right under this article, or where the heirs who have accepted the inheritance with the benefit of inventory sell such tenement in satisfaction of any debt due by the inheritance, and in either case there exists other assets of the inheritance with which such debts may be satisfied, the surviving spouse shall have a right to demand, within one year of the sale, damages from the heirs of the deceased spouse, or from the heirs of the deceased spouse who have accepted with the benefit of inventory who shall not have taken any possible action to pay such debts out of the other assets.

- (7) The spouses may, in a pre-nuptial or post-nuptial agreement, in accordance with this Code, whichever patrimonial regime is to regulate their property, exclude or reduce the right competent to the surviving spouse in virtue of this article.

- (8) The right of habitation conferred in this article shall cease on the remarriage of the surviving spouse, or if the surviving spouse enters into a public deed of cohabitation.

- 633. (1) The surviving spouse shall be entitled to the right of habitation over the tenement occupied as the principal residence by the said surviving spouse at the time of the decease of the predeceased spouse, where the same tenement is held in full ownership or emphyteusis by the deceased spouse either alone or jointly with the surviving spouse.

- HABITATION NOT USUFRUCT

- 1. Tenement is the PRINCIPAL RESIDENCE

- 2. Held in FULL OWNERSHIP or EMPHYTEUSIS

- 3. Applies even if surviving spouse has a share

- 4. Does it apply to property held in USUFRUCT or LEASE?

- (2) The extent of the tenement subject to the right of habitation shall not be limited on the grounds that, after the death of the predeceased spouse the surviving spouse requires a lesser part of the tenement.

- It applies to the WHOLE PROPERTY.

- If house is too big, can spouse have Lodgers in order to get some extra cash?
- (3) For the purposes of articles 631 and 632, the tenement subject to the right of habitation under this article shall be excluded from the estate of the deceased over which the surviving spouse has a reserved portion
- If the Spouse Claims the Right of habitation - that particular property is not included in the calculations of the value of the reserved portion due to the spouse.
- Nor is it's value deducted from the reserved portion payable.
- The Choice is up to the Spouse and not the heirs.
- In making the choice – it is question of VALUE and AGE /LIFE EXPECTANCY
- If the house is HUGE and worth 4 MILLION and ½ belonged to the deceased.
- The Surviving spouse's share, if there are children, is 1/4 ie €500,000 + his/her own half in the house (2 Million) . With that sum the surviving spouse can easily buy decent accommodation.
- If it is a small one bedroom apartment worth €100,000 which is owned 50:50
- ¼ share is €12,500 + his/Half share of €50,000. Which will not be enough to find decent accommodation
- (4) The provisions of article 395 shall not apply to the right of habitation granted under this article.
- The surviving spouse need not draw up an inventory or give security
- 395. (1) The grantee of a right of use or habitation shall make up an inventory and give security as provided in the case of usufruct.
- (5) The right conferred in sub-article (1) shall subsist even where such right has the effect of reducing, during the lifetime of the surviving spouse, the reserved portion due to any other person.
- This right TRUMPS claims by children/descendants for their reserved portion
- Take for example the scenario where the deceased's assets all formed part of the community of acquests and the ESTATE was valued at €2,019,000 as to 2 Million Euro for the half share in the villa and the balance representing the ½ share of the movables and savings.

- The Couple have three children and the husband makes a will and leaves everything to one child, leaving out the wife and other children altogether.

- The reserved portion of a child claiming the reserved portion is 1/3 of 1/3 of the estate = 1/9th. . 1/9th of €2,019,000 is €257,667.

- There are insufficient funds to pay out the reserved portion, nonetheless, if the wife also chooses the reserved portion, the right of habitation will not be reduced in any way.

- Now the right of habitation is there for the lifetime of the surviving spouse and it is guaranteed, so if other children are claiming the reserved portion as well, this right of habitation will subsist, it cannot be reduced or abated. When balancing the reserved portion of the children and the reserved portion of the wife, when it comes to the right of habitation, the right of the wife beats anyone else. It comes first. So if there are enough assets to make goods, this rights save the others. The other person claiming the reserved portion has to suffer the losses. The wife/husband comes first, as the case may be.

  - Interesting to note that the right granted to a co-owner under Art 495 (3) – does not apply if the property is subject to the right of habitation

  - Case law has extended this obstacle also to Art 495A.

  - (Ethel Muscat vs Mary Mangion -965/16 dec APP 23/11/2020)

- Keep in mind the strong effect of the right of habitation. If you remember your second year lectures, dealing with ways of terminating co-ownership, one of the ways of terminating co-ownership of property which has been inherited is by selling your share after three years. After three years you are deemed to own an undivided share in each single item and you can sell your undivided share in any item, at any time after three years. So if I have inherited ⅓ share from a house, I can sell my ⅓ share to that house. This is a right in Article 495(3). So if there is a right of habitation, this right to sell your undivided share does not exist anymore. You cannot use it.

- Case law has extended this rule even in the case of sale by the majority under Article 495A. We have majority co-owners wanting to sell and minority owner does not want to sell. In this case, the Court has said that if there is the right of use, usufruct and habitation, the remedy under Article 495A does not apply. So if the property is going to be sold all the heirs have to agree and if the wife happens to be a co-owner his or her signature is required otherwise the sale cannot take place. That is how strong the right of habitation is.

- When dealing with methods of termination of co-ownership arising from inheritance in this case, Article 495(3) and 495A of the Civil Code stipulate that if you have inherited property and more than three years have passed and there is no lawsuit requesting the division of the estate, and there are no usufruct, then any heir is the owner of his individual part. So if I have 1/3, I have 1/3 of every single item and I can sell that 1/3. It will not be a suspended sale. You may recall that before these amendments were made in 2010, a sale of part of a common property which was inherited was held in suspension and you only know whether the buyer actually bought that item when there was a physical division of the estate.

  - (6) Where a creditor of the deceased spouse enforces his right over the tenement subject to the right under this article, or where the heirs who have accepted the inheritance with the benefit of inventory sell such tenement in satisfaction of any debt due by the inheritance, and in either case there exists other assets of the inheritance with which such debts may be satisfied, the surviving spouse shall have a right to demand, within one year of the sale, damages from the heirs of the deceased spouse, or from the heirs of the deceased spouse who have accepted with the benefit of inventory who shall not have taken any possible action to pay such debts out of the other assets.

- So when it comes to an asset you are a co-owner in everything. When it comes to liabilities it is as though the division took place immediately and you owe the liability according to your share. With liabilities, the share is fixed on date of death. With assets, you have to wait three years.

- Here we have a situation where the legatee is a creditor, he is entitled to get these €3000. So that is clear – he is going to get these €3000. Who has to pay it?

- The heirs have to pay it each according to his share. If there are three heirs, and they are left with equal shares – 1/3 each – each one has to pay 1/3, hut the legatee is also an heir and he will say, “wait a minute, I have got a legacy of €3000 but I am an heir and I am not going to get €3000, I am only going to get €2000 because the other €1000 I am going to pay it to myself. I am a debtor and I am going to pay me my €1000.” The law says that if you are a pre-legatee, meaning that you are a legatee and an heir, as far as your share is concerned you withdraw it. So take the situation where I have a gift of €3000, there are three children but in the estate my father said “you get 50% and the other two siblings get 25% each”. From that €3000 I will only get €1500 because I am an heir of 50%. So fictitiously I pay myself, it does come out of the estate and then it is divided, and the result is exactly the same.

- Take the example where the estate value is €10,000, and I have a legacy of €3000 and there are two children in equal shares between them – 50/50. I claim my €3000. From the €10,000 it went down to €7000. €7000 divided by two is €3500 each. So I will get €3000 as a legacy and €3500 as an heir. There were €10,000. That is one exercise.
- There is €10,000 and it is divided by two, so €5000 each. I said that the heir pays himself. So from my €5000 I pay myself, so my €5000 remain the same, but I get the other €1500 from my sibling. So it comes to €6500.
- So here the law is talking about the way of how the payment is affected.
- Let us do it the other way round.
- When it comes to divide the property, if they come to divide the estate, the surviving spouse has a right of preference and he can say as part of his share of the inheritance he wants the matrimonial home, and that matrimonial home will be valued minus the value of the right of habitation. It is not easy to value the right of habitation. If you look at Chapter 364, S.L 06, there are rules on how to value the usufruct which is age related. So, if a person is over eighty the value is 10% of the intrinsic value of the property. So the surviving spouse will get the property with a 10% discount. If the surviving spouse is younger, the value of habitation is higher. So if the person is twenty-five years old that value is about 60%, so the surviving spouse will get 60% discount.
- Not only does this right of habitation terminates upon death. It also terminates if the surviving spouse re-marries or if the surviving spouse enters into a deed of co-habitation.
  - Creditor Enforces his right over tenement
  - Or
  - Heirs (benefit of inventory) sell to pay debts
  - IF THERE ARE OTHER ASSETS
  - Spouse may demand damages (????) – sale by creditors/sale by heirs
  - Claim within 1 year
  - (7) The spouses may, in a pre-nuptial or post-nuptial agreement, in accordance with this Code, whichever patrimonial regime is to regulate their property, exclude or reduce the right competent to the surviving spouse in virtue of this article.

- By agreement the spouses may exclude or limit the right of habitation
- PRE or POST nuptial
- In that case the tenement will be computed when calculating the reserved portion
- (8) The right of habitation conferred in this article shall cease on the remarriage of the surviving spouse, or if the surviving spouse enters into a public deed of cohabitation.
- Remarriage
- Or
- PUBLIC DEED of cohabitation
- These are extra grounds of termination of the right of habitation
- Partition between heirs and surviving spouse.

• It's not easy to value the right of habitation and if you look at chapter 364, subsidiary legislation 06, 364.06 these are rules on how to value a usufruct which is age related and if a person is over 80 the value is 10% of the value, so that surviving spouse will get a property with a 10% discount. If the surviving spouse is younger the value of habituation is younger, so if the person is 25 years old that value is about 60% so the surviving spouse will get a 60% discount. So the surviving spouse will say I want this house as part of my reserved portion, as part of my division and I will get it at a discount. Earlier on we mentioned that the right of habitation terminates upon death, not only it also terminates if the surviving spouse remarries or enters into a deed of cohabitation.

- Partition between heirs and the surviving spouses
- 634. Where the matrimonial home belongs in part to the surviving spouse, in any partition between the heirs of the deceased and the surviving spouse, the surviving spouse, or the said heirs, may demand that the property subject to the right of habitation be assigned to the surviving spouse upon a valuation which is to take account of such right of habitation over the property.

- This section also applies even in normal situations of inheritance. A surviving spouse can have property partly in habitation and partly in ownership. Let us say that the house was part of the community of acquests, so the surviving spouse has half. In respect of that half, that is owned by that spouse, the other half the spouse

has the reserved portion plus the right of habitation. If they come to divide the estate, both if there is a reserved portion and if there is not a reserved portion, that surviving spouse will have a discount if this right of habitation exists. So if there is a will and the spouse is given the right of habitation, or if the spouse is a co-owner claiming the reserved portion and claimed the right of habitation, and they come to divide the inheritance, in that case the surviving spouse says that he wants to keep the house to herself/himself. Half is his/hers already, the other half is valued according to the rules of habitation, and it is discounted according to the age of the person concerned. If the person is young there is a big discount, if the person is old, the discount is not so big.

- This is an option granted both to the surviving spouse and to the heirs
- Applies to inheritance in General irrespective of whether the reserved portion is claimed or not.
- If the right is exercised, the value of the house is reduced by the value of the right of habitation (if it has been claimed)
- According to the rules on the Duty on Documents Act (364.06) a usufruct is valued depending on the age of the usufructuary. Thus in the case of a usufrutuary who is under 20 years of age, the value is 70% whilst in the case of a person over 70 years of age, the value is 10%. The right of habitation does not confer the same rights as a usufruct. The person habitation cannot rent out the property and get the fruits and hence a right of habitation is a lesser right than the right of usufruct. Do you also factor in ¼ reserved share?
- Use of contents of matrimonial home.
- 635. The surviving spouse shall also have the right of use over any of the furniture in the matrimonial home belonging to the deceased spouse.
- Definition of furniture.
- 636. The provisions of article 318 shall apply in relation to the right of use referred to in article 635.
- (1) The word "furniture" comprises all furnishing movables, including the pictures and statues forming part of the furniture of an apartment.
- (2) It shall not include, however, collection of books, pictures, or statues.
- Nor would the furniture include money, jewels, articles of precious metal intended for the ornamentation of the person or to be worn, things that are

accidentally in the house or that belong to third parties nor would it include a car left in the garage.

- What is/are furniture? The word ‘furniture ’is defined in the law. It comprises all furnishing movables including pictures, statues, forming part of the furniture of an apartment. It does not include collections, nor does furniture include money, jewellery, precious items, bank deposits. Not even a car in the garage.

- You have to distinguish between movables which are situated in the matrimonial home and furniture. Moveables situated in the matrimonial home includes everything.

- There is a difference between the definition of immovables and the definition of furniture. Furniture is less than immovables. Not all immovables are furniture. Jewellery is not furniture. A statue or a painting is furniture, but if you have a collection of statues or of paintings, or a collection of books or a stamp collection, those are not furniture and they are not, the surviving spouse is not given the right of use.

  - Limitations of right of use.

  - 637. The provisions of article 633(3), (6), (7) and (8) shall mutatis mutandis apply to the right of use granted by article 635.

  - Just like the right of Habitation, the items included in the right of use is not computed in calculating the value of the reserved portion of the surviving spouse. Furthermore, the rights of creditors are not to be prejudiced.

  - The law also gives the spouse a remedy in damages against the heirs of the deceased spouse if the furniture is sold to satisfy the liabilities of the inheritance if there were other assets to make good.

- What happens if there are liabilities to the payment? The person who died owed money and there is not enough money in the bank, and the only asset is the matrimonial home. The law says that if it comes to a sale, the matrimonial home has to be left for the very last. All the other assets have to be liquidated first. If there is a matrimonial home, and the right of habitation has been claimed, that is the last item to be sold.

  - Cases where surviving spouse cannot claim rights.

  - 638. The provisions of articles 631, 632, 633 and 635 shall not apply in any of the following cases:

- (a) if, at the time of the death of one of the spouses, the spouses were separated by a judgement of the competent civil court, and the surviving spouse had, in terms of articles 48, 51 and 52, forfeited the rights referred to in those articles;

- (b) where the predeceased spouse has, by his will, on any of the grounds mentioned in article 623(a), (b), (c), (d) and (e), or on the grounds of adultery, expressly deprived the surviving spouse of the rights referred to in articles 631 to 633 and 635 and such ground, or where more grounds are stated, any of such grounds, is proved;

- (c) if, in regard to the surviving spouse, there exists any of grounds on which such spouse would under article 605 be, as unworthy, incapable of receiving by will

- Now again, this is the last bit when do you lose the right of inhabitation you spouse would under article 605 be as unworthy, incapable of receiving by will.

- You cannot claim this right if you are unworthy. They also lose this right if there are ground as a result of which you forfeit your right to succession, like grounds of separation, for example.

- In the will the testator can also write a clause saying that he does not want his wife to inherit because she was adulterous, or the other way round the wife writes the same thing. In that case this right of habitation does not arise.

- So basically, this right of habitation can be lost either on grounds of unworthiness or on grounds resulting from the law relating to personal separation where a person loses these rights, adultery, violence.

  - Separation

  - Unworthyness

  - Incapacity

  - Furthermore, irrespective of whether there was a legal separation of not, the predeceased spouse could disinherit the spouse not only on the grounds mentioned in Art 623 but also in the case of adultery. Should the matter be raised up in court, the heirs would have the burden of proving such grounds.Vide Susan Vella vs Vella (1031/2013LSO dec 12/7/2018)

- Mentioning separation cases, it’s the final bit the law gives a limited list of grounds on which a person is unworthy and they’re specific over and above those grounds

keep in mind the problems of surviving spouses. So hypothetically, the children can in appropriate circumstances deny the surviving spouses's right of habitation

- The law gives a limited list of grounds on which a person is unworthy. They are specific. Over and above those grounds, keep in mind the problems that the surviving spouse may encounter if there are additional grounds which could have given rise to personal separation. So hypothetically, the children can in appropriate circumstances deny the surviving spouse's right of habitation if they prove that the surviving spouse committed one of those grounds listed in the law dealing with personal separation, for example adultery. There must be a pending case, of course. The children cannot open a new separation case, the case must have been started already, but the children can continue it. As part of that continuation process, they can demand that the surviving spouse claiming the reserved portion will not receive the right of habitation over and above the right to the reserved portion.

  - Furthermore, the surviving spouse also forfeits the reserved portion if such spouse is guilty of any of the ground on which such spouse cold be declared as unworthy.

  - In Paul Caruana vs Olena Caruana Verbystka (Rik 150/10 Dec APP 24/6/2016) which confirmed that in the case of abandonment and adultery the forfeiture was automatic. It went on to add that a spouse could also forfeit such rights in terms of Art 48, 51 and 52 of the Civil Code for serious and grave reasons, but in this latter instance the court has a discretion.

  - Il-Qorti allura, hlief fil-kaz li jkun hemm abbandun jew adulterju, ghandha d-diskrezzjoni jekk tapplikax il-provvediementi tal-Artikolu 48 jew le. Fic-cirkostanzi tal-kaz fejn l-appellanti kienet hatja ta 'ingurji gravi serji hafna l-ewwel Qorti dehrilha li ghandha tapplika hi wkoll dan l-artikolu u tiddikjara li l-appellanti iddekadiet mid-dritt ghall-alimenti.

  - Application of articles 633 and 635 in cases of personal separation or divorce.

  - 639. The rights referred to in article 633 and article 635 shall also apply in cases where:

  - (a) the spouses were personally separated and the surviving spouse was either in terms of article 55A or in terms of a public deed of consensual separation entitled to reside in the matrimonial home; or

- (b) the person who died was divorced and his former spouse was, at the time of his death, entitled to reside in the matrimonial home by virtue of the applicability of the provisions of article 66(5) and article 55A.
- This article provides for the continuation of a pre-existing right of the surviving spouse to live in the matrimonial home
- It is re-enforcing such pre existing right.
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23rd March 2023

Lecture 11.

- Law of Succession
- Part 11
- Abatement
- Dr Peter Borg Costanzi
- The Law Protects the right for the reserved portion
- This right is not easily lost and, even when lost, it goes to the descendants
- The law also anticipates possible ruises by testators to reduce the said portion both if these are inter vivos or causa mortis
- Here we will look into how the law reacts to ensure that the reserved portion is paid to the fullest extent

- Last week we touched on the reserved portion and how important, how strong the law protects the reserved portion, and protects it also from abuse. So it has an induced mechanism, where are talking about testate succession, there is a will. Where the testator either in the will or during his lifetime has disposed of so much of his assets by donation or by legacies that there is not enough left to pay the reserved portion and in that case the rules of abatement apply.

- If there is a legacy or a donation which eats into what is called the non-disposable portion, than the donation/legacy is reduced, it is abated, and this is of abatement strengthens the right of a person is claiming of the reserved portion. So this is how much importance the law is giving to this right, the reserved portion. Now ignorer to calculate the reserved portion, you have too look at the whole inheritance first, you have to see what the testator has left. You have to see the normal stuff. What balance he has in his back account, what property he has in his name at the moment of his debt.

- So that goes into a spreadsheet/list. House, boat, jewellery, cars, investments, they go into a list and those list are written down and than you start looking at the donations and the legacies. Of course if the assets still form part of the inheritance, but if the assets had gone out of the patrimony, they had been donated or 50/50 sold, where there is a contract of sale, hiding a donation. Assimilated contract of sale, than the law will calculate that property as part of the testator, to see what constitutes the value to be taken into consideration.

- If there are donations made during the life time. The donation as we said before is valued as at date of donation. So you have a list of assets that are there when the testator pass away, you see that the donations that are there are made, and you see the value of those donations and add them up. Because donation if not made would be part of the discussion. So the law wants that the donation, as at value of the date it was donated.

- So you look at the object as it was as the time of the donation, in other ways the nature of the object as at date of the donation, and the value as at donation. If you donated a plot of land which was later on built as a block of apartments. You value it as a plot of land not as a block of apartments and you end up with a lump some, you end up with the value, and you say okay someone wants to claim the reserved portion.

- What is the disposable portion, what is the non disposable portion. You carry out an exercise. You say okay, one of the children is claiming the reserved portion, if there are less than 5 children, ⅓ is the non disposable children. Even if only 1 child leaves. So you have ⅓ of the estate which is non disposable portion. So if you have an estate which is worth €99, €33 is the non disposable. Portion. It is a portion that has to be kept safe. So you have you to establish how much the non disposable portion is. That is one example.So you value the non disposable portion.

- Second step, you look at the total amount of assets actually in the name of the deceased and you say when he died he had a car, boat, house, bank account and they are worth €80 for example. And you say how many of those assets have

been given out as legacies, as gifts, in the will itself. So now we are forgetting the donations made before. So we said the value of the estate is €99 and €80 is all that is left. There is €19 which where donations which where made during his life. And you know that €33 is the non disposable portion.

- You have €80 and you look at the legacies as listed in the will. In the will he says for example I am leaving the house to my eldest son. I'm leaving my boat to my other daughter and i leave the rest of my estate divided by my three children. The house is €50 and the boat is worth €5, are gifts. And you said that the estate is €80 and €55 is legacies. €80 minus €55 is €25 left. But the non disposable portion is €33 so €25 is not enough to pay €33. So we have to eat into something. So we have to eat into the legacies, or if there is not enough legacies you eat into the donations. So for the people getting the legacy or the donation, have to contribute in part towards the reserve portion.

- So, at the moment we are establishing the general principle of how abatement works out. This is a very complex part of the law, it is difficult to explain and it is very difficult to apply, and when you read judgments, you start to wonder. It takes a while to figure it out.

- So let's explain it again, you have an estate worth€99, €80 was left to day, €90 what was give out during this persons lifetime. In his will he gave certain legacies that are worth €55 so there is €25 left to be divided between the 3 heirs. One of the three heirs is claiming the reserved portion, because he said "25/3 is 8 and 8 is not enough" so he claimed the reserve portion. In that case this one child, the exercise would be to calculate the amount that can be disposed of or not and if it is enough to pay the single child. So we will see at the moment that this child has ⅓ of ⅓ which is ⅑. ⅑ of 99 is 11. So his share of the reserve portion is 11.

- Earlier on Dr. Borg Costanzi said, to calculate the disposable portion and the non disposable portion and non disposable portion, we said is €33. but there is only €25 left. Yet the subdue to this child is €11, and you will say, €11 can be paid from the €25. So, in practice you can say there should be no abatement. Because there is enough money to pay the €11, why should we abate the legacies/donations and the law doesn't say that.

- The law says, that you first calculate the non disposable portion, the non disposable portion has to be reserved, it has to be there, and if the testator doesn't leave enough for the non disposable portion, whether one child or two children or three children or the wife claim the reserve portion, it doesn't make a difference on how much that person gets. It is the non disposable portion that determines abatement and not the amount payable to that individual child or spouse.

- So in this example, even though the €11 can be paid from the €25, it wont all be paid from the €25. There will be a contribution from the legacies. And the contribution is pro-rata. You see the value of the legacies, in this case the blue of the legacies was €55, you see the value of the rest of the estate at the time of death, for now forget the donations. Which is another €25. So it is €25 is to €55, and the €11 will be paid €25 is to €55. So in actual fact this €11, will be paid roughly about €8 from the legacies and the €4 by the heirs who remain in the will. So the legacies will be reduced, so the one getting the house will have to contribute the most. If they contribute more than the one getting the car.

- At the end of the day if the people getting the legacies are the heirs as well. So there are three of them, two of them have gifts and the third has the reserved portion, it is an interim exercise made between the heirs both as heirs and as legacies. It is something they have to sort out between themselves. The law establishes how the respective contributions have to be made.

- Let's repeat the example which is a little bit complicated.

  - Step 1, value of the inheritance of date of death is €8, what is left when the testator dies. €19 is the value of the gifts made during his life. So total value is €99. There are three children, one of them is claiming the reserve portion, so the non disposable portion is ⅓. ⅓ of €99 is €33. So we know we have established the quantum of the non disposable portion. Now we go back to the estate and we notice €80 was left today and €19 in donations. Now lets look at the €80 because €19 have already been disposed off. Now form the €80 we said there are two gifts. The house worth €50 and €5 being the value of a car or the boat. So €55 are legacies. So there is €25 left. So the estate that has been disposed off by donation and by legacies has been €99 - €25. So in this example the testator has exceeded, he has given more gifts and he has eaten in the non disposable portion. Because the non disposable portion is €33, and there is only €25 left. Till now we know that the rules of abatement is going to apply.

  - Second part is who is going to abate? How does abatement work? And abatement is calculated pro-rata, and in this case, we know that there is €25 left. So there is €8 missing. So that €8 has to come from somewhere. So they have to come from the legacies.

- This is something that very very rarely arises. In our careers, maybe we will have one case. This happens because usually when someone is making a will and has decided that favour some more than others. The notary who has some brains will point out to the testator that this son has right to the reserved portion, let us work it out and let us see if you are going to leave enough. So if he claims the reserve

portion he is not going to create these kinds of problems, So always try to leave enough to make good for the reserve portion.

- You have €25 left and €8 missing, so €25/€33 is going to be paid by the heirs, €8/€33 is going to be paid by the legatees so you have €11/€33 x €25 is paid by the inheritance and you have, €11/€33 x €8 paid by the legatees and that should get you €11. Then the individual legatees can keep on splitting it up depending on the value of the legacy one has €50, the other has €5, so it's €5/€55 divided by the legacies. The one who will get the house has to pay more than the one that has the car.

- €11/€33 x €25 = €8.33, so 8 ⅓ is going to be paid by the inheritance, that's clear it comes out of the bank account where there are €25.

- Then you have €11/€33 / €8 - €2.6, has to come out between the legatees, so one has €50, the other has €5, so €2.6/€55 x€50 = so €2.4 is paid by the one who gets the house, and the rest €0.2 is paid by the one who owes the car.

- Now in this case in abatement, you have to do simple proportion.

- Keep in mind that the time bar to claim the reserve portion is 10 years.

- Normally a notary will advice the client, and of course it is up to the client to decide and the client might take the risk or he will take the notary advice and change his will. So normally when there is a claim to the reserve portion the testator will adjust his will but. There are times when he doesn't, The result is found in the will itself and not in the donations.

- On the last slide of the power point there is a 50 page judgement about Vella vs Vella and this judgement is in Maltese, but this judgement goes across all the law dealing with the reserved portion. It is very logical and the judge is very logical, he deals with 1 thing at a time. So it is an old judgement but it is readable and understandable and Dr. Costanzi advises to read it through and study it since it is quite a solid judgement.

- If you have access to e-courts, go to civil cases, find a heading called documents and under document in most cases you will find all the evidence and documents that have been submitted towards the court. Have a look at the submission list by the lawyers and compare them with the judgement. Under documents in most cases you'll find all the documents, have a look at the nota tas-sottomissjonijiet and compare this with the judgement, when you compare the nota tas-sottomissjonijiet they are dealing with very specific points. If you read the judgement it is much more comprehensible and much more readable. The judge didn't get enough material.

- In order to calculate the reserved portion:
- one must first establish the extent of the bulk
- and then fictitiously divide such bulk into two parts:
- a disposable portion and
- an non-disposable portion.
- If the non-disposable portion has been exceeded and there are insufficient assets in the estate to make good, the law here provides and regulates what happens.
- Testamentary dispositions exceeding disposable portion, liable to abatement.
- 647. Testamentary dispositions exceeding the disposable portion, shall be liable to abatement and limited to that portion, at the time of the opening of the succession, provided the demand is made within the time established in article 845.
- 1. TESTAMENTARY dispositions
- Here the law is dealing with what happens with provisions made in the WILL
- 2. Exceeding the Disposable Portion
- You first have to establish the value of the total non disposable portion and not the value of the individual reserved portion.
- 3. Time Bar- 10 years (minors – from when they reach age of majority)

• In this Vella Case, abatement actually occurred and the very shortly before the person passed away, the deceased gave out a lot of donations, and the heirs renounced to the succession. So the legatees where called to the case, and in the end the court declared that there was abatement of the donations and it ordered that the amount abated is paid by the legatee who was not an heir. The court went so far as saying that he has to pay X amount of money and since there is not enough liquidity, if you don't pay this property is to be sold. The gifted property is to be sold to make good for the reserve portion. So the legatee was given a choice to either pay or if he didn't the abatement would have eaten into the property itself. And the property itself would have to be sold. This judgement is a very good example on how abatement works in practice.

- How abatement is determined.

- 648. For the purpose of determining the abatement, the following rules shall be observed:
- (a)all the property of the testator, existing at the time of his death, shall be formed in one bulk, after deducting therefrom the debts due by the estate;
- (b)any property which has been disposed of by way of donation shall be then fictitiously added, such property being reckoned at its value at the time of the donation;
- (c)the disposable portion shall then be computed according to the estate thus formed, regard being had to the rights of the surviving spouse in accordance with articles 615 to 639.
- Subject of donation perished before death of donor not to be included in the bulk.
- 649. Repealed by: XVIII.2004.75.
- All Property of the deceased- All property Donated is fictitiously added up
- 1.First you have to calculate the residual estate of the deceased.
- 2.Include the entire property whatever its nature – movable or immovable, corporeal or incorporeal.
- 3.Include all the debts, including those owed by/to the heirs or legatees.
- 4.Some rights which are personal to the deceased and cease upon his death such as the right of usufruct or a life annuity. These terminate on death and are not included.
- What about leaseholds? residential and commercial urban properties and agricultural leases.
- Life insurance policies: Types and whether with benefits
- Funeral expenses.
- Bequests “for the repose of their soul” and Caruana Galizia opines that these too should be deducted as long as they are reasonable taking into consideration the financial and social position of the deceased. If they are excessive, he recommends that they should be reduced and therefore liable to abatement.

- One quick point we mentioned this before, how do you calculate the estate? When calculating what is left in the inheritance, the law limits what you can deduct, you have the pluses on one side and minuses on the other.

  - For example funeral expenses are a minus because everyone has to pay the cost of a funeral, that is not something of choice. It is a necessity. If there liability that existed during that person lifetime, they have to be paid. If he didn't pay for his car or had a bank loan they have to be paid.

- In the past there send to be clauses in will. In nowadays these are very very rare, where a person would leave a legacy to the church, to use the income of that property to pay for masses and cleanse that persons soul.

- In the past it was considered feasible as long as it was not overboard. So you had to look at the request, in relation to the estate. If you look at an old will, a will made 150 years old, this will be a very elaborate will. The notaries would be paid by the page in those days. Nowadays they are paid even more because they have a billing calculator. If you have a noble the more elaborate, the more elaborate, the more the esteem of the person. You can come across a will where the testator says that they want all of there village to attend his funeral and he wants three carriages and the tears to be collected and buried in his grave and the people and criers have to be compensated for the services that have rendered and the people who walk behind the funeral possession will be compensated as well. Then also some masses every day, every month and every year, and setting up a foundation for that purpose. Of course that would be super elaborate and if that person was extremely esteemed, in that proportion it would make sense. But if the person had no assets, and spent all his money on the funeral's arrangement of course it went overboard. So it's an issue to be determined by what is reasonable.

  - What about donations and legacies?

  - These too are to be included, no matter their nature, even if they are remuneratory in compensation for services rendered and even if they out of gratitude or in consideration of the merits of the recipient.

  - The same applies to donations

  - Some donations may be disguised such as when property is sold for an irrisory consideration or where one has remitted a debt. In such case one must look behind appearances and hence should be included to the value of the part deemed as donated.

- On the other hand, maintenance expenses and expenses incurred as a result of a legal obligation are not included.

- Donations, we also mentioned remunerate legacies, where people give compensation for services rendered. Say you have a Philippino who looked after you and you compensate her for taking care of him. How big is that thank you? Is it excessive? and the court will carry out an exercise to see if it is excessive or not. If it is excessive, the excess will be deemed to be remuneration.

  - How are donations valued for the purposes of calculating the reserved portion?

  - Pre 2004: Nature: as at date of donation. Value: Date of Opening of death of donor

  - Post 2004 : Nature and Value as at date of Donation

  - No consideration of change of circumstances effecting value:

  - Eg if thing perished or if thing appreciated in value

  - no similar amendment was made in the part dealing with Collation – vide Article 931 (1). This is clearly a mistake by the legislator but to date such mistake has not been rectified.

  - When all these rules are factored in, it will be possible to fictitiously establish the net value of the bulk of the estate and proceed to compute the extent of the disposable portion and the non disposable portion.

- Now one point that is important to remember when looking at old case law. The validity of the donations, the way there was donations was changed in 2004. Up to 2004 the nature of the property was determined as the date of donation. So it was valued as a plot. But the price was the value of succession, after 2004 the value date is the date of donation. So the nature is the same but the value date has changed.

- Now the question put here, what do you think managed or appreciated in value? Under the present law it is not at all, but, under the old law, it was relevant. The appreciation value was of the same object of the original nature. So, if it was a plot of land, it was valued of a plot of land even there was buildings carried out on it. If it perished under the old law and it would have perished anyway, in other words there was no fault. In the case the object donated was ignore. If the thing perished because of some fault than the thing was reliable.

- Of course these things don't happen anymore, because the court takes a snapshot of the value of the object and the nature of the object the moment it was donated, so what happens after that is not part of the inheritance.

  - For example, if the donation was of a flat on the 5th floor in Portomaso which is worth millions and there was an earthquake, and all the flats were demolished and don't exists anymore and they apply for a new plan and the planning authority comes to its sense and says they want to flatten the land, and that flat disappears, through no fault of the person received, under the new law it is not referenced. You take the value of the nature of the property when it was donated. Under the old law, it would not be taken into consideration at all because the thing perished is fortuitous.

  - When value of donations exceeds or is equal to disposable portion.

  - 650. Where the value of the donations exceeds, or is equal to, the disposable portion, all testamentary dispositions shall be ineffectual.

  - Any such testamentary dispositions shall be without effect – as though they have not been written.

  - A person donated -bulk of his estate such that the resultant assets

  - equal to

  - or

  - less than the disposable portion.

  - Example 1

  - Value of Estate: € 3,000

  - Donation Value: €2,500

  - Legacy Value: € 500

  - Reserved portion if there is 1 child (1/3) € 1000

  - Disposable Portion: €2000

  - Donation EXCEEDS the Disposable Portion

  - Therefore the LEGACY is without effect.

  - Example 2

- Value of Estate: € 3,000
- Donation Value: €2,000
- Legacy Value: € 500
- Residual estate €500
- Reserved portion if there is 1 child (1/3) € 1000
- Disposable Portion: €2000
- Donation EQUAL TO the Disposable Portion
- Therefore the LEGACY is without effect.
- This section takes us the mechanics of Abatement of Donations and the sections dealing with collation:
- 915. It shall not be lawful for the child or descendant, notwithstanding an express exemption from the obligation of collation, to retain the donation except to the extent of the disposable portion, and any excess shall be subject to collation.

- Now a quick detour on section 915. It's a big mouth full, let's take it bit by bit it shall not be lawful for the child or descendant So over here we are talking about donations that we make to children or descendants and not to outsiders. So the obligation to collate, only applies as far as this section is concerned to children and descendants and spouses, including all inherit by operation of law.
- Now normally in a will the person making the will, will say he exempts the children from collation, meaning they don't persistently give the value of the donations to keep the value. If no one claims the reserved portion, collation will apply. It doesn't apply only when someone claims the reserved portion, if no one claims the reserved portion collation will apply. So if the testator has given a number of gifts during his life time maybe in different values and he excepts his children from collation, so one got a villa in Monaco, the other one got a farmhouse in Gozo, and the third one got around the world holiday trip. They all enjoyed what they got of course there's a big difference between the three, and there is an exemption from collation and there is €300,000 in the bank account and he says I will live my three children equally and exempt them from collation, if no one claims the reserved portion they will get €100,000 each. If someone claims the reserved portion then the villa in malta, the farmhouse and the around the world

trip, all equally will be added to the estate and an abatement will apply. The villa in Monaco is worth 20 million and it supersedes by far the estate.

- a) Child or descendant who has not renounced to a succession
- b) Notwithstanding an exemption from collation
- c) Cannot keep the donation in excess of the disposable portion
- d) The Excess is subject to collation
- So if the donation exceeds the disposable portion, is the donation valid?
- The law says: excess is to be “subject to collation” which implies that the “thing” donated is kept but that it’s value will be imputed to collation as otherwise there would be no excess.
- 916. An heir who renounces a succession, may, nevertheless, retain the donation, or claim the legacy bequeathed to him, to the extent of the disposable portion, saving, where such heir demands the reserved portion due to him by law, the provisions of article 620(4).
- 1. Heir who renounces
- 2. Retains donation/legacy
- 3. to the extent of the disposable portion.- if he has renounced what happens to the excess? Does he have an obligation to pay part of the reserved portion nonetheless?
- 4. Where he claims the reserved portion:

- Here again what happens if an heir renounces his succession under article 916? An heir who renounces a succession they never claim the legacy or the donation. What does this mean? This is a very interesting section.
  - For example, a person made a will and amongst other things he left this person his Rolex watch and this person claimed the reserved portion, he is the child of the deceased. So he is the heir at law and in the will he is also named as an heir. So he has been given this Rolex and the way things have happens he wants to claim the reserved potion and his reserved portion is valued at €30,000 and his Rolex valued at €15,000. He will get the Rolex worth €15,000 and get €15,000 in cash. So he can claim the Rolex, even though he has renounced to the inheritance, the legacy is given to him even though taken into account of the legacy and in fact if you look at section 620(4) he can’t refuse this legacy.

- So if the heirs insist that he takes the Rolex instead of the cash, of course the Rolex is broken and needs to be scarped then of course by agreement they have to agrees and they say no we keep the watch and give you the money instead but that is subject to agreement. By agreement you can do what you like, but section 640 and section 916 speak to each other and collaborate each other. Even though he has renounced that inheritance he has obligation to take that legacy and he take of the reserved portion and the same applies to donations, donations made in his life time you can keep.

- This we mentioned last time, if he has a gift in his life time it is taken into consideration. When you renounce you can either renounce flat, if there are 3 children they have ⅓ each, if they renounce they get ⅑. The liabilities are deducted.

- What about the liabilities? So let's say a person dies, the person owns one million in property but he owns €900,000 to the bank, the reserve portion is calculated on the €10,000, not on the one million because that is the net value of the estate. So the person claiming the reserved portion doesn't pay liabilities but they are deducted anyways.

- Now with collation, we mentioned it last time, there is a mistake in the law and when you come to collate, when you come to see what is taken already. So it has been calculated that you are entitled from €8.33 from €99 in the previous example and from those €8.33 you have already received €5 which where yours. So we do €8.33 minus €5. But how is that €5 valued? In this part of the law dealing with collation the €5 is not valued at the date of donation but it was valued at date of opening of succession, and it could be that that €5 is worth €15. Which means you got more than your share and you get nothing, for Dr. Borg Costanzi this doesn't make sense and he thinks this is a mistake in the law.

- Ultimately, last time we mentioned two cases by Francesco Vella De Pasquale, and there's a lot to be said about these two judgements but the emphasis which really struck him was that in both cases the judge was strongly motivated by a sense of justice. You won't find it very often in a judgement when the judge says I'm a court of justice and I want to give justice but when a judge says taht, he is almost stating the obvious. Clearly the judge has seen a situation where the law is taking him one place but here the sense of justice is taking him in an opposite direction and there's this conflict in his mind, if I decide in this way I'm going to create a massive injustice and its wrong, I'm a court, I'm a judge and I have to give justice so I can't go against the law because I'm breaking my oath of office but at the same time I've been appointed as a judge because I'm a just person, the system that has selected me has perceived that I'm a fair, impartial and a just person and that's why I've been chosen not only because I know the law, because

I know the law and because I'm a person of integrity, honesty and have a sense of justice.

- This sense of justice is a golden thread, no matter if it's big or small, it is something that underlined every single court case. Sometimes it comes out stronger than others and in this case, this is where you have to go and make your argument, you have to convince the court to rely on the court's sense of justice and give a proper interpretation. The technical words used are in latin, de lege condenda, and de lege ferenda. Meaning the law as is written and the law as it should be and if you search, either through google or court services, if you will find the occasional judgements where this point is debated, and where the courts have found conflict between what the court says and what the legislator intended. Sometimes in drafting, the drafters don't draft properly.
- There are cases where for example rent laws the maltese text and English text differs, even in succession law there are cases where maltese and English etas say opposite things. Here we have a situation where we have two conflicting situations of the law, both giving different results, dynamically opposed each other, what does the court do? And at the end of the day it will find a just solution.
  - (4) The person to whom the reserved portion is due shall impute to it all such things as he may have received from the testator and as are subject to collation under any of the provisions of articles 913 to 938.
  - Collation and Reserved portion.
  - Gifts are taken into consideration BOTH WAYS.
  - If the reserved portion of that child was €20,000 and during his lifetime his father gave him a donation worth €5000, then the child will only receive €15,000.
  - KIV: method of valuing donations under rules of collation differ.
- These are a few examples.
  - Valuing of a thing donated for purposes of collation: as at date of opening of succession.
  - So eg: Estate worth € 31,000
  - Donation to child A in 1990 valued THEN at € 5,000
  - (PresentValue €10,000)
  - Total Value € 36,000.

- If there are 2 children and Child A claims reserved portion. 1/3 of €36,000 divided by 2 = € 6,000
- So if the 1990 value is taken for purposes of collation, Child A receives € 1,000
- If present value is used, then child A get nothing since his donation TODAY is in excess of the reserved portion to which he is entitled.
- Proportionate abatement.
- 651. Where the testamentary dispositions exceed either the disposable portion, or the residue thereof after deducting the value of the donations, they shall abate proportionately without any distinction between heirs and legatees.
- If there are insufficient funds, the heirs and legatees abate pro-rata between the disposable portion and the non disposable portion.

Legacy	Residue	Total	Disp. Portion	Non Disp. Portion	Resv Ptn say €1000
€3000	€0	€3000	€2000	€1000	All paid by legatee
€2700 EXAMPLE 1	€300	€3000	€2000	€1000	Legatee €900 Heirs €100
EXAMPLE 2					Legatee €700 Heirs €300

- Not clear how this works : see 2 examples below
- Calculation EXAMPLE 1:
- €1000 to be paid.

- Disposable portion : 2000: Non disposable portion :1000
- Therefore Disposable portion pays 2/3 Non disposable portion pays 1/3
- Legacy is €2700 I of which €2000 disposable + €700 non disposable.
- Therefore pays:
- Disposable share: 2/3 of €1000 = €666
- Non disposable share 700/1000 x 1/3 x 1000= €233
- Heir is receiving €300 from non disposable and therefore pays
- 300/1000 x 1/3 x 1000 = €100
- Calculation EXAMPLE 2:
- Example 2 is if all residue goes out first and then you take the rest from the legacies.
- This is NOT what the law states: The law states that it shall be abated proportionately
- Legatee: €700
- Heir: €300
- Example 1
- Value of legacy €2700
- Residual estate €300
- 2700: 300 = 9:1 - €900 : 100
- Declaration by testator that a disposition shall have effect in preference to others.
- 652. Nevertheless, in all cases where the testator has expressly declared his intention to be that a disposition shall have effect in preference to the others, such preference shall take place, and any such disposition shall not abate except in so far as the value of the property included in the other dispositions shall not be sufficient to make up the share reserved by law.

- If there are a number of benefits, the testator may exclude some benefits from abatement if there are sufficient assets from other benefits. He may rank them.
- Separation of subject of legacy.
- 653. (1) Where the legacy subject to abatement is a thing from which the part exceeding the disposable portion can conveniently and without being injuriously affected be separated, the abatement shall be effected by means of such separation.
- (2) Where, however, such separation cannot conveniently and without injury be effected, it shall be lawful for the legatee to pay in cash the amount due by him to the party claiming the abatement.

- Keep in mind section 653 when reading the judgement because this is where the judge applied the law, the judge applied this section.
  - Surprising that this clause was not altered when the “Legitim” as a “pars rei” was substituted for a “Credit” in value.
  - The law here provides that if the thing left by way of legacy can be split, then the “split” part which exceeds the disposable portion will no longer form part of the legacy. This can happen as long as the part being cut off is not injurious.
  - Does such part go to the heirs or to the person claiming the reserved portion?
  - Does this contrast with the heirs obligation to honour the legacies?
  - If it cannot be segregated, then the abatement is in money.
  - Vide judgement Vella vs Vella 490/19RGM dec 16/3/2023
  - Law of Succession
  - Part 12
  - Disherison
  - Dr Peter Borg Costanzi
- We are now going to deal with a totally different section of the law dealing dealing with the law of disherison. Earlier on we where dealing with unworthiness, when a person is unworthy to inherit. Now unworthiness is a ground which is regulated by law. It is totally independent on the wishes of the testator.

- For example, If someone murders the testator, that person is by operation of law, unworthy to inherit. Now obviously, a testator cannot write in his will. If my child kills me he is disinherited.

- We are dealing with something which is written in the will itself, it is expressly written in the will by the testator. He doesn't want someone to inherit him and that someone is a person who normally entitled to inherit by operation of law. So who are the persons who inherit by operation of law? those persons are the spouse, the children or the descendants of the children, who are entitled to the reserved portion.

- So in his will the testator can order that these people, or any one of them don't inherit him. If the person does not have the right to he reserve portion, he doesn't have to say anything. If I don't want to leave anything to the university of Malta, they can do nothing. The University of Malta has no claim over his inheritance, so you don't need to mention them. but if you want to disinherit a grandchild, child, spouse than of course you need to write it in the will. This is something of course that the person would not be entitled to the reserved portion. It is not the law which is applying here, but the wishes of the testator.

- Now, imagine you are a parent and you come to write your will, and this is your last word. And after you die, your children or spouse find your last wishes, and it's too late for them to try to convince you. So obviously of course before you decide to inherit it is not an easy decision and a lot of idea goes to your mind, first of all the reputation of your child, in the past this used to be a strong disloyalties. It effects their reputation. On the other hand, who knows.

- Better than the parents, they raised the, they had a life long relationship. So such a choice is not made likely, there are people who have been disinherited due to the heat in the moment, maybe there angry or maybe something happened and burst a reaction but these situations happen but maybe in hindsight that person might regret it but they never got to changing the will.

- You have a situation where five years ago you had a massive argument with your father and by that time you came close again and your father had cut you out of his will and later on you became friends again and so on. If the will hasn't been changed, the will will apply.

  - 622. Besides the grounds on which a person may become unworthy to inherit, the persons entitled by law to a reserved portion may be deprived thereof by a specific declaration of the testator on any of the grounds specified in this Code, to be stated in the will.

- In fact, if the ground of dis inheritance approved the effects are absolute. You can't say it wasn't so bad 50%, you're either disinherited or your not, no half ways.
  - 1. Disherison, like unworthiness, will deprive a person of the right to the reserved portion.
  - 2, Unworthiness - at the instance of the heirs
  - Disherison - at the instance of the testator
  - 3. Once the reserved portion is set aside by LAW despite the wishes of the testator, should not the grounds of disherison be by operation of law rather than being left to discretion of the testators?
  - parents/spouses themselves would be privy to a lifelong relationship with their child and therefore they should be left to judge.
  - Caruana Galizia contends that parents would be reluctant to inflict such a situation on their children because of the ignomy of it all and thus the law "defeats its very purpose" and further recommends its abolition and instead to increase the grounds of unworthiness
  - If the ground of disherison must be proven the effect is absolute
  - The persons who could be disinherited are only those persons who are entitled to the reserved portion – ie the spouse and the descendants
  - Can only be done if there is an express statement to that effect in the will and cannot be induced.
  - If a testator leaves a beneficiary out without saying anything about it, this is not tantamount to disherison.
  - Grounds on which a descendant may be disinherited.
  - 623. Saving the provisions of article 630, the grounds on which a descendant may be disinherited are the following only:
  - (a) if the descendant has without reason refused maintenance to the testator;
  - (b) if, where the testator has become insane, the descendant has abandoned him without in any manner providing for his care
  - (c) if, where the descendant could release the testator from prison, he has without reasonable ground failed to do so;

- Now the grounds of disherison need to be specifically stated in the will, if it is not written it does not count, in the sense that that person is not disherison. The law lists the grounds of disherison and these are the only grounds listed for dis inherit on listed by the law. If you read through them, you will find out that the testator is offended or hurt.
    - For example the testator has refused maintenance for his son, he is begging for food and the son is a multi millionaire, ask him for money and he doesn't even bother giving him. If the testator has become insane and the descendants abandon him. Of course within reason to look after him.
- Releasing the testator from prison, there was an institute for dealing with debt, you owe money and you won't pay it. There was a mandate where you could actually send your debtor to jail until he paid you. This doesn't exist anymore, but it still applies to what we call the mandate in cactum. Where a person has an order to do something and he doesn't do it and then that person is sent to jail until it gets done.
    - The only case where Dr. Borg Costanzi knows this happened was where there was a married couple contesting custody of a child and the husband kidnapped his own child so to speak and hid the child somewhere in Gozo, the mother was granted custody, the father refused, he was sent to jail until he gave the child back to his mother.
- If you are a in a position to get the person out of jail than if you can and you don't you risk being disherison, of course they may be a reason why. It's not absolute, it is not a case where he is in jail and he pays money so you pay him off, than there are circumstances where you justify your refusal to release him from jail. So the court will look into the circumstances and see if the decision was reasonable.
    - (d) if the descendant has struck the testator, or has otherwise been guilty of cruelty towards him;
    - (e) if the descendant has been guilty of grievous injury against the testator;
    - (f) if the descendant is a prostitute without the connivance of the testator;
    - (g) in any case in which the testator, by reason of the marriage of the descendant, shall have been, under the provisions of articles 27 to 29, declared free from the obligation of supplying maintenance to such descendant.
- Another one, of the defendant struck the testator or has otherwise done something cruel towards him. Now striking is something physical, otherwise cruelty can be physical or mental. If the defendant has been guilty of grievous

injury, if the descendant is a prostitute without the connivance of the testator. Then there are grounds dealing with separation.

- Saving the Provisions of Art 630: an additional basis for Disherison on ground of Prodigality

- 630: Where the person entitled to the reserved portion is interdicted on the ground of prodigality, or is so burdened with debts that the reserved portion, or at least the greater part of it, would be absorbed by such debts, it shall be lawful for the testator by an express declaration to disinherit such person, and to bequeath the reserved portion to the children or descendants of such person.

- Lastly prodigality, an additional basis for disherison is the ground of prodigality is someone who doesn't have control on his assets and the parents or the husband/wife may feel that if they leave there inheritance to this person, there inheritance is going to be squandered. In that case, this is ground for disinheritance but you can leave your estate to your grandchildren or the descendants of such person.

  - 1 Being a prodigal or heavily burdened by debt is not in itself an offence against the testator.

  - 2. Being interdicted does not debar a person from inheriting. It is a ground barring a person from making a will but not from receiving.

  - 3. Here the testator can ensure that his precious patrimony for which he worked hard to conserve and which he wanted to pass onto his heirs will have his mind at rest that it will not be squandered or gobbled up by creditors of his prodigal/indebted child/spouse.

  - 4. Creditors of the child/spouse may feel cheated

  - 5. The testator has cheated them of nothing. He owes them no obligation.

  - 6. It would be different scenario had the beneficiary been named in the will and then renounced to the inheritance to the prejudice of his creditors. In such latter event, in terms of Art 886 the creditors of a person who renounces an inheritance to the prejudice of their rights, may apply to the court for authorisation to accept such inheritance in the place of their debtor.

- When there is a prodigal and spend all there money, the creditors may feel cheated, this guy was going to inherit his father's millions, but the father disinherited him so they wont get paid.

- On the other hand if the father appoint shim to be an her and the son relies on the inheritance, the creditors have a remedy to claim the inheritance instead of the child to the extent of there credit.

- Look up art 866 where a child has been noticed as an heir and is entitled to inherit but because of his liabilities he has renounced his inheritance so they go to his children and not to himself, the creditors say that he has tricked them, that he has inheritance and he gave it away, he done something voluntary to prejudice there rights, and in that case the creditors have a right to accept the inheritance instead of the child up to the extent to their credit. But on the other hands, dispersion up to prodigality, the action is not by the child, but the action is by the testator. The person making the will has an absolute right with his assets he can do whatever he likes with them as long as section 320, subject to the limitations of law. So read section 320 again in the civil code, you have an absolute right of ownership subject to the limitations of law, like the reserved portion.

- When you own something you have an absolute right over it, you can dispose of your estate as you wish and if you feel that leaving your estate to a prodigal child is going to be squandering your estate, you have a right to skip that generation and disinherit that child. It is a ground for disherison which recognises and acknowledges the absolute right of ownership, where the testator here protect there estate to make sure it is not squandered.

  - .....it shall be lawful for the testator by an express declaration to disinherit such person, and to bequeath the reserved portion to the children or descendants of such person.

  - TO DISINHERIT

  - BEQUEATH THE RESERVED PORTION

  - TO THE CHILDREN OR DESCENDANTS

  - …….. are only:

  - These are the only grounds.

  - Numerus clausus and no additional grounds can be put forward.

  - EG: A parent cannot disherit a child merely because a child refused to marry the person chosen by the parent.

  - Other than Prodigals/Heavily burdened by debt, these grounds only mention DESCENDANTS.

- What about Spouses?

- These are the only grounds of inheritance except in respect of spouses.
  - Spouses:
  - See Art 638. When a Spouse cannot claim the reserved portion
  - A) if Separated by a JUDGEMENT and the spouse is guilty of adultery, desertion, or under such circumstances where court determines forfeiture of succession rights (See Art 48,51 and 52)
  - B) where the predeceased spouse has, by his will, on any of the grounds mentioned in article 623(a), (b), (c), (d)
  - What about amicable legal separation contracts where the spouses renounce?
- A spouse can lose the right of inheritance when dealing with the grounds of legal separation. Incidentally the ground mentioned in article 623 (a), (b), (c) and (d) are the rules dealing with unworthiness are also the risk in articles 41 and 52 dealing with separation.
- Now let's go through the grounds one by one. If the defendant has without reason to refuse maintenance, the law here is referring indigents, maintenance is maintenance in the way you're used to be living to retain a decent level of living not the bare minimum.
  - a) if the descendant has without reason refused maintenance to the testator;
  - Children: Obligation of maintenance arising out of Art 8 of the Civil Code
  - Children: bound to maintain ascendants in the event of indigence.
  - Spouses: See Art 2. Not limited to indigence. Law mentions "material support" and therefore this is judged according the means and economic standing.
- So if you need money to be able to live a normal life not the bare minimum but a bit more and there's is no reason to refuse such maintenance, than that is a reason for disinheritance.
  - b) if, where the testator has become insane, the descendant has abandoned him without in any manner providing for his care

- One questions how this ground can ever arise. If the testator is insane he cannot make a will so how can he disinherit his dsscendant. Re Spouses – desertion is also a ground.

- (c) if, where the descendant could release the testator from prison, he has without reasonable ground failed to do so;

- In the past a person could be imprisoned for debt. Can apply if the testator has a “conditional discharge”. REASONABLE GROUND

- (d) if the descendant has struck (SAWWAT) the testator, or has otherwise been guilty of cruelty (MOĦQRIJA) towards him;

- Not just physical violence

- Also applies to any form or cruelty.

- (e) if the descendant has been guilty (KIEN ĦATI) of grievous injury against the testator;

- Grievous injury – inġurja gravi. Vide Criminal Code and also the discussion when dealing with unworthyness.

- Here the law is talking of GUILT and not the mere committing of the offence. Does this necessarily mean Criminal Proceedings?

- This we went through, now if defendant was guilty, kien hati of grievous injury. Over here the law is implying a criminal prosecution and at least it could be that the issue of guilty is not necessarily determined by the criminal courts and it wont be determined by the criminal courts. The law doesn’t say has been found guilty but has been guilty and the word found is not there. It was found guilty, it would have meant that there would have been a court case. Over here, the court doesn’t need a court case. Since this is missing there is no court case. The fact that it is written in the will it is evidence that they are testifying.

- If someone wants to disinherit a child or a spouse, the reason will be exaggerated and amplified in the will just to emphasise the point. It is the only opportunity that the testator has to explain his reasoning.the will will be the same thing, elaborate and colourful and emphasising the point, it’s the only opportunity the testator is going to have to write what’s going on in his mind after he ides he can’t do it so the grounds for disherison has to be explained in great detail. Not only that but it has to be in such a way that the heirs has to find the grounds to prove it because if it is contested, the burden of proof will lie on the heirs. There is a presumption that there is no disherison, disherison is the exception and not the rule and

therefore the heirs will have to prove the ground if they go to court and if they don't prove it they will lose. If the ground in the will is not clear they will lose.

- There's another point Dr. Borg Costanzi would like to make, what are the consequences if there is a ground of dis inheritance stated on the will and it is proved? If it is proved you are disinherited but if there are descendants, if I have children my children have the right to claim the reserve portion. The only difference is that if they are minors, I have no right to the usufruct or administration of that reserve portion. I cannot touch the inheritance in any way at all. that if it is proved, if the ground is not proved or it is unclear, or it is not one of the listed grounds of disherison. So I say I disinherited my child because he was wearing jeans. There are still consequences, and if the ground is not proved or listed in the law, you are not disinherited but you will get your right to the reserve portion.
- So if there's a ground in the will and i say i'm leaving my two children as heirs I'm disinheriting my third child and the third child wins the case and says no that was wrong it wasn't true. Th inheritance is not divided by three, the two heirs get 50% each. The third one will get ⅑ as a reserved portion.
    - (f) if the descendant is a prostitute without the connivance of the testator;
    - Acceptance
    - permitting
    - creating circumstances which facilitate
    - Consenting
    - Allows
    - Encourages
    - (g) in any case in which the testator, by reason of the marriage of the descendant, shall have been, under the provisions of articles 27 to 29, declared free from the obligation of supplying maintenance to such descendant.
    - A parent may be released from such obligation:
    - Art 27: if descendant marries a person of shady character despite opposition
    - Art 29: Secret marriages – total or partial dispensation of banns
    - There must be a court judgement

- Thus for example in the case Filippa Debono vs Alfred Falzon (dec 30/10/2003 PAGCD 2020/20) the father had disinherited his daughter on the ground of grievous injury (Moħrija) because of the daughter's failure to visit her mother, the testator's spouse, when she was in hospital in her last illness and because she failed to attend the funeral.

- The court examined this ground and stated that in this particular case, the child had for years been suffering from a mental illness and hallucinations that therefore was unable to cause grievous injury to her mother. Since the ground of disherison was not proved, the child was therefore entitled to the legitim.

- Shires vs Bonello decided on the 4th December 2006 (771/1986 LFS)

- Il-Professur Caruna Galizia kkummenta fuq dan l-istitut; li mhix il-ligi li qed tippenalizza lill-persuna, imma t-testatur innifsu, li jiddeciedi li jiddizonera lil xi hadd minn uliedu. (op.cit, p.1,004)

- Cause of disherison must be proved. "ghandha tkun provata minghand min isostni d-dizeredazzjoni." (Ara Giovanni Bartolo vs Antonio Bartolo et deciza millPrim'Awla Qorti Civili, fis-7 ta 'Jannar 1936)

- Interpretation AGAINST disherison because the law provides for the reserved portion even against the wishes of the testator

- The cause : hemm bzonn li tkun tezisti kawza minn dawk enumerati mil-ligi u hemm bzonn li tigi sodifacentement provata mill-eredi.

- Meta fit-testment ma tkunx imsemmija r-raguni li ghaliha wiehed ikun gie dizereditat, jew ma tigix ippruvata, id-dizeredat ghandu jedd ghal-legittima biss."

- "Cini vs Asciak" (PA JVC 879/17 dec 20/5/2021) the testator has disinherited plaintiffs, his grandchildren (children of his pre-deceased daughter) , billi huma ħ"atja ta offizi gravi" without elaborating further. He had objected to the spouse of his pre-deceased daughter and took it out on the grand children

- The heirs but not the testator tried to justify this by stating that the grandchildren had abandoned the testator. Apart from the fact that it was the other way around the court went on to add

- Madanakollu, il-Qorti tinnota wkoll li t-testatur Paul Asciak ma fissirx b'mod car il-fatti li kellhom jaghtu lok ghad-diseredazzjoni kif jitlob l-Artikolu 622 tal-Kodici Civili. Infatti, dan l-Artikolu 622 jesigi mhux biss li d-dizeredazzjoni tkun dikjarata

bhala wahda mir-ragunijiet msemmija fl-Artikolu 623 tal-Kodici Civili, pero ’jesigi wkoll li din ir-raguni tkun ‘…imfissra fit-testment ’(enfazi tal-Qorti).

- …..Din il-Qorti tqis li l-Artikolu 622 tal-Kodici Civili jipprovdi li r-raguni kellha tkun imfissra sew mit-testatur fit-testment u mhux mill-eredi li fit-termini tal-Artikolu 625 sub-artikolu 1 huma obbligati biss li jippruvawha

- Dorothy Grech -vs- Deborah Fenech De Fremaux (PA 2710/97JRM dec 8/2/2006

- Fit-testment tiegħu, missierha neħħiha mill-wirt għar-raġuni hemm dikjarata li hija naqset li teħilsu mill-ħabs, bla raġuni tajba, u meta setgħet tagħmel dan. Huwa jżid jiddikjara li hija tat xhieda kontrih f’Qorti u li, minħabba f’dik ix-xhieda, intbagħat il-ħabs, u dan meta hija setgħet tat xhieda mod ieħor li minnha kien jeħles minn dik il-piena

- 1.Purpose of the lawsuit is not to revoke the will but to defeat the ground of disherison

- 2.Where a person has been disinherited on one of the grounds stated in the law, that person will not be entitled to the reserved portion.

- 3.The court will examine whether the ground is one of those listed in the law

- 4.Not every offence to the testator constitutes a ground for disherison

- 5.If a testator misuses the right given to him to disinherit a person, this will be considered as though the testator did not exercise such right

- 6.Disherison is a sanction imposed by the testator

- 7.The ground of dieherison must be expressly stated in the will

- 8.The ground must be proved by the person alleging it.

- 9.There is a presumption against disherison/doubt in favour of child/spouse

- In this case the child at the age of 10 yrs old, had testified against her father in sexual abuse proceedings taken against him. He was found guilty and imprisoned for 3 years.

- He alleged that the child was provoked by the mother (his wife).

- The court saw that (a) this ground had been raised in his appeal from his conviction and dismissed (b) the child was a minor at the time and proceedings

had been filed on the complaint of the mother (c) his conviction was not based solely on the child's evidence and (d) there was nothing the child could do to have him released from jail and (e) did the father expect the child not to say the truth?.

- Look up the judgements because there's much more in the judgements than the slides themselves.

27th March 2023

Lecture 12.

- Law of Succession
- Part 13
- Formalities and Types of Wills
- Dr Peter Borg Costanzi

- Today we're going into a bit of a tedious part of the law. We are going into formalities.
  - ORDINARY WILLS
  - Secret or Public
  - PRIVILEGED WILLS

- Do not underestimate the power and danger of the formality. Sometimes you tend to look at substance and forget the format but a will can be challenged, and has been effectively challenged, even because of mistakes of formality. Till now we have dealt with substance and areas dealing with incapacity, unworthiness and disherison, which are substantive aspects. Now we are going to deal with formalities. And our law, Maltese law distinguishes between three types of wills which are public wills, secret wills, and privileged wills
  - Ordinary Will is either public or secret.
  - 654. A will may be either public or secret.
- Wills are always confidential and the difference in name, public, secret or privileged relates to the method in which the will was drawn up, rather than the confidentiality of the will itself. The law starts off by saying that a will can be public or secret. There are two types of public wills the ordinary wills and privileged wills
  - THEY WAY THAT THE WILL IS GOING TO BE REGISTERED determines the Nature and Requirements

- Following EC Council Regulation 650/12 – other types of will can be made
- The ordinary Mode is a Public Will
- In some rare instances : Secret Will
- Privileged wills: wills made under extraordinary circumstances

- Having said this, in the EU Council Regulation 650/12 we have a new can of worms, and under this regulation it is stated that wills made in Malta by a person who falls under the Regulation can be done in the form of the law of the country of that person.
- So if you have a German who is on holiday in Malta he can do a will in Malta in German Law format.
  - In German Law, for example, you can have what is known as a holograph will, which is a will written on a piece of paper and then stored in a desk drawer.
- We're not dealing with types of wills under the EU. Under the EU Regulation, the form and the substance is governed by the law regulating the domicile, or residence, or nationality of the individual concerned.
- In the past before the Regulation, the situation was governed by private international law, and under private international law, the formal validity of a will was regulated by the country where the will was drawn up. So if a will was made in Malta you had to look at the Maltese format, if it was done in Germany you have to look at the German format. So you have to look at the place where the will was done.
- The substance was governed by the domicile of the individual, or in the case of immovable property by the lex situs. That is how our law was under private international law. It is still the same as far as Non EU wills So, this Regulation only regulates EU jurisdiction.
- So if you have a South African who is in Malta, his will has to go by the old private international law rules, so the form is the form of Maltese law. Having said that as an introduction let's go to the format.
  - Form of public will.
  - 655. (1) Saving any other provision of this Code, a public will is received and published by a notary in the presence of two witnesses in the same manner as any other notarial instrument, in accordance with the provisions of the Notarial Profession and Notarial Archives Act, even in regard to the signature of the

testator, according as to whether the testator knows how to, and can write, or not.

- (2) The signature of the witnesses is in no case dispensed with whatever may be the value of the thing disposed of by the will.

- Having said that as an introduction let's go to the format. Article 655 of the Civil Code immediately states that saving any other provision of this Code, a public will is received and published by a notary in the presence of two witnesses in the same manner as any other notarial instrument, in accordance with the provisions of the Notarial Profession and Notarial Archives Act, even in regard to the signature of the testator, according as to whether the testator knows how to, and can write, or not.

  - 1. a public will is received and published by a notary

  - 2. in the presence of two witnesses in the same manner as any other notarial instrument,

  - 3. in accordance with the provisions of the Notarial Profession and Notarial Archives Act, even in regard to the signature of the testator, according as to whether the testator knows how to, and can write, or not.

  - 4. The signature of the witnesses is in no case dispensed with whatever may be the value of the thing disposed of by the will.

- A public will is received and published by a notary. Only a qualified and warranted notary in Malta can receive a public will, not any individual. It has to be someone who has a warrant to practice as a notary in Malta. You could have a notary who is qualified in Italy, but in order to practice as a notary in Malta he has to have a warrant and the warrant must be issued in Malta.

- The will has to be received in the same way as a public deed is received by a notary in terms of Chapter 55, the Notarial Profession and the Notarial Archives Act.

- There is a difference as to whether the person making the public deed could write or not. If he can write he has to sign, if he cannot write then a different provision applies.

- The Civil Code and Chapter 55 have to be read together, they almost jigsaw-puzzle each other. There is one difference, which will be explained in a minute.

- In the Civil Code it is also expressly stated that the signature of the two witnesses cannot be dispensed with. You have to have signature of two witnesses in a public will. That's in the civil code.
    - Must be read in conjunction with Chapter 55
    - Notary is only person who is competent to receive a public will
    - General formalities which apply to all wills and additional requirements in the case of persons who are deaf
    - Original/Copy – how is will done, registered and conserved?
    - Date, Name of notary and particulars of the person:
    - Name and surname, marital status(name and surname or spouse), names and surnames of parents and if alive, place and date of birth, place of residence and reference to document of identity.
- So let's go back a bit. Only a notary can receive a public will, when the will is done the notary will take all the details of the person his name, surname, ID card number, whether that person was married or not, if that person was married his or her pre-marital surname, name and surname of the parents and whether they are alive or not, place of birth, place of residence.
- Those are the only details that the notary will require and write down in the will, like he would in any public deed. If there is one bit missing it does not render the will null, as long as that person is properly identified or identifiable.
- On the will you have to write the name of the notary. The will will start off with the date and time. It is required for notary to write the date and time by hand. They cannot be pre-type. They have to be handwritten by the notary with his own hand including the timeline. Once the notary starts writing, the first thing he will write is "Before me Notary Dr Peter Borg Costanzi…. there appeared before me…..", and he will write who appeared before him, the first thing mentioned is the notary's name.
    - Late filing/ lack of particulars?
    - A Notary cannot receive a public will if beneficiary is
    - him or his wife or
    - any person related to him by consanguinity or affinity in the direct line to any degree or

- in the collateral degree, up to the third degree
- Failure to abide by this will render the will null.
- The whole will will be null and not just the benefit.

- A notary cannot receive any will he likes. If he is going to benefit from that will he cannot draw up the will himself, he cannot publish it. You cannot be a beneficiary in the will, or as an heir, or as a legatee, and also make out the will.
- The will will be null, the whole will will be null not just part of it, all of it. Not even if the notary's wife is benefiting from it, so again we are protecting the testator from abuse. He is confiding with the notary, discussing what he/she wants to do with the estate when he/she dies, so his emotions are exposed, he's in a position of weakness, in a position where it can be taken advantage of because you are opening up, you are not defending yourself, there is no defence mechanism here. When you are doing your will, it is the last chance, so if you are going to write a will it has to be open and complete.
- The person you are doing your will with is going to be a person you trust because you are going to discuss the contents of the will. So the person you are going to discuss with, the notary, cannot benefit because he can take advantage of you, neither his wife, children, parents or cousins. The people related to the notary by notary by blood or marriage cannot benefit from the will, up to a certain degree. If this is breached, the will is TOTALLY NULL, not only the benefit left to the notary, but everything. It is not annullable, it is null, it is as though it never existed.
  - Signature by 2 witnesses.
  - In terms of Art 672, non compliance with Art 655 renders the will null and void – not annullable but null ab inizio.
- What about the signature of two witnesses? Here we have a conflict.
  - 25 (3) The presence of two (2) witnesses shall be required only in the following cases:
  - (a) whenever any of the appearers so requests; and
  - (b) whenever any of the appearers does not know how or is unable to sign his name:
  - Provided that in the case of public wills and in the case of acts of delivery of secret wills, the notary shall in all cases inform and explain to the testator about the testator's right to have two (2) witnesses present:

- Provided further that in the case of public wills if the testator chooses not to have two (2) witnesses present, the notary shall in the will declare that he has informed and explained to the testator about his right to have two (2) witnesses present and that the testator chose not to have two (2) witnesses present:

- Provided further that in case of acts of delivery of secret wills if the testator chooses not to have two (2) witnesses present, the notary shall in the act of delivery declare that he has informed and explained to the testator about the testator's right to have two(2) witnesses present and that the testator chose not to have two (2) witnesses present.

- Last year, (or the year before) the law was changed and Chapter 55 was amended but not the Civil Code. Under the Civil Code it says you must have two witnesses and if you do not have two witnesses than the will is null. That provision is there till today. There are elaborate provisions of the law stating who can be a witness, and that he has to be independent, impartial, etc.

- In Chapter 55 it is stated that a public will can be one without any witnesses and you must only have two witnesses if the person making the will asks for it. If he asks, he has to have witnesses. If he doesn't actually ask he doesn't have to have witnesses.

- We have a conflict between Chapter 55 and the Civil Code. This amendment was done not for the benefit of the testator but for benefit of notary, for practicalities. Notaries find it difficult to find witnesses, especially in unusual circumstances. But then again, when do you need protection most? It is exactly in these unusual circumstances. That is when a person is the most vulnerable. So in situations where a person is the most vulnerable, where there is room for possible abuse, you have a situation where the notary can go ahead and do the will without any witnesses.

- Another situation where it is doubtful whether the person making the will is in the right frame of mind. Who decides? The notary. The notary is the only person by law who is empowered to understand the wishes of the testator.

- So if the notary walks into a room and there is this old man and his daughter; and his daughter tells the notary, "Nutar, dan hekk irid ta'. Irid jagħmel hekk, hekk u hekk." In such circumstances, the notary would ask his daughter to get out of the room because she is not the one making the will, her father is. The notary has to hear what her father has to say.

- But, if they are on their own and there are no witnesses who is to stop this badgering from taking place? No one. If eventually such will is challenged, who's head is on the block? The notary's.

- So in a doubtful situation, where the notary takes the responsibility to do a will without any witnesses, it may be a practical solution in that particular moment but if there is a Court case challenging the will, the notary's head is on the block and his discretion is going to be challenged by the Courts.
- So in practice doing away with the requirement of witness is, in Dr Borg Costanzi's opinion, prejudicial to the notary. He should not sacrifice safety on the author of convenience. It may be convenient not to have a witness but it is always good to play it safe. The notary is there to protect and safeguard the wishes of the person making the will. He has a role to carry out. He has to protect and ensure that the wishes that have been written down in the will are properly recorded and they are safe. Consequently if the notary has any slight doubt at all as to the circumstances of the making of the will, he should play it safe and if need be refuse to do the will and insists that this is only done in the presence of independent witnesses.
- The requirement for witnesses can be done away with in most situations, except two. One of them is when the one making the will specifically asks for witness. If he asks there has to be witnesses, but the one making the will usually does not know the law. So, if the testator asks for witnesses and the notary tells him that there is no need for witnesses to be present, most probably the testator will rely on the notary and makes his will without any witnesses.
  - Default is that NO WITNESSES ARE REQUIRED:
  - TWO Exceptions:
  - (a) whenever any of the appearers so requests;
  - If there are no witnesses how can this be proved?
- If the person asked for witnesses who is to say he did so? The only person who can say so is the notary or anyone else in the room. Do you think the notary is going to refuse to have witnesses if there is someone hearing the testator? If the testator is dead, and during the making of his will he says that he wants witnesses, and there is his wife or there are his children next to him, if there are witnesses, the notary will play it safe and get witnesses.
- So, the danger of this situation and the fallacy of this section of the law is that when the testator asks for a witness in those situation where you want the testator to be most protected, he is at his most vulnerable. Once the act is done he cannot speak because he will be dead, the will will be opened after his death. There is no one to prove that the testator wanted witnesses. It is only the word of the notary. The notary, in the right mind, would not admit that he made a mistake and

that actually the testator wanted witnesses but he failed to do so. He will lose his warrant if he says that and rightly so.

- (b) whenever any of the appearers does not know how or is unable to sign his name:
- Here we are not talking of a person who cannot read and write but only that he:
- DOES NOT KNOW how to sign his name
- Or
- IS UNABLE to sign his name

- Another situation where witnesses are required even under Chapter 55 is if the person is unable to sign his name. This is the absolute minimum of literacy. He does not have to know how to read and write, just merely signing his name. If he can sign his name he does not need a witness, but if he cannot sign his name then you have to have two witness and the notary cannot do away with it, but if he can sign, no matter how untidy that signature is, then he can do away with the requirement of the witnesses.
- In the will itself, if there are no witnesses, the notary is required, he must write down that he explained the situation to the person making the will that if he wanted to he could have asked for two witness. It has to be written down and it also has to be written that the testator chose not to have them. The same applies incidentally to secret wills.
  - Provisos
  - Provided that in the case of public wills
  - and in the case of acts of delivery of secret wills,
  - the notary shall in all cases inform and explain to the testator about the testator's right to have two (2) witnesses present:
  - 2. Provided further that in the case of public wills
  - if the testator chooses not to have two (2) witnesses present,
  - the notary shall in the will declare that he has informed and explained to the testator about his right to have two (2) witnesses present and that the testator chose not to have two (2) witnesses present:

- 3. Provided further that in case of acts of delivery of secret wills
- if the testator chooses not to have two (2) witnesses present,
- the notary shall in the act of delivery declare that he has informed and explained to the testator about the testator's right to have two(2) witnesses present and that the testator chose not to have two (2) witnesses present.
- Clear Conflict between the Civil Code and Chapter 55
- Which law will prevail? Lex Specialis and Lex prioris rules
- Is it worth taking a risk?
- Why does the law require witnesses?
- What happens if there are witnesses?
- What happens now if there are witnesses and they are not competent witnesses in terms of law?
- If will is null ab inizio there is no time bar. The will NEVER EXISTED

- In the case of conflict, which law will apply, the one in the Civil Code or Chapter 55? We are talking about legality here not abuses.
- You have a general law, the Civil Law, saying that you need two witnesses and a special law saying that you can do away with them. In the interpretation and application of laws, it is the special law which will apply, lex specialis derogat lex generalis. If we had to come to Court the Court will probably apply Chapter 55. But if you are a notary, do you want to take that risk? Do you want to take the risk of your reputation being put at stake and the will that you publish being challenged because it was inconvenient for you to find the witnesses and put the testator's wishes at risk? Because if the Court says that you needed two witness and you did not have these two witnesses, then that will is null. So this person's last wishes are going to be sacrificed. Do you want to be in that position and take that risk?
  - Maria Asssunta Azzopardi et vs Anthony Camilleri et Rik 13/06 AE (PA Gozo) dec 13/3/2009
  - L-azzjoni ta 'nullita 'hi mpreskripibbli, kuntrarjament ghal dik ta 'annullabilita ' soggetta ghall perjodu ta 'hames snin (Art. 1442);
  - In-nullita 'tista 'tigi eccepita minn kull min ghandu nteress u wkoll mill-qorti ex officio (Art. 1421);

- M’huwiex possibbli li kuntratt null jigi sanat jekk il-ligi ma tiddisponix mod iehor, mentri kuntratt annullabbli hu sanabbli (Art. 1444).

- If you look at case law on the requirement of witnesses, case law is very strong on this before this amendment. Our Courts have consistently held that the presence of witnesses has a twofold benefit. Apart from protecting this situation as being abusive, it also protects the notary. It protects the integrity of the will but it also the notary.

  - WITNESSES

  - Civil Code: must be literate in that they must be able to sign

  - Re: Public Will, the heirs, legatees, or their relations by consanguinity or affinity within the degree of uncle or nephew inclusively are not competent witnesses

- As far as witnesses are concerned, if there are witnesses, there are certain requirements.

- What happens if you do have witnesses but one of them is not a qualified witness? If you take the step to have witnesses, then you have to abide by the law. If the witness is not valid that will will be null. If the testator relied on the fact that he has witnesses, and chose to have witnesses, then those witnesses must be competent and capable witnesses according to the law. If not, that will will be rendered null, not annullable, null.

- There are requirements of relationships that the heirs, legatees, or their relations by consanguinity or affinity within the degree of uncle or nephew inclusively are not competent witnesses. So anyone benefitting from the will or anyone related to someone benefitting from the will, up to degree of uncle or nephew, cannot be witness.

  - WITNESSESUnder Chapter 55 no person shall act as a witnesses

  - 1)Unless he is 18 yrs of age or more,

  - 2)Unless he was born in or is residing in Malta

  - 3)if he has an interest in the will

  - 4)Is blind or deaf or dumb

- 5)Is related to the notary or to any of the parties or appearers, by consanguinity or affinity in the direct line in any degree or in the collateral line up to the third degree inclusively;
- 6)Is the spouse of the notary or of the testator/s
- 7)Does not know how to or cannot sign.

- Under Chapter 55 there are more requirements: Unless he is 18 years of age or more; Unless he was born in or is residing in Malta; If he has an interest in the will, is blind or deaf or dumb, that person cannot be a witness. If he is related to the notary or to any of the parties or appearers, by consanguinity or affinity in the direct line in any degree or in the collateral line up to the third degree inclusively, is the spouse of the notary or of the testator, does not know how to or cannot sign?
  - Trapani vs Hili 2558/96 PA 4/12/1998 confirmed in Appeal 6/10/2010
  - the witness was the husband of the daughter of the heir.
  - The Will was declared NULL
- In the case of Trapani vs Hili, decided by the First Hall of the Civil Court on the 4th of December 1998, and which was confirmed in Appeal on the 6th October 2010, the witness was the husband of the daughter of the heir. The Will was declared Null
  - Surprising that the legislator has chosen to relax the requirement for witnesses
  - Protection and Check on the Notary
  - There were situations of abuse:
  - Eg a Contract (3/7/2013 Vassallo vs Sciberras 844/2004 LFS).
  - Not having witnesses on a public will certainly places more responsibility on the Notary and also makes it easier for abuse without the possibility of disproving what the Notary has declared.
- Look up the judgement Vassallo vs Sciberras, decided on the 3rd of July 2013, per Judge Lino Farrugia Sacco. This was not a Court case about a will but it was a Court case about a contract of sale.
- Where there was this woman, she was a spinster, had no children and she lived with the nuns in an old people’s home in Mosta. One day she received a letter

form the Inland Revenue Department informing her that an architect is going to inspect the property for a contract of sale. She said that she never signed any contract, so how can it be that she received such notice? She spoke to her procurator who used to visit her every day and told him to check it out. He did, and found out that there was a contract published by a notary where she sold property and in this contract it was stated that the price will be paid over a period of time, something like a €100 a month.

- So this person sold her property and did not receive a single penny on paper. There were two witness, and this contract was done in Qormi. So on paper this contract looked perfect, and it was registered in the public registry. She challenged this contract and said that how come she could have gone to Qormi if she never left the home? The buyer said that she did in fact leave the home, and he himself came to pick her up from there and took her to the notary's office. The witnesses said that they remember this woman, she came to the notary and that she was very weak.

- However, the nuns, when they testified said that this woman never left the home. If she left the home they would have known, so it was for sure she did not leave. There was no way she could leave. The Court believed the nuns and said that this contract of sale was a total fraud.

- So you had a contract published by a notary, countersigned by two witnesses and the Court declared it as a fraud, let alone a will without any witnesses when we have this corrupt situation taking place. Even though there were two witnesses, because this woman could not sign, she could only put an 'X', they still found two people to fraudulently put their names down. So whether this woman was at the notary's office, it was definitely believable, they must have got another woman who pretended to be this woman. The situation did occur, these two witnesses were totally believable.

    - Leonard Abela vs Saverin Sinagra (8/4/2013 – 729/08AE) the court noted:

    - Il-presenza tax-xhieda tidher li hi ntiza sabiex tiggarantixxi li hadd ma jezercita pressjoni jew influwenza fuq it-testatur u ghalhekk li t-testment jirrifletti l-volonta tieghu.

    - A case where it was alleged that there were no witnesses present.

    - Will (and Notaries) saved by the skin of their teeth.

- This is another case, this was a judgement before this law was changed. In this case there were two spinsters and they called a notary because they both wanted to make a will. They were both together in the house, and they both did an

identical will, where they left everything to each other and in default it goes to someone else. There were no witnesses present for the will, the surviving spinster said. It was just the two sisters and the notary. Yet, when the sister's will was published, there were two other signatures, one of them of another notary, who was a colleague of the notary publishing the will. A dispute arose as to the validity of the will. The surviving sister testified clearly that she and her sister were alone and that there were no witnesses. The witnesses went to Court and denied this, and there was a conflict situation.

- In the end, Judge Ellul ruled in favour of the validity of the will because there was no doubt that that was the wish of the person making the will. He went on to say that he is believing the witnesses, even though he has some doubt, he is choosing to believe the witnesses that they were there because it would be incredulous and stupid for the notary publishing the deed and the second notary witnessing the deed to have done something so wrong, and taking false testimony beforehand, knowing full well that if the Judge decides otherwise not only will they lose their warrant but they are also subjected to criminal proceedings.

- So the judge probably knew that the spinster was correct but he also knew two things, one that the will was genuine and secondly if he decided otherwise two or three people are going to jail and they're going to lose their warrant and of course the will was changed and this judgement has quoted a part of it but if we read it all, we'd be surprised with the thinking of the judge and how very close he was, really really close to deciding in the opposite way.

- "Il-presenza tax-xhieda tidher li hi ntiza sabiex tiggarantixxi li hadd ma jezercita pressjoni jew influwenza fuq it-testatur u ghalhekk li t-testment jirrifletti l-volonta tieghu."

- So here we have a situation of a will with two witnesses going for the riggers of the law and yet after this judgement the legislator changed the law.

  - Law places a heavy weight on Notary to properly record the testator's wishes.

  - If nobody is "watching" who can control what the Notary has written?

  - - the testator of course but……..

  - Under Chapter 55 Witnesses can also be dispensed with if the testator is deaf and dumb even though the CIVIL CODE still provides for stringent additional requirements.

  - Legislation : regulatory and also protective.

- Who are these amendments protecting?
- Does the Notary have to explain the contents of the will?
- Other than the explanation contained in the will when the testator elects not to have any witnesses, the Civil Code does not require the Notary to explain the contents of the will except in the case of a deaf person who does not know how to read.
- Since the Notary is sole person who is competent to read and explain the will this implies a consequent duty for him to do so and record this in the will itself as otherwise it would have been pointless to designate the Notary's exclusive competence without a corresponding obligation
- Vide Case dec 5th October 1904 "Luigi Mallia Tabone vs Carmela Camilleri"

• Does the notary have to explain the contents of the will? What does the notary do? The notary writes down the will, and he is only bound to read it and give a brief explanation. In fact at the end of a will the notary will say "in debita censo razzjoni", it is like he is saying that he done, read and published it after a brief explanation. So the reading and the explanation of the will have to go hand in hand. He does not just read it. He makes sure that the one reading it, the person making the will is satisfied with the comments. If there is a doubt, it will be explained. If need be, it would be changed and re-written.

- A dispute arose where the testator's identity card number was not correctly written in the will. In Bernardina Riolo vs Joseph Cassar (App 9/10/2001) the Court stated:
- " Il-Qorti m'għandhiex dubbju li f'kull testament huwa obbligu impellenti u suprem ta 'kull nutar li jizgura ruħu mil-identita 'tal-persuna tat-testatur."
- And went on to add that the fact that a different number was used did not necessarily mean that the Notary had not identified the testator and went on to dismiss the appeal.

• In the case of Bernardina Riolo vs Cassar, a dispute arose where the testator's identity card number was not correctly written in the will. Plaintiffs alleged that the will was done not by the testator but by someone else because the ID Card number did not match. In actual fact it did not match, but what happened was that our ID Card system was changed. Originally, when ID Cards came out in 1976 it was not related to your birth certificate number, it was some kind of random number. Later on the system was changed.

- The Court stated:
- “ Il-Qorti m’għandhiex dubbju li f’kull testament huwa obbligu impellenti u suprem ta ’kull nutar li jizgura ruħu mil-identita ’tal-persuna tat-testatur.”
- It went on to add that the fact that a different number was used did not necessarily mean that the Notary had not identified the testator and went on to dismiss the appeal.
    - Burden of proof in allegation of lack of formalities:
    - John Pace nomine et vs Carmela Chircop fl-4 ta ’Gunju 1964 (Judge M Caruana Curran) which stated:-
    - “…. meta min jimpunja t-testment minhabba vizju ta ’forma jipprova l-kaz tieghu prima facie jew almenu iqanqal dubbju serju u ragonevoli jekk il-forma gietx rispettata, minn dak il-mument il quddiem jispetta lill-parti li tallega l-fatt positiv tal-osservanza tal-forma li tippruvaha.”.
    - FATT POSITTIV
- Burden of Proof in Allegation of Lack of Formalities, on who does the burden of proof lie?
- In practice, a distinction is made between the proof of a positive fact and the proof of a negative fact. The general rule is that it is impossible to prove a negative and that it is only possible to prove a positive. In order to prove that I did not go to Gozo today, I have to prove that I was somewhere else. So I have to disprove a negative by proving a positive.
- In Court, when it comes to evidence, the Court is always dealing with the proof of a positive fact and the burden of proof will lie on the person who has to prove that positive acts, min jallega jrid jipprova who alleges must prove.
    - Take for example a paternal case, a father, or a husband, states that no way he could have been the father and it is impossible. To prove that possibility, he has to prove the impossibility of co-habitation. He can only do so by proving that during the period of conception, he could have not physically have had contact with the wife, for example he was abroad. He has to prove a positive fact.
- The dispute arose regarding an alleged formal validity of a will. Judge Caruana Curran reasoned that as soon as a doubt is created, then the proof of the form has to come by the person proving validity.

- So if for example, it is alleged that a witness was not a competent witness, in Judge Caruana Curran's reasoning, the ones defending the will have to prove that that witness was competent because he wanted to prove a positive fact.
- 8th April 2013 (729/2008 AE) Leonard Abela et Vs Saverin Sinagra
- The court did not agree with this conclusion and went on to state
- " Il-qorti tistqarr li ghandha rizervi dwar din l-affermazzjoni in kwantu fil-fehma taghha:-
- i.Id-dubju ghandu jimmilita favur il-validita 'tat-testment meta tqies li fuqu hemm il-firma tat-testatur.It-testment hu fih innifsu prova tal-osservanza tal-prova.
- ii.Jekk fuq semplici dubju dwar jekk gietx segwita formalita 'wiehed jasal biex jannulla testment, dan iwassal ghal stat ta 'incertezza fejn m'hemmx bzonnha.
- iii. Hu minnu li l-presenza tax-xhieda hi formalita 'essenzjali, pero 'fil-fehma tal-qorti d-dubju ghandu jimmilita favur il-validita 'tat-testment ghall inqas zgur fejn jirrizulta, kif irrizulta f'dan il-kaz, li dak li jinghad fittestment hu fir-realta 'dak li riedet it-testatrici.
- Ghalhekk fil-fehma tal-qorti fejn jibqa 'jipprevali dan id-dubju, il-presunzjoni li gew osservati l-formalitajiet ghandha tipprevali."

- We're quoting a judgement by Judge Anthony Ellul great fan of judge caruana Curran's judgements and he is disagreeing, if someone is alleging a doubt that person must prove the doubt, there is a presumption of validity, a will is presumed to be valid. If someone is alleging that it is not valid, something is missing, there's lack of formality, that lack must be proved. If there is insufficient proof the case will be dismissed. This was the judgement dealing with the two witnesses we just mentioned. he decided in favour of validity, that presumption of validity carried a lot of weight and the Judge in verifying whether the witnesses were competent, if they were witnesses at all, he said the will looks valid, if there was someone alleging the witnesses were not there he has to prove it, there's a conflict of evidence between A and B I do not know who to believe, case dismissed because you have not proved your case. The judge said as soon as the doubt is shown the burden of proof shifts.
- In a normal case, in any case forget wills, its almost impossible if not impossible to prove something negative, you can't prove that today you didn't go to valletta. The only way you can prove it is to show something probable that you were at home all the time. You have to provide. This explains caruana Curran's

conclusion, someone threw a doubt and he shifted the burden of proof and in his statement and that's why we pointed it out.

- "…. meta min jimpunja t-testment minhabba vizzju ta 'forma jipprova l-kaz tieghu prima facie jew almenu iqanqal dubbju serju u ragonevoli jekk il-forma gietx rispettata, minn dak il-mument il quddiem jispetta lill-parti li tallega l-fatt positiv tal-osservanza tal-forma li tippruvaha."
- The judge is saying if there's a doubt prove the positive fact, prove that that person was a witness, prove that the person was a competent witness, that was what Caruana Curran was saying there are two versions of evidence which were conflicting. The spinster said there was no one there, the two witnesses said they were there and the judge believed them all. So if there is a conflict and the judge doesn't know who to believe who wins? Judge Ellul said there's a conflict, I don't know who to believe and therefore I will decide in favour of the validity of the will. If he applied the Caruana Curran test, the conclusion would be different, if he applied the Caruana Curran test which said that once there is a doubt then the validity must be proved, the court would have said there's a conflict of evidence there is insufficient proof of validity therefore the will is null.
- So judge Ellul decided to change caselaw because he wanted to rely on the presumption of the validity of the will an issue which Caruana Curran did not take into consideration.
- Where it a normal contract, Dr. Borg Costanzi would say Caruana Curran's would be the correct situation but because it was a will and because of the legislator and caselaw gives strong protection to the will it gives a presumption to validity therefore this presumption carries weight and in case of a doubt the doubt goes to the favour of the validity of the will.
- it's an important judgement and it is a judgement which in a similar situation will be quoted.
    - Date and time:
    - The will must state the date and time it was made and these must be in the Notary's own handwriting.
    - Signatures
    - Both the notary and the testator have to sign on all the pages in a will.

- When there are witnesses, the witnesses sign on the last page only, unless the testator cannot sign (reason to be mentioned in will) in which case the witnesses have to sign each page of the will.

- Going back to formalities. The will must state the date and time it was made and these must be in the Notary's own handwriting.

- When it comes to signatures, both the notary and the testator have to sign on all the pages in a will. Every single page has to be signed by the notary and the person making the will.

- When there are witnesses, the witnesses however only sign once on the end, unless the testator cannot sign (reason to be mentioned in will) in which case the witnesses have to sign each page of the will.

  - Secret (???) will by person totally deaf.

  - 669. (1) Where a person who is totally deaf, but can read, desires to make a public will, he shall read such will himself in the presence of the notary and the witnesses, and the notary shall, before the will is signed by himself and the witnesses, enter, at the foot of the will, a declaration to the effect that the will has been so read by the testator.

  - (2) Where, however, such deaf person cannot read, he himself shall declare his will in the presence of the notary and the witnesses, and the notary shall, before the will is signed by himself and the witnesses, enter, at the foot of the will, a declaration to the effect that the will is in accordance with the will as declared by the testator.

- Here we're going to a situation where people have some deficiency in hearing, talking or writing and The law caters for this situation in Article 669 of the Civil Code

- When a will is made, the notary has to read it out. When a person is deaf, he/she cannot hear, so the law says that when someone is deaf, he has to read the will himself. So if he can read, and he is deaf, then this person can make a public will. The notary has to write down that this person is deaf but he/she read the will himself/herself (Article 38 of Chapter 55).

- If the person cannot read and he is deaf, then there has to be someone to communicate with this person, there has to be someone who can interpret the will and communicate with this deaf person in sign language or in any way that this deaf person understands (Article 38 of Chapter 55).

- So till now we have stated someone who is deaf and can read and someone who is deaf and he cannot read but in both of these instances, this deaf person can still sign his name.
- What happens if he cannot sign his name? If he cannot sign, there is a problem, and, for sure, witnesses are needed. The Civil Code does not make any special provision in respect of a dumb person who cannot read and write and such person must therefore follow the same process as any other illiterate person.
- However, Article 38 of Chapter 55 imposes the extra requirement that one of the witnesses or an interpreter, as the case may be, could communicate with the testator in sign language.
    - The note in the margin refers to secret wills but in fact the dispositive part of the law refers only to Public wills
    - TOTALLY DEAF BUT CAN READ
    - Obviously since the testator is deaf it is pointless for the Notary to read out the will. Hence the testator himself must read the will and this must be ascertained by the notary as well as by the witnesses. This is to be duly recorded in the will (Art 38 of Chapter 55).
    - If the deaf testator cannot read and as long as he can sign, the will can still be done but as we have seen, he is to be assisted by a witness who could communicate with sign language or if none do understand such language, by an interpreter who could. (Art 38 of Chapter 55)
- If the deaf person wants to do a secret will, he can do so as long as he can read and write, or, as we shall see, if he can sign his name. If he cannot read and write then he can only do so like any other illiterate person by seeking the assistance of a Judge or Magistrate.
- Keep in mind that the law here is talking about signatures, it is not talking about writing. The person concerned must be able to sign his name. It does not matter if he does not know how to write an essay. As long as he can sign it is enough.
    - DUMB PERSON who cannot read or write
    - The Civil Code does not make any special provision in respect of a dumb person who cannot read and write and such person must therefore follow the same process as any other illiterate person.

- However Art 38 of Chapter 55 imposes the extra requirement that one of the witnesses or an interpreter, as the case may be, could communicate with the testator in sign language.
- If the deaf person wants to do a secret will,
- he can do so as long as he can read and write
- or, as we shall see, if he can sign his name.
- If he cannot read and write then he can only do so like any other illiterate person by seeking the assistance of a Judge or Magistrate.

- Later on we will come to a situation where there is a conflict in the Maltese and English text they don't agree and this issue comes along.

17th April 2023

Lecture 13.

- Law of Succession
- Lecture 16
- Types of Wills continued
- Dr Peter Borg Costanzi

- In the last lecture, we dealt with public wills, namely a will drawn up by a notary and registered in the public registry. The reason why it is a public will is because it is registered in the public registry.
- The law also provides for what we call 'secret wills'.
  - ORDINARY WILLS
  - Public Wills
  - Secret Wills
  - PRIVILEGED WILLS
- It is called a secret will not only because the information is confidential but because you cannot find out that a secret will had been made unless you present a death certificate. A secret will is lodged in the safe in the Court of Voluntary Jurisdiction. You cannot find out if one exists without presenting a death

certificate. So as long as the person is alive there is no way of knowing whether that person has done a secret will or not. That is why it is called a secret will.

- Form of secret will.
- 656. (1) A secret will may be printed, type-written or written in ink either by the testator himself or by a third person.
- (2) Where the testator knows how to, and can write, the will shall, in all cases, be signed by him at the end thereof.
- (3) Where the testator does not know how to, or cannot write, the provision of article 663 shall apply.

- Now, normally when there is a secret will, it is not usual for a will to be done in this way, so it means that there is something unusual going on, or maybe the person making the will wants to hide the fact that he has done a secret will. There is a hot potato somewhere, and normally wherever there is a secret will there has to be a degree of conflict, and with conflict there comes scrutiny. If I am not happy with the will, I try to see if I can challenge it and try to see if there is something technical to prove this will as invalid.
- So, normally a secret will, besides creating, or giving rise to some form of conflict in a situation, it will also give rise to queries.
- How do secret wills come about? Before 1868, we did not have a Civil Code, and our laws on inheritance where somewhat different. In order to find out whether a person made a will, you had to go to all practicing notaries there were around 15 to 20. There was not even a public registry, so the only way you can get the information was from the notary himself. You go to the notary and you had to rely entirely on the integrity of the notary. There was nothing to stop a notary from hiding whether the deceased made a will or not, and this was one of the problems that was addressed when the public registry was created. When it was created, it because compulsory on all notaries to register any public will within a specific period of time.
- Nowadays it is twenty-one days, So within twenty-one days the notary has to enrol the will, and the fact that the person has done a public will is recorded. At the end of the year, the volumes of wills of the notary are bound, and handed in to the Government, and kept by the Notary of the Government. The notary himself would keep a copy, what is called a ‘register’. So there are two sets, one held by the Government and one copy held by the notary. These are public wills.

- What happened to those wills before 1868? The law stated at that time that all notaries have to deposit all the wills in the Civil Court Second Hall and all the will which existed at that time became secret wills. That is how secret wills started. These were the first secret wills that were recorded, the ones which were handed in by various notaries in the 1800's to the Civil Court Second Hall. In that Court, there are registers going back to 1868 recording every single secret will that was deposited. Of course, in 1868 we have wills going back even to the 1700's.

- What is a secret will? A secret will is a will that can be written on any simple piece of paper. I can write it myself, I can sit at my desk and write out my will. Normally a secret will, nowadays at least, is drafted by a notary as well, or by a lawyer. Normally there is the assistance of a legal person. There doesn't have to be assistance by someone vested in the law but normally it is.

- The law says that it has to be printed, typewritten, or written in ink. It can be even written out by a third party, so it is not just the testator who can write such will, even his notary, his friends or his wife can write out his will.

  - 663. Dawk li ma jafux jew ma jistgħux jaqraw u jiktbu, ma jistgħu jagħmlu ebda dispożizzjoni b'testment sigriet mingħajr l-għajnuna ta 'mħallef jew maġistrat.

  - 663. It shall not be lawful for any person who does not know how to, or cannot write, to make any disposition by a secret will without the assistance of a judge or magistrate.

- The law says that if the testator knows how to, and can write, the will shall (so this is compulsory) in all cases be signed by the testator himself at the end of such will. So here the law only requires one signature at the very end. If the testator cannot write, then the law send you to Article 663 of the Civil Code. this is where problems start.

- Let us go back again to the previous section:

- Section 656 says that if you can write, you just sign at the end, if you cannot write you have to go to section 663. So section 656 only requires the faculty of writing and if you can write, the faculty of signing your name. So it reduces itself to being able to sign.

- If you go to Section 663, if you cannot write, in Maltese it says that you have to be able to read and write, in the English text it says that you only need to know how to write.

- Which of these two texts will prevail, the Maltese or the English text?This issue arose in Court. There were two cases where legalities of secret wills were addressed from an academic point of view.
- In the case of Maria Spiteri vs Rev Sac Don Giuseppe Mamo et, decided by the Court of Appeal on the 4th May 1923, the issue arose whether the will had to be written by the testator himself, whether he was the one who had to author the writing. The Court made reference to other legislations which actually required the testator to write the will himself. However the Court said that our law is different and in fact our law allows the will to be written by a third party. So the writing of the will itself does not have to be written by the person making the secret will.
- When it came to the case of a person who could not read or write, until 1980 the law stated that in the conflict between the Maltese text and the English text, the English text will prevail. So it was clear that if this issue had to arise before 1980 the law requires only writing. With the Statute Law Revision Act in 1980 the law was changed and it said that in the case of conflict between the Maltese text and the English text, the Maltese text will prevail. What is interesting though is that the law hasn't changed. The same wording of the law interpreted under the English text till the 1980 and after the 1980 interpreted the Maltese text.
    - Inconsistency between Art 656 and Art 663:
    - Art 656:
    - If he can write – he MUST SIGN
    - If he cannot write: Art 663 applies
    - Art 663:
    - If he cannot READ AND WRITE: Needs assistance of a Judge or Magistrate
    - Or is is just "WRITE"? Difference between Maltese and English text
    - Inconsistency between Art 656 and Art 663:
    - Art 656:
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    - If he cannot write: Art 663 applies
    - Art 663:

- If he cannot READ AND WRITE: Needs assistance of a Judge or Magistrate
- Or is is just “WRITE”? Difference between Maltese and English text
- Annie Ferrito vs Josephine Cassar (723/2005 TM PA dec 5/7/2007) which was confirmed in Appeal on the 26/3/2010).
- This case concerned a number of secret wills which were signed by the testator and written by the Notary.
- It was alleged that the testator
- could not read and
- he could not write and
- that his signature was a mere tharbixa”.

- What does this mean? Under the Maltese text those who cannot read or write need the help of a judge. However, the Courts have interpreted it slightly different. In this case of Ferrito vs Cassar the evidence produced was that this person could not really read and he could barely write and even when it came to the signature, it was just a scribble.
- The Court eventually said, both at First Instance and in Appeal that as long as this person could sign his name it was not important how the signature was done, how clear it was. As long as that was his signature he could write. So the minimum requirement was being able to sign, if that was his signature he could write. In this way, the Court protected the validity of a will.
- So when it comes to a will, if the Court has no doubt at all about is genuinely, the Court will protect that will. If you read this case, you will see that this person made many secret wills, it was not just this one. The Court had no doubt that this was a genuine secret will done by this person and therefore it bent over backwards and protected it by accepting the minimum, just a simple signature.
- Interestingly, there was a Court case which decided differently. According to Dr Borg Costanzi, this case is the exception to the rule. This is the case of:
  - The first issue raised was the difference in wording of Section 663 whereby the English text only mentions “writing” whilst the Maltese text mentioned “Reading and Writing”. Whilst Section 656 – both in the English and the Maltese text mention only “writing”.

- The Court first decided which of the two texts prevail. Judge Tonio Mallia at 1st Instance held:

- Conflict was resolved by the rules of interpretation, l-artikolu 8(3) tal-Att ta` l-1980, Dwar ir-Revizjoni tal-Ligijiet Statutorji, issa jipprovdi li “jekk ikun hemm xi konflitt bejn it-test Malti u t-test Ingliz ta` xi edizzjoni riveduta, it-test Malti ghandu jipprevali

- Once the Maltese text prevails this means that the testator must be able to BOTH READ AND WRITE. – otherwise he must resort to the assistance of a Judge or Magistrate.

- Judge Mallia however went a step further:

- Jidher pero`, f`kull kaz, li, ghal-finijiet tal-applikazzjoni ta` dan l-artikolu, mhux rilevanti jekk it-testatur jafx jew le jaqra, izda l-kriterju importanti hu jekk jafx jew le jikteb. - SEEMINGLY ARGUING THAT 663 ONLY KICKS IN IF THE TESTATOR CANNOT WRITE.

- Basing himself of Caruana Galizia (Page 998) he also stated that if one can sign he is presumed to be able to write.

- Purpose behind this requirement is to protect the “sincerity of the will”

- Jidher li m`ghandekx bzonn xi kapacita` kbira biex jista` jitqies li bniedem hu kapaci jikteb, u r-rekordjar ta` isem jitqies bhala rizultat ta` min hu kapaci jikteb. It-testatur Nazzareno Abela jidher li ma kienx jaf jaqra u jikteb fit-tul, pero`, b`mod jew iehor, kien jaf jikteb ismu, u jekk l-firma tieghu, maghmula bil-mod deskritt min-Nutar Bonello du Puis, tghodd ghal-fini ta` testment pubbliku, ghandha ghaldaqstant iehor tghodd ghal-fini ta` testment sigriet. Kwindi, ghal-fini tal-artikolu in ezami, ma jistax jinghad li hu ma kienx jaf jikteb; it-testatur ma kienetx persuna illiterata ghall-ahhar, u kwindi l-formalitajiet imposti bl artikolu 663 ma kienux mehtiega li jigu segwiti.

- La darba l-ligi tista` tigi interpretata b`mod wiesgha, ghandha hekk tigi interpretata biex jinghata effett lill-volonta` tat-testatur. Min jaf, it-testatur, kemm inkwieta u haseb fuq it-testmenti tieghu qabel ma dawn gew redatti, u l-Qorti ma tarax li ghandha, b`semplici daqqa ta` pinna, thassarlu kollox meta l-ligi tista` tigi interpretata b`mod li salva dak li sar.

- In contrast see Micallef vs Farrugia 687/09 GCD dec 11/10/2011 where the court in a very curt judgement held that whilst it was not necessary for the

testator to have written the will himself, even though he does proceed to sign it, the secret will is only valid if he could both read and write:

- 14. Għalkemm is-sub-artikoli (2) u (3) isemmu biss jekk it-testatur ikunx jaf jikteb, u ma jgħidu xejn dwar jekk jafx jaqra wkoll, dawn b'ebda mod ma jolqtu l-applikabilità tal-art. 663 għax jirregolaw biss il-ħtieġa ta 'firma, u mhux il kapaċità ta 'min jagħmel testment sigriet bla għajnuna, li hija biss ta 'min jaf kemm jikteb u kemm jaqra.

- 15. Lanqas ma hu biżżejjed li, biex jitqies li "jaf jikteb", it testatur ikun jaf biss jiffirma jew, kif ipoġġuha l-atturi, "ipinġi" jew "jiddiżinja" l-firma tiegħu bħal ma l-atturi jgħidu li kienet taf tagħmel Salvina Armeni. Il-liġi fl-art. 663 trid illi t-testatur ikun jaf jaqra u jikteb, u mhux biss jiffirma ismu, għalkemm ma tridx ukoll illi t-testatur jikteb it-testment b'idejh..

- In this case, the Court said that in this case a person making a secret will who cannot read and write needs the help of a judge and in this case the Court required the person to be able to read.

- In fact if you compare this judgement with the previous one you will see how differently the Courts approached the case. in the first one, a 'tharbixa 'of a signature was enough. In this case, the Court said that the fact that a person could actually draw his signature was not enough. From the strictly legal point of view, it is the first judgement that is correct and valid.

  - Paper containing secret will to be closed and sealed.

  - 657. (1) The paper on which a secret will is written, or the paper used as its envelope shall be closed and sealed.

  - (2) The testator shall on delivering such paper declare that it contains his will.

  - Here the law is going into the steps on how the secret will is to be presented to the Court of Voluntary Jurisdiction. The will must be closed and sealed.

  - On the outside the testator must be state that the document represents his will and testament.

  - The Court staff are thus not able to know the contents of the will. The will remains sealed until it has been opened by the judge following the death of the testator.

- What happens to the secret will? The secret will is put in a sealed envelope, and the testator delivering it has to declare that that is their secret will. So when one

goes to Court with their secret will, he presents a sealed will. It has to be already sealed, it is not sealed in Court. The employees in Court do not know what is inside that envelope. All they know is what is written outside the envelope.

- Delivery of secret wills.
- 658. (1) A secret will shall be delivered by the testator to a notary, or, in the presence of the judge or magistrate sitting in the court of voluntary jurisdiction, to the registrar of such court.
- (2) The will shall be deemed to have been made on the day on which it is so delivered.

- When the person writes that that is his secret will, he has to also write his particulars on that envelope because those particulars will be recorded in the register. If the secret will is delivered by the Notary, there are also the details of the notary written on the envelope.
  - The will must be hand delivered by a Notary or else the testator may hand it over to the Registrar of the Court of Voluntary Jurisdiction in the presence of a Judge or Magistrate who would be currently presiding such court. It may take a bit of waiting for this to be co-ordinated. It is important to note that the will is considered as having been done on the day it was delivered and not on the day it was written.
  - When the testator delivers the secret will himself, the note of the particulars on the paper on which the will is written or on the envelope containing it, as the case may be, is equivalent to a note of delivery.
  - Duties of notary receiving a secret will.
  - 659. (1) The notary who receives a secret will shall draw up the act of delivery, recording therein the declaration prescribed in sub-article (2) of article 657, on the paper itself on which the will is written, or on the paper used as its envelope.
  - (2) The act of delivery shall be signed by the testator, the witnesses, and the notary.
  - (3) Where the testator declares that he does not know how to, or cannot write, the notary shall enter such declaration at the foot of the act, and such entry shall be equivalent to the signature.
- Now, if you go to this technical part of the law you will see in great detail giving an exact explanation of what the notary has to do when delivering a secret will. The

will must be hand delivered by a Notary or else the testator may hand it over to the Registrar of the Court of Voluntary Jurisdiction in the presence of a Judge or Magistrate who would be currently presiding such court. It may take a bit of waiting for this to be coordinated. It is important to note that the will is considered as having been done on the day it was delivered and not on the day it was written.

- When the testator delivers the secret will himself, the note of the particulars on the paper on which the will is written or on the envelope containing it, as the case may be, is equivalent to a note of delivery.

- Upon receiving the will the notary shall record it's delivery in the presence of two witnesses and this must be written on the paper on which the will is written or, if the will is in an envelope (as is usually the case) on the envelope itself. This must also be signed by the testator.

- These formalities are there so to make sure that there is no doubt of the integrity of the will, that the notary did not swap one document for another and secondly to make sure that the formalities of drawing up the will had been satisfied.

- The person who made the will is dead and gone, he cannot speak anymore so the will has to defend itself and the law goes into great length to protect the integrity of the will and imposes a lot of formalities on the notary having to hand in the secret will. It is a very formal process. In fact, the hand-over of the document is also specified. There has to be a document signed by the notary, by witness (in other words Court staff), that they accept to receive such document.

    - Upon receiving the will the notary shall record it's delivery in the presence of 2 witnesses and this must be written on the paper on which the will is written or, if the will is in an envelope (as is usually the case) on the envelope itself. This must also be signed by the testator.

    - Here the law also envisages the situation where the testator does not know how to, or cannot write. In this eventuality, he must perforce be assisted by a Judge or Magistrate but in such a situation, these latter persons are not mentioned at all by the notary but, as we shall see the Magistrate/Judge have to observe other formalities. To this effect the Notary should ensure that there is the appropriate attestation by and signature of the Judge or Magistrate who assisted the testator. On top of that the Notary has to make a declaration at the foot of the document that the testator cannot sign and this entry will be equivalent to the testator's signature.

- The secret will is drawn up in front of a judge or magistrate, The law also envisages the situation where the testator does not know how to, or cannot write. In this eventuality, he must perforce be assisted by a Judge or Magistrate but in

such a situation, these latter persons are not mentioned at all by the notary but, as we shall see the Magistrate/Judge have to observe other formalities. To this effect the Notary should ensure that there is the appropriate attestation by and signature of the Judge or Magistrate who assisted the testator. On top of that the Notary has to make a declaration at the foot of the document that the testator cannot sign and this entry will be equivalent to the testator's signature.

- Notary to present secret will to court of voluntary jurisdiction.

- 660. A notary who has received a secret will, shall, within four working days, to be reckoned from the day of the delivery, present such will to the court of voluntary jurisdiction for preservation by the registrar, as provided in the Code of Organization and Civil Procedure.

- This section is one of the main reasons why Notaries are very reluctant to draw up secret wills, because they have four working days within which to register the will in the Court of Voluntary Jurisdiction, and in order to register it there has to be a Judge. It is quite a task to have to go to Court, make an appointment with the registrar of the Court of Voluntary Jurisdiction in the presence of the presiding Judge or Magistrate and all this within 4 working days. If he fails to register it in time, it will not render the will null, but it will subject the notary to a fine of between €232 and €2323 (LM100-LM1000)

- The Law here makes a cross reference to the Code of Organisation and Civil Procedure, the relevant sections being Arts 528 et seq.

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- When the Notary hands over the secret will to the Registrar in the presence of a Judge/Magistrate, he is given a receipt. On the envelope itself, the Registrar then notes down the date, the particulars of the testator, the name and surname of the notary (or if delivered by the testator, a declaration to this effect). The registrar must also note the circumstance of the presence of the judge at the presentation of the will. This is signed by the Registrar, the Judge and the Notary/Testator who would have delivered the will. If it is the testator who is delivering the will and he cannot sign, a note to that effect is written on the envelope

- Within 24 hours the registrar must record the will on a special register which is kept for such purpose.
- The Judge's role during and after the delivery of a secret will
- The Judge is to have a copy of the special register and every quarter the judge is to double check that the two books match up. A kind of stock take.
- At the moment of delivery the Judge is to check that when a Notary hands over a secret will, the act of delivery to the notary was duly endorsed by the testator and that such endorsement states that it contains the will of the person from whom the Notary received the will.
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    - At the moment of delivery the Judge is to check that when a Notary hands over a secret will, the act of delivery to the notary was duly endorsed by the testator and that such endorsement states that it contains the will of the person from whom the Notary received the will.
- The law not only makes it very formal to hand over the will, but even the Registers recording the existence of secret wills are very strict. In fact there are two registers, and every quarter, every three months, the Judge who is in charge of the Court of Voluntary Jurisdiction has to check the registers to see if they match. So there is a continuous audit. If one register is destroyed, there is another one which is survived. There are no copies of the will, even if the notary or the testator has a copy, that copy has no legal value.

- Withdrawal of will.
- COCP: 532. (1) A secret will may not be withdrawn before the time comes for its opening, except by the testator himself or by an attorney specially authorized for the purpose.
- (2) The testator or attorney withdrawing the will shall sign in Act of withdrawal. the presence of the judge, in the margin or at the foot of the entry in the book referred to in article 530(1) recording the receipt of such will, a declaration that he has withdrawn the will; and such declaration shall also be countersigned by the judge.
- Civil Code: Testator may withdraw secret will.
- 671. The testator may at any time withdraw his secret will from the notary to whom he shall have delivered it, if the will is still with such notary, or from the registry in which it shall have been deposited.

- What happens if the testator changes his mind? It is not a problem, the testator goes to Court, shows them his ID and they give him the will. It is as simple as that.
- In fact, this takes us back to unica charta wills. With unica charta wills, you will remember that if there is a clause saying that one cannot change the will and if this person changes the will, then he will incur forfeiture.
    - So we have this situation of a husband and a wife with no children and they do a unica charta saying that they leave everything to each other and when the last one passes away, half goes to the husband's side of the family and half goes to the wife's side of the family. When the last one dies, that is what will happen. The husband, behind his wife's back does a secret will and says that he is leaving everything to his nephew. The wife dies first, the husband says that now there is a problem of forfeiture and so he will go to the Court of Voluntary Jurisdiction and he withdraws his secret will. No one knows that the husband ever did a secret will, no one can know that he did a secret will. If the husband withdraws the will, the record of the fact that he had done it and the record of the fact that he had withdrawn it is not available to the public. You cannot find out. It is confidential and it remains confidential.
- When one applies for information on secret wills, one has to submit a certificate of death, and the certificate for wills will say whether there is a secret will or whether there is no secret will done by this person. It will not say that there was a will but it was withdrawn. It will only say whether there is an existing will or if there is not any existing will but if there was one and it was withdrawn, that information

will not be disclosed. Of course, to withdraw it, it has to be done in the presence of a Judge. There is a certain degree of formality.

- It is not a common practice since most times, if a testator changes his or her mind, the testator merely proceeds to make a new will and. However when the withdrawal of the will does happen this is done in a controlled and very confidential manner. A typical case would be when the testator does not anyone to know that a will was done in the first place.

- EG when one spouse has done a Unica Charta will and then does a secret will. After death of 1st Spouse he/she may withdraw the secret will and nobody is the wiser.

- COCP 533. (1) Where a will is to be opened, the court shall by a decree, upon the application of any party interested, appoint the day, time and place for the opening and publication of the will, and order that all interested parties be summoned: those known, by application, and those unknown, by means of banns to be posted up at the entrance of the building in which the court sits and published in the Government Gazette and in a daily newspaper.

- (2) The opening and publication of the will shall not take place before the expiration of four days from the date of service of the said application, or of four days from the date of the posting up of the banns and their publication whichever is the later.

- What happens when it comes to publish a secret will?

- One has to file and application and request the Court to publish the will. If the will was delivered by a notary, that notary will be called to attend. If he has passed away, the Court will find someone else but a notary will be called. The publication process is a formal one.

- Any member of the public can attend the publication process. In fact, the publication process will be held in a room with the doors open, and there will be the Judge, the deputy of the Court and the Notary. Those three have to be present.

- This will then becomes a public will. From a secret will it becomes a public will, and the notary who receives this secret will does an additional note in the public registry and states that he received this secret will. That will be registered in the public registry and that will form part of his public wills. So the original document will be together with the original wills held by the notary and the notary will also keep a copy in his register. So if you want a copy, you either go to the Notary of the Government or to the notary himself. The document is not held by the Court,

it is not the Court which will give you a copy of the will. The Court will only give the original will to a notary.

- 534. (1) The will shall be opened by the registrar in the presence of the judge, at the time and place appointed by the decree of the court, after the signatures affixed by the judge and the registrar at the foot of the note of the particulars mentioned in article 530, shall have been verified.

- (2) After the will is opened, it shall be published in the presence of the judge and the registrar, by the notary who had presented it or, if such notary is dead or absent, or is prevented from attending on account of sickness or for any other reason, or if the will had been presented by the testator himself, by a notary to be selected by the party who made the application for the opening of the will.

- Again, not going through these formalities in the law it's quite detailed

  - Once the secret will is opened after all the formalities required by law, the will itself is given to the Notary who delivered it or, if it was delivered by the testator himself or for some reason that Notary cannot receive the will, then it is handed over to the notary nominated by the applicant who had requested the publication of the will.

  - This will then forms part of the records of that notary and a note to that effect is enrolled in the Public Registry

  - Delivery of will to notary.

  - 535. (1) When the will is published as provided in the last preceding article, it shall be delivered to the notary by whom the publication of the will shall have been made.

  - (2) The notary shall, in the presence of the judge, sign a receipt in the book referred to in article 530; and such receipt shall be countersigned by the judge.

  - (3) Any will delivered in terms of sub-article (1) shall not be deemed to be cancelled from the book referred to in article 530; for the purpose of any document certifying the existence or nonexistence of secret wills, and there shall be indicated in any such document, in respect of any such will, the name of the notary who published it and the date of its publication.

  - Secret will by illiterate person.

- 663. It shall not be lawful for any person who does not know how to, or cannot write, to make any disposition by a secret will without the assistance of a judge or magistrate.

- This was discussed earlier where it was pointed out that the Maltese text stated “read and write” and not just “write” and the conflicting jurisprudence on the matter.

- Remember the conflict between this section and Art 656.

- If the person cannot sign his name, he cannot make any secret wills. So the minimum requirement to make a secret will is that this person can sign his name.

- What is important to highlight is that the Judge or Magistrate cannot substitute their discretion for the discretion of the person making a will. If the person making the will wants to write something stupid and strange, the Judge or Magistrate cannot interfere no matter how stupid or strange that wish is. If the person is mentally capable, he can do what he likes and the Judge or Magistrate merely ascertains that what is written in the secret will is the exact wish of that person. So he ascertains the communication aspect, whether what has been written reflects the true wish of the person making the wish. That is the role of the Magistrate or of the Judge – to ensure the integrity of the will and that it respects the wishes of the testamentary.

  - Duties of judge or magistrate assisting an illiterate person.

  - 664. The judge or magistrate requested to give his assistance under the last preceding article, shall read out and explain to the testator the contents of the paper which the testator declares to be his will, and shall enter, at the foot thereof, a declaration to the effect that he has complied with such requirements, and that he is satisfied that the contents of the paper are in accordance with the intention of the testator. Such declaration shall be dated and signed by the judge or magistrate

  - Formalities to be observed by judge or magistrate assisting an illiterate person

  - 665. (1) The said judge or magistrate shall, after the will is duly closed and sealed, enter on the paper itself on which the will is written, or on that used as its envelope, a declaration to the effect that such paper or envelope contains the will of the person making it, and shall affix his signature to such declaration.

  - (2) Such declaration shall not operate so as to dispense with the act of delivery referred to in article 659 or the note of particulars referred to in article 662.

- Any judge or magistrate even temporarily present in Malta or Gozo may assist illiterate person.

- 666. It shall be lawful for a testator who does not know how to, or cannot read and write, to apply for the assistance of any judge or magistrate being, even temporarily, in the island or place in which his assistance is required, including the judge or magistrate sitting in the competent court in which the will is to be deposited.

- Contents of will to be kept secret.

- 667. The judge or magistrate giving his assistance, as provided in the last four proceeding articles, shall be bound not to disclose the contents of the will.

- The judge or magistrate cannot substitute their discretion with the person making the will, no matter how stupid or strange that wish may be. Here is the communicational aspect of whether what has been written reflects the true wish of the person making the will that is the role of the magistrate or judge to ensure that the wishes are respected of the person making the will. These clauses highlight the importance of the duties of Judges/Magistrates when providing their assistance in the drawing up of a Secret Will. Through this process an illiterate person is ensured that the document he holds genuinely reflects his wishes.

  - Of course, the will must then be delivered to the Registrar of the Court of Voluntary Jurisdiction either by the testator himself or through the services of a Notary.

  - Secret will by a deaf-mute.

  - 668. (1) A person who is deaf-and-dumb, or dumb only, whether congenitally or otherwise, may, if he knows how to write, make a secret will, provided the will is entirely written out and signed by him, and provided he himself, in the presence of the court or of the notary to which or to whom he presents such will, and of the witnesses of the delivery, writes down on the paper which he presents, that such paper contains his will.

  - (2) The notary in the act of delivery, or, as the case may be, the registrar, in the note of particulars referred to in article 662, shall state that the testator wrote the declaration mentioned in sub-article (1) of this article, in the presence of the notary and the witnesses, or in the presence of the court.

- What if a person is deaf or dumb? Or dumb only. Again, if this person knows how to write, it is not a problem. If he does not know how to write, then he is unable to

make a secret will. Despite the note in the margin, this clause also applies to testators who are dumb only.

- This article provides how a literate deaf-mute or dumb person can make a will. Since the law stipulates that the will is to be written out by the testator, this mean that this cannot be printed or typed but must be in the testator's own handwriting. Again the law is seeking to ensure the genuinely of the act and that it is not a will which is being forced on the testator. The controlled process of delivery also protects the safety and confidentiality of the will.

- If the person is illiterate, one would assume that such person can still do a secret will but in this case, besides abiding by the rules of Chapter 55, such person must also seek the assistance of a Magistrate or Judge.

  - Despite the note in the margin, this clause also applies to testators who are dumb only.

  - This article provides how a literate deaf-mute or dumb person can make a will. Since the law stipulates that the will is to be written out by the testator, this mean that this cannot be printed or typed but must be in the testator's own handwriting. Again the law is seeking to ensure the genuinity of the act and that it is not a will which is being forced on the testator. The controlled process of delivery also protects the safety and confidentiality of the will

  - If the person is illiterate, one would assume that such person can still do a secret will but in this case, besides abiding by the rules of Chapter 55, such person must also seek the assistance of a Magistrate or Judge.

  - Persons incompetent as witnesses in public wills.

  - 670. In public wills, the heirs, legatees, or their relations by consanguinity or affinity within the degree of uncle or nephew, inclusively, shall not be competent witnesses.

  - This has already been dealt with. Worth mentioning the case Trapani vs Hili (App 6/10/2000) presided by Judge Joseph Said Pullicino where the court carried out a comparative exercise of various legislations in order to interpret this clause. The court noted that the Maltese text differed in some respects and that this was not by mere chance. The relationship that the law is mentioning here is not to the testator but to the heirs and legatees. Besides excluding the heirs and legatees, the law is also excluding their relatives. In this case, the Court held that the husband of the heir's daughter was not a competent witness.

- In Public Wills, one does not need to have witnesses anymore, but if one does have witnesses, that witness has to be a capable and a competent witness. the issue of capacity and competence is in relation to the notary, his spouse, to the testator and even to the heirs and legatees. In other words, if you are going to benefit or even related to a person who is going to benefit from that will, you cannot be a witness. Section 670 deals with the relationships of heirs and legatees and people related to them. Heirs, legatees or people related to them cannot be witnesses.

- In this case, the Court carried out a comparative exercise of various legislations in order to interpret this clause. The court noted that the Maltese text differed in some respects and that this was not by mere chance. The relationship that the law is mentioning here is not to the testator but to the heirs and legatees. Besides excluding the heirs and legatees, the law is also excluding their relatives. In this case, the Court held that the husband of the heir's daughter was not a competent witness.

  - Nullity of will.

  - 672. Non-compliance with the requirements of articles 655, 656, 657, 658, 659, 663, 668, 669 and 670 shall, saving the provisions of articles 673 to 682 inclusive relating to privileged wills render the will null and void

- When dealing with a nullity of a will, the law says that non-compliance with the law renders the will null. So if there is a strict formality stated by the law, that will is null, it is not annullable, it is null as though that will never existed, no matter how much time passes. If it's null it's always null from day one to time in memorial.

  - Once again it is pointed out that if any of the statutory formal requirements are not observed.

  - This will render the will null. We have seen that the courts lean in favour of validity and try to conserve the wishes of the testator and will not lightly declare a will void "bid-daqqa ta 'pinna" (Ferrito Case).

  - A good example of this is the Sinagra case aforementioned where the Court saved the wills in issue despite the fact that there were extremely strong doubts that the requirement of having witnesses was not complied with.

  - Privileged Wills

  - Art 673- 681

  - Wills in places where communications are interrupted.

- Wills made at sea.
- Requirements are relaxed
- Will considered as short term

- Privileged wills are not related to people of nobility. These are wills made under unusual circumstances and because they are done in unusual circumstances, there is a relaxation of the formal requirements, and therefore they are privileged – you do not need the same amount of formality.
- The circumstances are wills in places where communications are interrupted or wills made at sea, because of these circumstances, such wills have limited timeframes and have relaxed the requirements.
- Privileged wills are considered to be temporary in nature. Once you land and you get your feet back on the ground that will does not exist anymore. It is valid for the trip. The privileged will will safeguard you as long as the perilous situation still exists. If you are still under peril, then that will will remain valid, but once the peril or the unusual circumstance does not exist anymore then you have to do another will. Privileged wills are only allowed in two specific situations:
- Where there has been an interruption in communications by order of a public authority or if made at sea.
  - In these particular circumstances where it may not be possible to find a Notary, Judge or Magistrate or have access the Courts, the law makes it possible for a person to make an urgent will but due to the lowering of the formal benchmarks which are applicable for Public and Secret wills, such privileged will is of short duration and effect.
  - Such wills lapse if the testator survives beyond the expiry of the periods stated in the law.
- In the former, it will remain valid for a period up to 2 months when communications return
- In the latter case, up to 2 months from when the person lands in a place where a normal will may be done. It only applies if the testator dies such intervening period.
- The law does try to impose a certain minimum of formalities in order to ensure:
- That the will was voluntarily and consciously made and that the will is recorded and conserved.

- In these particular circumstances where it may not be possible to find a Notary, Judge or Magistrate or have access the Courts, the law makes it possible for a person to make an urgent will but due to the lowering of the formal benchmarks which are applicable for Public and Secret wills, such privileged will is of short duration and effect.
- Such wills lapse if the testator survives beyond the expiry of the periods stated in the law. So you have a two month window. If that person dies within those two months, the will made at sea or the will made during the interruption of communications then the will will be valid.
- The notion of privileged wills is not something new and in fact the typical situation of privileged wills, is for example when people go to war. They write a will there and then. That will is valid and it will be valid until two months after communications have been restored. So if this persons makes it and goes back home, that will is valid for two months. If this person passes away, his friend who was entrusted with this will can go home, present it to a notary or a public registry, as it should, and that will will be valid. It is a will made in a situation where it is impossible to find a Judge, or a Magistrate or a Notary.
  - Law of Succession
  - Part 15
  - OF THE INSTITUTION OF HEIRS,
  - OF LEGACIES,
  - AND OF THE RIGHT OF ACCRETION OF THE INSTITUTION OF HEIRS, AND OF LEGACIES
  - Dr Peter Borg Costanzi
  - The Institution of heir.
  - 683. Any testamentary disposition, whether made under designation of institution of heir, or under the designation of legacy, or under any other designation whatsoever, shall have effect, provided it be so expressed that the intention of the testator may be ascertained, and it be not contrary to the provisions of this Code.
- We will be going through the difference between heirs and legatees. The main difference between heirs and legatees is that a legacy is a single gift, I give you a legacy of my house, I give you a legacy of my boat, it is something specific.

- An heir, on the other hand, usually denotes a universality. I give you ⅓ of my estate, no matter how big or small it is. No matter what is in the sack you get ⅓. You get a portion, or maybe you get the whole of the estate when you are appointed as a sole universal heir.

- An heir is bound to implement a will. He is a creditor and a debtor. If there are liabilities, he has to pay them. If there are legacies, he has to give them out. Of course, if you are an heir you can accept with the benefit of inventory, and in that case the estate will be kept as a separate patrimony. The sack will not be mixed up with my own assets, and if there are any liabilities they have to be paid out of whatever there is in the sack. Apart from that, the point that Dr Borg Costanzi wants to make is the distinction between a legacy and an appointment of an heir. The law states that a testamentary disposition, in other words what is written in the will, can be by singular title or by universal title. No matter what you call that person or that disposition.

- So if I say that I leave you this gift as an heir, and I leave a specific item, that is a legacy even though I called you an heir. On the other hand, if I leave a statement saying that I leave you as a legacy all my estate, that is a disposition by universal title. So what name you give it is important but it is not the final interpretation. The interpretation will be given according to the content of what is written. The content of the disposition determines whether it is by singular title or by universal title. It is not what you call it but what it contains which defines the disposition.

- Of course, sometimes it may be difficult to interpret a will and the issue of interpretation arises. Interpretations of wills have been cropping up since time immemorial. Normally the general rule is that the will has to speak for itself and if the wording of the will is clear then there is no room for interpretation. You cannot get extraneous opinion, the will has to be what it talks, and maybe previous wills but the will itself has to communicate.

  - Clearly the presumption is in favour of the validity of a will

  - As long as it is not against the provisions of the law

  - And

  - As long as the wishes clearly emerge from the reading of the will

  - It will be given effect – no matter what the bequest has been called.

  - Whether the beneficiary is called a LEGATEE, HEIR or something else, it not the TITLE which counts but the substance

- The person who made the will cannot speak, those are his last words. The courts have been faced with situations where they were called to interpret a will.
  - The courts have been faced with situations where they were called to interpret a will.
  - 4th November 1881 -“Ursola Dimech vs Count Giovanni Barone Cassia”
  - a will being the last wish of the testator is the supreme law to be followed.
  - If the words were clear and unambiguous giving a clear meaning , that that wish is to be respected and enforced.
  - ONLY FOR COGENT REASONS would a court attempt to give a different interpretation to the literal meaning of the word used.
- In the case of Ursola Dimech vs Count Giovanni Barone Cassia, decided on the 4th of November 1881, the Court said clearly that a will being the last wish of the testator is the supreme law to be followed. The will is law. You cannot have a stronger statement than that. If the words are clear and unambiguous that wish has to be respected and enforced. However the Court said that only for cogent reasons would it attempt to give a different interpretation to the literal meaning of the word used. So it has to be something really strong.
- We saw this earlier lectures when Dr Borg Costanzi referred to a judgment delivered by Judge Francesco Depasquale about two months ago. In this case, the issue arose as to the interpretation of the words “by accretion and substitution”. In this case there was a will, there were four children and one child died before the father. There were also some grandchildren. The dispute arose whether accretion takes place first or substitution takes place first. If accretion takes place first, the grandchildren would only get the reserved portion. If substitution takes place first, they will get a quarter, they will be treated as normal heirs.
- The Court, in interpreting the will said that this is a cogent reason, it is clearly a mistake and therefore it stated that the will should be interpreted in that way and the Court that substitution takes place first, accretion second.
- In the Ursola Dimech case, the issue was that the will said “inhalli l-uzufrutt ereditarju lil…”, the wording was hereditary usufruct, implying that the usufructuary was an heir. If he was an heir, he was liable to pay the liabilities of the estate. there was a third party character who was owed money by the deceased and he sued the usufructuary and he said that he is l’erede usufruttuario therefore he is the heir. The usufructuary said that this was a disposition by a

singular title, he is not an heir but only a usufruct. The Court said that no matter what you call it, that was a disposition by a singular title. That person is not an heir and so not bound to pay the liabilities. So it looked at the meaning, at the content of the clause, not the heading but what was written in the clause itself.

- Mallia vs Mamo (APP 2/5/2021) where the Court held:
- If the writing is clear then it should be exceuted
- Once may deviate when it clear that the written words conflicts with the wishes of the testator as stated in the will as otherwise one would eb replacing the testators wishes with someone elses:
- Quando la disposizione e 'chiara essa deve ricevere la sua esecuzione come esprimente la legge che il testatore ha volute imporre … Si deve quindi traslasciare la lettera dell 'atto solo quando si e 'certi che essa sia in opposizzione alla volonta 'del testatore, poiche 'quando tale volonta 'si trova chiaramente e formalmente espresso non e 'permesso d'interpretare i termini di cui il testatore si e'servito per far conoscere la sua volonta', poiche 'altrimenti si concorrebbe il rischio di far prelavere una intenzione sempre dubbia alla lettera certa."

- In a recent case there was an issue of interpretation, and the Court made it clear, again repeating what has been stated many times, that if the wording is clear there is no more room for the interpretation in the applied wording of the will. The Court cannot substitute its discretion.
  - Carolina Mifsud vs Matilde Pullicino (13/6/1888 Vol XI.633) the court confirmed that if the words of the will were clear, one could not resort to extraneous evidence so give a different interpretation to what was written.
  - "Ove le parole del testament siano per se 'stesse chiare, non e 'lecito con prove estrinsiche restringerne o ampliare il senso la disposizione deve restare quella che le parole del testament importano"
  - The wishes of the testator are to result from the will itself (Ribault vs Scicluna Vol XV162) though in Grima vs Borg (16/6/1961) the Court went on to add
  - "l-intenzjoni tat-testatur aktar milli mit-termini tal-lokuzzjoni kontroversa, tiġi riċerkata fil-kontest intier tad-disposizzjonijiet".
  - Zammit vs Degabriele (PA 20/7/2012) the court made it clear that once there was no ambiguity in the words used in the will, there was no need to look at the intention on the testator.

- Even in old judgements, the Court repeatedly stated that if the words of the will were clear, one could not resort to extraneous evidence so give a different interpretation to what was written.

  - However, Giuseppe Axiak vs Antonio Axiak et decided on the 26/2/1945 (XXXII.i.178) , reflects the current position (Vide Gera De Petri vs Testaferrata Morini Viani Dec 19/12/2012) . The court stated:

  - F'Materja ta 'interpretazzjoni testamentarja, meta d-disposizzjoni hija ċara, għandha tirċievi l-eżekuzzjoni tagħha bħala l-liġi li t-testatur ried jimponi,u mhux permess li ssir interpretazzjoni tal-volonta tiegħu. L-intenzjoni tat-testatur għandha tinġibed mid-disposizzjoni ta 'l-istess testament, konfrontati anki mad-disposizzjoni ta 'testmenti oħra tiegħu, preċedenti jew sussegwenti, u mhux minn materja estranea għat-testment. U hemm bżonn li jkun hemm motiv tajba biex wieħed jirritjeni li l-kliem użati mit-testatur kienu intiżi minnu f'sens divers mis-sens tagħhom naturali"

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- More recently the Court of Appeal was categoric on how a will should be interpreted, in the case decided on the 1st December 2021 (232/15) in the names

Victor Fenech et v. Michael Fenech. The will said that he is appointing as his heirs as to ⅙ each his 3 surviving siblings and as to 1/6th each for the children of 3 of his pre-deceased sibling Michael. It transpired that this person did not have a brother named Michael and all the other heirs said that he did have another brother but his name was Nazzareno, and Nazzareno did have children but the other heirs said that the children of Nazzareno do not inherit, they have been left out, they are only entitled to the reserved portion. So an issue of interpretation arose, was this a typo? Was this a mistake? Or was it done purposely.

- The Court of First Instance and the Court of Appeal decided that the reasoning in the will was clear and that there was a mistake in the name and that the correct name should have been Nazzareno despite the fact that one of the testator's nephew was named Michael.

- The issue of whether the person making the will knew what he was doing or not was not raised. No one said that this person was losing his mind. They were not challenging his memory and his mental capacity. The issue that was raised here was whether the testator left out the children or not and the Court said that he clearly intended the grandchildren to be heirs because of the way the will was written and also by comparison to previous wills and therefore the Court acknowledged that there was a mistake in name, and nothing else

- What happens if only part of the estate is disposed of? So there is a will and the testator only leaves legacies and does not appoint any heirs. In such a case, the heirs are the heirs at law.

- There can however be a problem. What if I leave a legacy and I say that I leave what is left to my son by title of legacy. I call it a legacy but in actual fact I leave everything else to my son. Clearly in the wall I've call it a legacy but if you look at the wording of the legacy itself, I am leaving a universality, I am leaving the rest of my estate. So even though I call my son a legatee in actual fact he is an heir, he is getting the rest of the estate. So the name given, whilst important in itself is not absolute, and there are all sorts of wills. If you do not leave everything in your will then the rules of intestate succession apply.

- So if you have a clause stating "I leave everything to…" even if you call it a legacy that is in actual fact the appointment of an heir. On the other hand, if you do not have this type of clause, if you have just single items even though there is nothing left in the estate, there is still the heirs at law.

- Let us say that there is an estate and in this estate there is a house, a boat and ten thousand euro in the bank, and nothing else. The person making the will says that he is leaving the house to his wife, the boat to his daughter and his €10,000 to Caritas. He has three children but there is nothing left in the inheritance. These

are clearly dispositions by singular title, they are all legacies but there are no heirs appointed. The heirs at law are the wife and the three children and if they do not renounce they will be bound to implement the will, they have to give it effect. If they make the choice to be heirs at law, they have to abide by the will, even though they are not going to get a single penny.

- This is when I make a provision in the will because of a specific situation – something has induced me to give a gift, or to make a bequest.

  - For example I have been widowed, and of all my children only one comes to see me, the others have abandoned me completely and therefore because one child has been so caring, I favour that child in my will and say that because this child has really looked after me in my last I want my child to be preferred and I am giving this child an extra gift. It is an inducement. If that sole inducement is false, then that clause disappears, it loses its effect but it has to be the sole inducement.

  - If I leave a gift to someone and I say that I am leaving this to Joe who is the arts curator at St George's College. In reality Joe is a handyman. Is that bequest valid? Yes, it is because the fact that he is a handyman or a curator is not the inducement but the inducement is Joe because he is my friend.

  - If on the other hand I say that I am leaving the bequest to Joe because of all the good work he did in looking after all the art pieces at St. Aloysius College, the inducement is the input he has given to look after the art at SAC. If that isn't true, that clause will not be effective and legally will not be granted.

- So you have got to look at what induced the gift, the actual fact giving rise to the gift. If that fact is false, or if the testator had been tricked and induced into a sense of falsity then that clause can be challenged.

  - More recently the Court of Appeal was categoric on how a will should be interpreted, in the case decided on the 1st December 2021 (232/15) in the names: " Victor Fenech et v. Michael Fenech".

  - He appointed as his heirs as to 1/6th each his 3 surviving siblings and as to 1/6th each for the children of 3 of his pre-deceased sibling: "lit-tfal taħ 'uħ mejjet Michele". In actual fact he did not have a brother named Michele but he did have a pre-deceased brother Nazzareno

  - The Court of First Instance and the Court of Appeal decided that the reasoning in the will was clear and that there was a mistake in the name and that the correct name should have been Nazzareno despite the fact that one of the testator's nephew was named Michael.

- 18. Tajjeb li jinghad li fir-rigward ta ’testmenti, id-duttrina legali relevanti in materja giet imfissra fis-sentenza ta ’din il-Qorti tat-28 ta ’Novembru, App. Civ. 232/15/1 19 2003, fil-kawza fl-ismijiet: Emanuel Buttigieg nomine v. Anthony Cauchi proprio et nomine, fejn inghad hekk:

- “i) meta l-kliem fit-testment huwa car u ma jammettix dubbji ma hemmx lok ghal ebda interpretazzjoni u wiehed jista ’biss jezamina jekk dak ilprovvediment mit-tifsira normali tieghu imurx kontra l-ligi jew le;

- ii) meta jirrizulta dubbju dwar is-sens tal-kliem allura hemm lok ghallinterpretazzjoni sabiex wiehed jasal ghall-intenzjoni tat-testatur;

- iii) fil-kaz ta ’tali interpretazzjoni wiehed ghandu dejjem jassumi li l-intenzjoni tat-testatur kienet konformi mal-ligi;

- iv) bhala norma wiehed ghandu jasal ghall-intenzjoni tat-testatur millkliem tat-testment innifsu u ma humiex ammissibli provi ohra”.

- Where only a portion of inheritance is disposed of.

- 684. (1) If the testator has disposed only of a portion of the inheritance, the residue thereof shall vest in his heirs-at-law, according to the order established in the case of intestate succession.

- (2) The same rule shall apply if the testator has only made singular legacies.

- Dispositions in a will may be by singular title (legacies or pre-legacies) or by universal title (heirs).

- The law provides that a will may have any or both of these types of disposition.

- Prior to Justinian, a will which did not provide for the appointment of heirs (by universal titles) and which only provided dispositions by singular title, were not considered valid.

- This was changed by Justinian and the position still remains the same today. (Giuseppe Borg vs Marianna Borg (App Civ 30/3/1936)).

- If there are only dispositions by singular title (Legacies) without the appointment of heirs, the inheritance will be considered ab intestato and the heirs will be those entitled to inherit at law.

- The law is here referring to the scenario where the testator made “singular legacies”. Legacies are usually considered as dispositions by singular title.

- However there may be situations where a legacy contains a bequest of a universal nature.
- Eg “I leave by title of legacy whatever is left of my estate to ABC”
- otherwise known as a legato di residuo.
- In this case once could argue that this article of the law will not apply since:
- A) It is not by singular title
- B) the testator has made provision for what is to happen to the residue of the estate. There are no other assets to pass on because whatever is left, plus or minus, goes to the named legatee.
- C) It is a “rose” by a different name and therefore such legatees are to be considered as heirs Vide Apap Bologna vs Delicata (8/5/1897 Vol XVI.ii.46) which could be applied a contrariu sensu) .(Eredi usufruttuario!)
- If so:
- A) are they bound to implement the other legacies in the will.
- B) do they make good for the liabilities of the estate?
- C) what if the legatee is a spouse in an unica charta will? Will such person still be considered as an “heir” and fact the consequences if he/she changes the will
- D) what if the legatee claims the reserved portion? Can that person also receive the legacy as a payment on account?
- Would the “legatee” be allowed to collect the goods forming part of the Legacy?
- Best if one plays it safe and files a rikors before the court of Voluntary Jurisdiction.
- But this can create all sorts of problems…….
- If there is opposition the matter will then go to litigation.
- Where reason constituting sole inducement of disposition is false.
- 685. (1) Any testamentary disposition founded on a reason which constituted the sole inducement of the testator, and which is false, shall have no effect.

- 2) If the testator has stated a reason, and the indications of the will are not such as to show that such reason was the sole inducement, the testamentary disposition, even if such reason is proved to be false, shall have effect, unless it is proved that the testator was solely induced by the reason stated in the will.

- If a testamentary disposition has been solely induced on the basis of a falsity, such disposition will have no effect.

- It is only that particular disposition which loses effect and not the whole will.

- The emphasis is that the disposition must have been made solely on the basis of a falsity

- If there are other reasons behind the disposition, that disposition will be considered as valid unless it is shown that the falsity was the sole inducement.

- The inducement and the falsity thereof must be proved by the person alleging it. In the lawsuit at Vol X page 457 the court affirmed:

- "e` necessario riconoscerla nelle stesse parole e non immaginarla, o crearla, e quindi non si deve indagare quale sarebbe stata la migliore disposizione in astratto, ma limitarsi all'esame della volonta` espressa”

- 9/3/2015 Cit 1198/2010MCH Andrew Cilia vs Lourdes Scicluna. It was alleged that a disposition in a father’s will stating that his son owed him a balance of LM 19,000 was false. The Court upheld the validity of the disposition since it did not believe the person challenging it. The Court stated that in these circumstances :

- Illi f’dan il-kaz huwa r-rikorrent li jrid jipprova li d-dispozizjonijiet testamentari ma ghandhom l-ebda effett minhabba raguni falza. Il-principju hu li "onus probanti incumbit ei qui dicit non ei qui negat". Huwa l-attur li jrid jipprova l-fatti minnu premessi u allegati fl-att li bih iressaq il kawza”

- The law states that the Testator was SOLELY induced in error on the basis of a falsity.

- If it is shown that even if the testator knew of such falsity he would still have made such bequest, the disposition will hold because clearly that falsity was not the SOLE inducement.

- If for example a testator states:

- "I bequeath all the paintings at my house at Palazzo Abela, Zejtun to Ray Portelli, an arts teacher at Saint Aloysius College, for the good work he has done in promoting the arts and art appreciation".

- "I bequeath all the paintings at my house at Palazzo Abela, Zejtun to Ray Portelli for the good work he has done at Saint Aloysius College including the promotion of the arts and art appreciation at the said school".

- Which is the PRINCIPAL INDUCEMENT. Will this clause still be considered as valid even if it shown that he taught at a Government School and not St Aloysius College

- These examples are almost identical, in the first one Ray Portelli, in the second instance it's clear that I'm giving him the gift because what he's done, in the first case I'm just telling them what he did.

- In the case of Andrew Cilia vs Lourdes Scicluna, decided on the 9th of March 2015, it was alleged that a disposition in a father's will stating that his son owed him a balance of LM19,000 was false. The Court upheld the validity of the disposition since it did not believe the person challenging it.

  - In Agatha Formosa Gauci vs Dr Francis Lanfranco APP 621/01 dec 28/11/2003 A sister challenged the will of her pre-deceased twin sister alleging amongst other things that the testamentary dispositions were solely induced by a falsity. In the Testatrix 'secret will there were bequests (legati) to her husband and her sister and the testatrix stated that she did not leave her share in her undivided property to them because she did not want to burden either her sister or her surviving spouse with the burdens such a bequest would cause both in terms of the headaches and because of the huge succession duty payable.

  - Ultimately the case was dismissed because the court held that plaintiff did not have a juridical interest,

- In this case, the sister of Agatha Formosa left all the estate to Dr Francis Lanfranco who was her lifelong lawyer and also a very good friend. The sister was married and she did not leave her husband as an heir, she only left him a legacy. Agatha, the sister of the decease, challenged the will, because in the will the testator explained where she said I'm leaving everything to Dr. Lanfranco and not to my husband to save my husband the hassle of dealing with the inheritance, so that was the inducement. At least it seems that was the inducement and Formosa Gauci argued that in actual fact there weren't any real headaches with the inheritance because as far a the husband was concerned, as far as the matrimonial home there were no taxes, and neither with succession taxes.

Eventually the court did not go into it but it did claim that it was not false at all and at actual fact the testator wanted her husband to be saved the hassle. The husband did not contest the will and he was happy. He testified and said I'm glad, I'm happy. Ultimately the case was dismissed because the Court held that plaintiff did not have a juridical interest because she was not an heir at law.

- If the testator did not make a will the sole universal heir would have been her husband so in this case the sister had no right to contest the will the only person who could have contested if he wished was her husband so the case was dismissed on a technicality.

- Another interesting point especially if you look up italian authors, is that the Court will look at different types of inducements, inducements which are impulsive and inducements which are done after a person has thought of it, and they seem to differentiate between the two.

- As far as inducements which were impulsive, they seem to argue that these should be ignored whereas only the ones which are final and determinate which have to be questioned and taken into consideration. Quite frankly, the law does not say this and it does not make this restriction at all. If it is shown that a clause is induced by a specific scenario and if it is shown that that scenario is a false one then that clause can be challenged, irrespective of whether it was done impulsively or not.

  - Bhala qariba tat-testatrici, l-attrici ghandha kwalsiasi dritt li ma taqbilx ma 'dak li ddisponiet ohtha ghal wara mewtha dwar hwejjigha. Ghandha wkoll kull dritt li thossha urtata bil-laxxiti mhollija, imma dan kollu per se` ma jammontax ghal dak l-interess guridiku attwali kif fuq spjegat fil-korp ta 'din is-sentenza. Dan apparti l-kunsiderazzjoni min-naha l-ohra li kull persuna sana hija libera li tiddisponi minn hwejjigha kif tixtieq hi u mhux kif ikun jixtieq haddiehor, imqar jekk din tkun tigi ohtha. "

  - Antonio Xerri vs Amabile Xerri (PA 5/4/1948) is an elaborate judgement which looked into the origins of this part of the law and made the distinction between:

  - false inducements which were impulsive and

  - inducements which were final and determinate in nature:

  - "Illi minn dana jitnissel ċar li dwar il-kawzi trid issir distinzjoni bejn jekk l-istess. għalkemm foloz, fl-istess ħin ma jannullawx l-legat u lanqas jirrevokawħ, u komunement imsejħa kawżi impulsivi, u dawk li mingħajrhom ma jistax ikun hemm volonta 'jew kunsens, u kwindi, jekk foloz, jirrendu l-legat bla effett, u komunement konoxxuti bħala kawżi finali u determinanti.

- The Court then explained that impulsive causes are independent of the real volition of the testator whilst the final and determinate causes are intrinsically tied to the disposition.:

- M'hemmx bżonn jingħad li fil-kaz ta 'determinazzjoni għal kawzi impulsivi jista ' jkun hemm volonta 'indipendentement minnhom fit-testatur li jibbenefika "qua legato non cohaeret", mentri fil-kaz ta 'disposizzjoni mnissla mill-kawżi finali u determinant, dawn huma tant inerenti fid-disposizzjoni, li jekk ikunu foloz ma jistgħux ħlief iħassru dik id-disposizzjoni;

- As to the appreciation and eventual decision on the falsity of the inducement and the effect it had on the disposition, the Court went on to add that some jurists tried to establish rules and guidelines but eventually held that such matter were left to the wisdom and evaluation of the Judge:

- Illi fil-pratika, pero, huwa wisq diffiċli lil-maġistrat jidderimi kawża minn oħra; u għalkemm xi ġuriskonsulti ttantaw u ppruvaw jagħtu u jniżżlu xi regoli għal dana l-fini, l-istess kif jgħid l-Merlin (Repertorio, vuċi Legati, paġ 661, Tomo X para XIV) huma l-bogħod minn regoli ċerti li bniedem jista 'joqgħod fuqhom b'għajnejħ magħluqa. Kien għalhekk li dana d-dixxerniment ġie mħolli għad-dottrina u prudenza tal-ġudikanti.

- The Court added that if the inducement was expressly declared as a condition to the disposition, this was considered as final and determinate. If it was not, then the will must be scrutinised with great attention in order to examine whether the testator's wishes were solely motivated by such inducement:

- Jingħad ukoll illi jekk huma minnu li l-kawza, meta tkun espressa taħt forma ta ' kondizzjoni, hija repetuta finali, fis-sens "nisi ex ipsis verbis testament pateat testatorem alias non fuisees legatorum", l-għaliex, magħula mit-testatur f'dik il-forma d-disposizzjoni, l-ezistenza tagħha tiġi subordinata għar-rejalta tal-fatt, huwa wkoll minnu li l-kawza tista 'ma tkunx espressa f'din il-forma, u allura l-kontest ta 'l-att, kif jgħid il-Pacifici Mazzoni (Ara Vol II Trattato delle Successioni, paġina 148 para 54) irid ikun ezaminat attentament, kif ukoll trid tiġi miflija n-natura tal-kawża sabiex jingħad li skond il-menti tat-testatur riedx jew le jissubordina l-effikaċja tad-disposizzjoni għall-verita tal-istess kawża.

- Il-ġurisprudenza tagħna (Vol X PA 16/10/1883 Schembri vs Galea Pg 251, 262 &236, VolXVI.PII pag 59 PA31/5/1897 Abela vs Galdies) zammew fermi dawna l-prinċipji;"

21st April 2023

Lecture 14.

- Law of Succession
- Part 16
- OF PERSONS AND THINGS FORMING THE SUBJECT OF A DISPOSITION
- Dr Peter Borg Costanzi
- Law of Succession
- Members of Monastic Orders
- 611. (1) The members of monastic orders or of religious corporations of regulars cannot, after taking the vows in the religious order or corporation, dispose by will.
- (2) Nor can such persons receive under a will except small life pensions, saving any other prohibition laid down by the rules of the order or corporation to which they belong.
- 796. Persons who are incapable or unworthy of receiving under a will, for the causes stated in this Code, are also incapable or unworthy of succeeding ab intestato.
- Art 800: Members of monastic orders. Repealed XVIII.2004

- We're now getting to the last half dozen lectures that we'll be doing, a little bit more technical, a lot of sections in the law Members of the Monastic Orders, who have taken a vow and in the previous lecture we saw that if you take a vow, you are incapable of making a will. The law also says that such member in incapable of inheriting except for a small annuity. So legally a member of a Monastic order is considered to be legally dead as far as inheritance is concerned but only temporary. He can do a Lazarus. If he is released from the vow, than he reacquires his right to inherit and reacquires his right to make a will.
- We also saw that if during this period of incapacity, such member does a will. That will, will be null, even if later on that person will be released from the vow. So if a person makes a will during that period that person is bound by his or her vows, during that period that person cannot make a will, if they make a will, that will is null. In order for the situation to be reintegrated a new will needs to be made since that will, will not count.
- When it comes to inheriting, to receive. The share due to the person, if there is a share due, is held in bank until that person passes away, because until that

moment, this person can be released from his vows. So if he or she is a main heir or had to been bequeathed a legatee, which is not a legacy but an annuity. Than that right to receive is kept in suspense and of course it will create problems with inheritance because someone has to look after this share.

- If in the will there is appointment of the testimony executor, we'll come to testimony executers later on. A testimony executor has control and administration over the estate and in certain situations he has the power to sell the estate in order to convert the object into money. So if there is an executor, that executor he himself will hold this share due to the member of the Monastic order in trust. If the executor passes away, a replacement will be appointed. At least, there is some kind of protection, otherwise if there is no executor or the estate is in testate than of course, it is the responsibility of the heirs to the culprit and if this person rights are to be protected they make it a point. An application will be made in court, for the court to appoint a curator. So as far as procedure is concerned.

- Say you have a situation with three siblings and this priest or nun has been appointed as one of the heirs. This priest or nun cannot inherit as long as that person is bound by a vow. If that person is released from the vow that right is acquired and has a retrospective effect. So it goes back to the date of opening of succession. So the other two siblings want to sell there property, and they do a 'konvenju 'but the notary will say there is this nun or priest. What are we going to do? And the children will say that, that person is bound by a vow so you can ignore him/her. The notary says no, if that person leaves than the right is reacquired, if the sale goes through, and that person leaves the order. It can create problems to the sale, so better if this priest or nun is represented.

- If there is an executor, than the executor will represent the priest or nun and the executor will have to file the appropriate papers in the court of voluntary jurisdiction. But if there is no executor than one will have to file an application before the court of voluntary jurisdiction for the court to appoint a curator to represent the potential interest of the priest or nun. The court will look at the request, it will see whether the terms of the sale are fair, and the conditions of the sale and if the court is happy it will grant the request. Most probably it will order the curator to deposit the funds in a separate bank account and they will remain there until such time the priest or nun passes away. At that point the funds will be excess able to the other two children.

  - Articles 686 – 693

  - 686. Any testamentary disposition made, by what is commonly known as implied nuncupation, or per relationem ad schedulam is void.

- Now, we are dealing with section 686 to 693 and this is a weird clause but there is a lot of history. “Any testamentary disposition made, by what is commonly known as implied nuncupation, or per relationem ad schedulam is void.”

- Basically it is saying that a further will is null. It seems obvious in this day and age where the democratic society, situation in Malta is calm and normal. To a certain point, there is no walls and civil strifes going on and no emergencies.

- But let’s say, take yourself back to the times where the knights of Malta are being attacked and there is a war going on and fighting and someone is wounded and he is on his last moments and he can’t make a will, so he writes his dying wishes. Compare this to the situation of privileged wills, which we did recently where if there is a break of communication, certain formal requirements are not necessary. In another words a privileged will can be done without a magistrate, judge or notary.

- In the past these kind of wills, where valid, and the person hearing the wishes was bound to write them down as soon as possible, of course this gave bounds for disputes and uncertainty. First of all you have pawning of the word of the person relying the message. Maybe that person did not hear correctly, so there will be room for dispute.

- Imagine there is a king he is on his death bed, he is going to make his last wish, who is he going to appoint as his successor and he points at someone and whispers something in his ear that this person is going to be king. Of course this is fiction, but in the past these kinds of situations arose. Of course nowadays, these kinds of wills are not valid. The only exception Dr. Borg Costanzi can think of is, if there is a privileged will of someone illiterate, someone who can’t write or sign his name. Of course that unusual situation can start problems.

- There is no answer for this, but he suspects that this clause section 686 will override, in other words you have a conflicting situation where in the one hand, privileged will are entitled to a reduced formality and on the other hand you have a specific section in the will that wills which are not signed are not valid. If you go to Roman Law notes, you will find this.

- Of course, if verbal wills where to be allowed, it will throw away the necessity to have it in writing in the first place, so all those formalities, requiring wills to be signed and all that stuff, they will completely meaningless. How can you register a verbal will? You can’t.

  - These type of wills are VOID

  - What are these wills?

- VERBAL wills –
- usually made by a person on the point of his death or in imminent danger. Eg a person who is very ill or in the thick of war
- They were not uncommon before 1868.
- In the presence of witnesses – to hear (witness) the will – numbers vary
- Witness to write down the will ASAP – sometimes there were time frames.
- COMPARE THIS WITH PRIVILEGED WILLS when the testator is unable to write.
- 687. Any testamentary disposition in favour of a person so uncertain that he cannot be identified even upon the happening of a contingency referred to in the will, is also void.

- What about a will made in a testamentary disposition? The word Testamentary disposition means anything written in a will, it can be a legacy, it can be an appointment of an heir, a grant in a will a request. If it is done by someone who can't be identified.
  - Even if the will says for example I give 10,000 euros to the next Malta marathon. That person isn't identified, that person isn't known at the moment that he passed away but that person can be identified. So you can't identify this person, in that case than that second option is not valid, because you can't identify the person.
- In order to identify that person, you have to look at the contents of the will. The will has to explain the wish, nothing else. So, once again we come back to the sanctity of the will, that the will has to speak for itself and if there is an issue interpretation or doubt or what did the testator want, that will has to speak. You have to read the will, maybe you look at previous wills o interpret, it's evidence, but that will is done, it's over and the person is dead.
  - A: I leave €10,000 to the winner of the next Malta Marathon which occurs after my death.
  - B: I leave €10,000 to the coolest runner in Malta
- Extraneous evidence is not really admissible. So in order to interpret a clause which is doubtful like if there is doubt to who the person is, the will has to give a good idea and the court will normally bend over backwards to give effect to do it.

If there's some way that the court, if there's a distinct, will find an answer, it'll give it.

- So in case of doubt, the rule is in favour of the penalty of the will the doubt always goes towards validity not invalidity, and if the court can come to some objective and reasonable answer from the parts of the will, that answer will be valid.
  - Disposition in favour of person or body corporate to be designated by heir or third party.
  - 688. (1) Any testamentary disposition made in favour of an uncertain person to be designated by the heir or by a third party is likewise void.
  - (2) Nevertheless, it shall be lawful to make a testamentary disposition by singular title in favour of a person to be selected by the heir or by a third party among several persons specified by the testator, or belonging to families, or bodies corporate, specified by him.
  - (3) It shall likewise be lawful to make a disposition by singular title in favour of a body corporate to be selected by the heir or by a third party, among several bodies corporate specified by the testator.
- Now there's another clause here going to technicalities disposition in favour of person or body corporate to be designated by heir or third party. Now I can say I leave my estate to the person who my son prefers. That third person is so uncertain that it’s not valid. So if I leave the choice in the hands of third parties, if the choice is so uncertain that that choice cannot be determined objectively, then that clause will not have any effect. Of course, if a person can be found, then that clause will be valid.
- Interestingly, sub-section (2) talks about a disposition by singular title. So here we talked about a legacy, a gift of a particular object. Look here the law makes a distinction.
  - If it's a gift of a particular object, then if I say my will that I leave a Ferrari to the best student of succession law of the year 2023, and that clause is valid if I say there's a lot to inherit between the students of this class, that clause is valid because it is from a group of persons, that group can be identified and therefore we can find who that person is, and the same thing not just the persons but even to body corporate.
- Now where does this clause acquire relevance? It usually applies to charitable institutions for example, I leave €4,000,000 to Victor Grech for him to give it to

charity choice and it is valid, because he will then select the appropriate charitable institution. Here, this is an exception by singular title.

- So the rule and then have the exceptions is that, the law is saying that, having said that, in these particular situations, I'm capping for it.
- Or for example, like I say, I'm a list of 10 institutions and I want that person to choose any one of them, Or any religious institutional in Malta or any institution that looks after Latin women or whatever. But if you give a list of bodies, or a group of bodies are described in the will and leave the beneficiary the choice to choose one or more of them, that is valid.
- Singular title means a particular gift. In other words they will not be, heirs there will be legatees, i.e. normally, these clauses exist. This is not something that doesn't exist. It's not something coming from space.
- Nowadays of course notaries will discourage it and then they'll tell you choose one yourself or maybe instead of choosing one, you choose a number, say choose between these five, my first choice, number one, if one doesn't exist, it goes to number two then goes number three, number four, number five, number six. There will be a choice here.
- Let's say Dr. Borg Costanzi chooses that he gives a gift to the nuns of Saint Rosa and by the time I pass away there are no nuns, then that clause has no effect. If I leave it to a particular nun, who is not bounded by a vow and she passes away and I stop there again it doesn't go forth. If that nun happens to be my daughter then different rules apply, because the rules of representation will apply. (You will do it with Dr. Kevin Camillieri Xuereb).
- The rules of representation apply vertically. If I leave my children and one of my children pass away, then the right I goes to grandchildren, they take step in by representation and that usually applies in testate succession.
- In testate succession, sometimes it can create problems. As we saw, there was that case of again for coming to it of Judge Depasquale. Where the clause and the witness said I leave my three children as heirs with the right of accretion and substitution, and the court, the dispute was which applies first accretion or substitution, and of course this was a situation where substitution arose in testate succession where there was a will.
- We're talking about dispositions made by singular title and the choice of an heir cannot be done in this way but the choice of a legate can be done in this way.
    - Disposition in favour of next of kin.

- 689. A testamentary disposition made in favour of the nearest relation of a person shall, in default of any other designation, be deemed to have been made in favour of the persons in whom the intestate succession of the said person would legally vest.

- Now, If I say I leave my estate to a next of kin, inhalli l-gid tieghi lid-dixxendenti tieghi, and in the rules of in testate succession. So this section may look simple, but it impact is really strong and it takes us back to the rules regulating entailed property. Which are no longer allowed today.

- The rules of entailed property, it was possible to leave my estate down the line to the next of kin, to my firstborn son, and I would also state in the will to be inherited by future generations.

- So each successive generation becomes an heir from my will and my will cannot be buried by the successes. So if I leave my property to my three children and I create an entail, my three children will enjoy the poverty. But in order to sell it, they need the permission from the court, and when they pass away, it automatically goes down to their own descendants. If they don't have any, the share goes in favour of the survivors, the surviving siblings, irrespective of what that deceased child has said in his will.

- So my original will, will regulate this estate for tens, twenties, hundreds of years always going down the line, and this is no longer possible. At first, it was partially stopped in 1952 and then completely stopped in the early seventies. So it's no longer possible to do entail, except in the form of a trust. Trust of course is a kind of entity where you need to escape for a hundred years.

- So here, when you say I'm leaving everything to the next of kin my line, the rules of intestate succession apply and according to those rules you see who the heirs are and that's it, it stops there.

  - Disposition in favour of the poor.

  - 690. A disposition made in general terms in favour of the poor, shall be deemed to be made in favour of the poor of the island in which the testator resided at the time of his death.

- Disposition made in the favour of the poor, so I say in fact I came across from these clauses sometime ago where this person made a will and the rest he left to the poor of Ħal Qormi. So, this guy left his estate to the poor of Qormi. Of course those cannot get identified and someone who may be poor today will not be poor tomorrow. So it is a very loose disposition.

- Disposition in favour of testator’s soul.

- 691. Any disposition made in general terms in favour of the soul of the testator or of any other person shall, if the pious use has not been specified, have no effect.

- Disposition in favour of testator’s soul. Now, you come across these types of clauses in wills. Where someone writes in his will, I leave so much for the cause of my soul. Who gets the money? What do you do? The law doesn't really allow this, but you can do a clause saying I leave a grant or I leave a field or I leave this house, I leave property and item, movable for immovable so that the property or the income from that property will pay for the sake of masses. For my soul and it will go to the church that has been designated and a masses will be sent to pray for me that clause is valid. It's a highest bird and it is very common.

- Now when it comes to pious burdens, these are personal rights. They're not real rights. So if the testator says, I leave the income from all the produce from this 10 tumuli of land to go to the parish priest of Floriana for him to say masses in repose of my soul and the mass is not to be said unless on my death and on whatever specific dates that they choose. The church has a rate for this. They have rates how much they charge for masses. The church has expenses and money has to come in from somewhere and then they don't make money for it, and the rate is something like €5 or €6 per mass. So when you consider that mass takes about half an hour, €5 or €6 per mass is not really payment for the time taken, so to speak. It had to be to calculated on a time basis. But there is a rate set in the Curia and sometimes this rate is advised. Now if you come to sell that property, normally the banks or the fire will want to get rid of this pious burden. So you have the right to the Curia and sort it out.

- There was a law which was passed in the eighties, Dr. Borg Costanzi can’t remember the name of the law. Which said that if you want to redeem a pious burden you multiply by 20 and deposit your money in court. This law was declared unconstitutional and therefore it is no longer valid to find reference on this law look up the 1991 Ecclesiastical Entities (Properties) Act.

- So today if you want to redeem, you have to find a request with the curia, and the Curia again has rates. They will update the value of the mass, so if the iceberg was done 70 years ago where a mass was £1 per mass and today it is €10 per mass, they will update to €10. They will see if all the masses have been paid for. Because very often these pious burdens wouldn't have been paid and the last co payment order years and they will capitalise the sum. Usually by 20 but there is a minimum rate, not less than €1,000. So if you have a 10 euro pious burden times 20 is €200. €200, less than a €1,000 and of course, people will prepare. to prepare

to pay €10 times so many years. So there is negotiation. eventually once there's a negotiation made and there's an agreement on the price. The issue is submitted to the policy and kind of committee in the Curia they will vet the request, normally they say yes and then you just do a reports, send the money to the curia and undersign and you get the masses.

- So if there's a price benefit which is relatively set up, there's a way of paying it off in settlement rather than on annual basis. Of course, this is not what the testator wished, the testator wished that masses for repose of his soul will be done in perpetuity, but of course there had to be some kind of solution of how to terminate this obligation.

  - Inadmissibility of evidence to show that the words of the will are contrary to the intention of the testator.

  - 692. (1) No evidence is admissible which is intended to show that the institution or legacy, made in favour of any person, or body corporate, or for any use specified in the will, is merely fictitious, and that such institution or legacy is in reality made in favour of a person or body corporate, or for a use, not disclosed in the will, notwithstanding any expression contained in the will calculated to constitute an indication or a presumption of any such intention.

  - (2) The provisions of this article shall not apply in any case in which the institution or legacy is impeached on the ground that such institution or legacy was made through intermediaries in favour of persons under a disability.

- Now what if the writing in the will is vague or unclear?

- Now here the law says very clearly No evidence is admissible which is intended to show that the institution or legacy, made in favour of any person, or body corporate, or for any use. So what the law is saying here is if there's a clause in the will, that clause is deemed to be valid and we can't bring evidence to show that the testator wanted to do something else. What is written is considered to be what he wished and you can't say, that's not you what he really wanted, he wanted something else. If it’s written down and signed for that is the wish, even if this person told 2,000,000 other people that he wanted something else.

- The strength of the will is protected and people find themselves in a situation where they are put under a lot of pressure and in order to get rid of there pressure, that pressure they say yes. So I make a will and my will is secret and private. No one knows what I wrote except me and my notary. But someone comes along and us what did you write in the will? and they put pressure and pressure and pressure and just to shut them up you say look, don't worry, I've thought of you I've done this, I've done that.

- What I say verbally doesn't count even if it's the biggest lie. In other words, I've told all the family this is what I did and then they opened the wind and they get a surprise. it's the will which should count, irrespective of what this person may have told other people, and if there an issue of interpretation, it's only the will which must be.

- Look up the judgment Camilla Maria vs Carlo Mamo, Maria vs Mamo volume XXIIV, part 1 page 729, and Galea vs. Gauci Court of Appeal 31st May, 2002. The courts said in these cases that the wording made in the will had to explain itself.

  - Fiduciary dispositions.

  - 693. Any testamentary disposition whereby even a sum of money or any other determinate thing is bequeathed to a person designated in the will for the purpose of making such use thereof as the testator shall have declared to have confided to such person, shall be null, even though such person shall offer to prove that such disposition is in favour of persons capable of receiving property by will, or for lawful purposes.

- Section 693 Fiduciary dispositions. I give you money, but yougive that money to my mate, but that's between me and you. That obligation doesn't count. Of course I may actually go in and do it but there's no obligation to it. So if it's not written then it's not binding. If I write in the will, I leave €10,000 to Joe and he knows what has to do with them because i told him privately then that clause will not be valid and he won't get this €10,000. Even though it can be shown or proved what those wishes were, the wish has to come from the will itself, not from some private writing kept by someone.

- So let's say I write a letter to Joe and I said look I made, I'm going to give you €10,000 and I want you to use these €10,000 for spares and I sign this letter and even notaries it. In my will I say i am giving €10,000 to Joe for wishes that I have told him privately or in a letter I sent to him. That clause will not be valid even though it can prove what those wishes were. There's no obligation to honour that clause. It will only be carry a moral obligation.

- In other words the heirs may choose to say yes but that is what we wanted. We're not going to go against his wishes and we're going to abide by his wishes, but if it comes to a dispute, if there's a dispute then that obligation cannot be enforced

  - Erroneous designation of heir, legatee or thing disposed of.

  - 694. (1) If the person of the heir or of the legatee is erroneously designated, the testamentary disposition shall have effect, if the identity of the person whom the testator intended to designate is otherwise certain.

- (2) The same rule shall apply where the thing forming the subject of the legacy shall have been erroneously indicated or described, if it is otherwise certain what thing the testator wished to dispose of.

- Now, erroneous designation of heir, legatee or thing disposed of. Sometimes there are mistakes made in wills, I make mistake the name of the person or I make a mistake about the object, and of course in succession the worst of people comes out and people try to take advantage of these mistakes, even though they are clearly genuine mistakes.

- What happens? Do you interpret doing in its literal form? And if you can't identify this person, therefore it's null or do you go by the truth to re-correct a mistake, and first of all when it comes to interpretation, the will has to speak itself, repeat it each time the will has to explain and you have to see the circumstances from the itself and not rely on what outsiders may have to say. What outsiders have to say may corroborate the will. It's not entirely irrelevant but the will has to speak.

- But if the court is satisfied that it is a mistake in the designation of the name, it'll correct it, and there have been cases where people's names have been wrongly stated and that in cases where property have been wrongly indicated.

- Now here in section 694, sub-section (1), says the heir or legacy. So we're talking about both universal dispositions and singular dispositions is designated. In sub-section (2) we're talking about the subject of a legacy.

- Why does the law that the subject only refer to legacies? Because normally when you point an heir you don't identify the subject. You say I leave you one quarter of my estate. You don't say I need one quarter of these 100 items. If I say I leave one quarter of these 100 items, that is a legacy not an appointment of an heir. so over here sub-section (2), even though the only refers too legacy, in actual fact there's no point in making also applicable to the appointment of an heir. is an heir is appointed the subject is not indicated.

  - This section of the law deals with a genuine mistake the designation of the heir or of the subject of the legacy. Here we are not dealing with a vitiation of consent based on error

  - If the testator made a genuine mistake in the name of a beneficiary or the object bequeathed, the legislator enacted this provision whereby it is possible to rectify that mistake and thus give full effect to the wishes of the testator as expressed in the will. It is to be borne in mind that when interpreting a will, jurisprudence has constantly emphasised that the wishes of the testator are supreme. (Fenech vs Fenech 22/9/2016 quoted below)

- As long as it is possible to identify the beneficiary, that testamentary disposition will be valid. In order to ascertain this one must primarily look at the will itself, though the Courts do listen to other evidence. This ties in with the rule that a will must be in writing. A.R. Mellows – The Law of Succession – pg 148 stated

- “If one looks outside the will, the requirement that a will must be in writing is seriously threatened. The requirement for a will to be in writing would then be an empty formality”

- Court of Appeal of the 1st December 2021 (232/15) APP in the names: “ Victor Fenech et v. Michael Fenech” where the testator gave the wrong name to one of his children. The Court of 1st Instance carried out this extensive study and how one must interpret the will:

- Illi l-Artikolu 694 tal-Kodiċi Ċivili tagħna jixbah lill-Artikolu 625 tal-Kodiċi Ċivili Taljan:

- “(1) Jekk il-persuna tal-werriet jew il-legatarju hija indikata ħażin, id-dispożizzjoni għandha effett, kemm-il darba wieħed ikun xort’oħra żgur liema persuna t-testatur ried jaħtar…”.

- §Illi l-kliem “xort’oħra” jindika li fil-każ ta ’nuqqas tać ’ertezza dwar l-identità tal-werriet jew legatarju, tista ’ssir riferenza għal provi extra-testwali u ċjoè barra mit-testment innifsu. B’danakollu, fil-fehma ta ’din il-Qorti, ir-riferiment għal provi estranei għandha ssir biss wara jiġi eżaminat it-testment kollu kemm hu:

- Now for example in the Fenech vs Fenech case, it was the resignation of the wrong name. He said, I mean my son Michael as an heir. His son was named Michael was called something else and those dispute Michael doesn't exist therefore this son gets nothing, only the reserve portion. Only the reserve portion was rubbish and goes in testate etc, and there was a recent case, there was one for example in 2014 where there was this plot in Mellieha and any single plot of land was left to one of the children, and the plot was written on as block number 50. Whereas in fact this have been 50A and the heirs said 50 doesn't belong to the testator, it is a legacy of property belonging to a third party. The testator did not say that this is a legacy belonging to a third party and therefore that legacy is null. Today we will come to legato di cosa altrui, a legacy belonging to another party

- On other hand the defendant said, no this is not a legacy, this is not a legato di cosa altrui this is a mistake which clearly should be corrected. This was the only plot that was owned by the testator. She didn't have any other land. She just made a mistake with the designation of the number and the court agreed, the court said

it was a mistake in the designation and therefore it said that the lady applied to plot 50A.

- Fil-fehma ta ’din il-Qorti, l-ewwel Qorti setghet ragonevolment tasal ghall-konkluzjoni li waslet ghaliha u din il-Qorti ma ssib xejn x’ticcensura fl-ezercizzju interpretattiv imwettaq mill-ewwel Qorti. Minn ezami mill-gdid tal-provi in atti, jirrizulta car li dan kien kaz ta ’zball fid-dispozizzjoni testamentarja li bil-ligi tista ’ u ghandha tigi kkoreguta. Il-korrezzjoni awtorizzata mill-ewwel Qorti ma titqisx bidla fil-persuna tal-werriet, kif jikkontendi l-appellant, izda interpretazzjoni logika ta ’dak li t-testatur ried jiddisponi permezz tat-testment tieghu. Fil-kuntest tal-artikolu in ezami, din il-Qorti mhix konvinta li t-testatur semma l-isem Michele, bil-hsieb li jeskludi lil hutu l-appellati, kif jippretendi l-appellant.

- Camilla Mallia vs. Carlo Mamo et, Appell Ċivili, 02.05.1921 (Vol. XXIV P I p 729):

- Connie mart Anthony Galea vs. Joseph Gauci (31.05.2002) APP

- Giuseppe Axiak vs. Antonio Axiak, (26.02.1945 Kollez. XXXII.i.178),

- Similarly, if the thing or object of the testamentary disposition has been erroneously indicated, such a disposition will still be considered as valid as long as the thing can be ascertained.

- Court of Appeal of the 5th December 2014 in the names “Mary Muscat v. Dr. Renzo Porsella Flores et noe” where the mistake was a wrong reference to a plot number, - plot 50 instead of Plot 50A

- Gli elementi interpretativi possono essere ricercati anche aliunde, ma questo ricorso a elementi di prova estranei al testamento e ’ammesso ragionevolmente soltanto per capire il contenuto di una volonta` espressa sia pure poco chiaramente”.

- APP (SC, JRM, TM) – 29/3/2023 Rik 1023/19/1 Helen Borġ vs Carmelo Rizzo

- See Judgement at 1st Instance re rules of interpretation of will.

- Jeħtieġ biss li dan jirriżulta fuq bilanċ ta ’probabilitajiet, u ċjoè li jirriżulta li mhuwiex biss possibbli iżda probabbli, u aktar probabbli milli le, li l-fond deskritt fit-Tieni Artikolu huwa l-fond numru 173 u li allura l-indikazzjoni tan-numru 177 hija biss żball. Fil-fehma ta ’din il-Qorti mill-assjem tal-provi jirriżulta sodisfaċentement fuq bilanċ ta ’probabbilitajiet li l-fond deskritt fit-Tieni Artikolu huwa fil-fatt il-fond bin-numru 173, kif wara kollox ikkonfermew ċar u tond l-atturi

Doris Casha (fol. 66), Philip Rizzo (fol. 69 dorso) u Helen Borg (fol. 72) fil-kontroeżami tagħhom.

- A similar situation arose recently it was decided 29th March, in Appeal of course in first instance it was sol de delirium where the door number was known as 177 and the plaintiff said that the testator did not own property 177 and therefore it was legato di cosa altrui and therefore the legacy was null. The court at first instance said this was a mistake, the legacy is valid and the number should be 117. And the Court said the issue of a legato di cosa altrui is not relevant.

- In appeal, the principles were confirmed as a principle and the court said that this was a mistake and therefore which agreed 173 However it transpired that the testator did not own all of 173. It show owned three quarters of it. The one quarter did not belong to her, but it belonged to the heirs of her husband, and the court appeal rules of legato di cosa altrui apply and therefore it was only valid for the part belonging to this the testator and not valid for the remaining quarter. It was not valid because she did not say this is legato di cosa alturi. Had she said this is a legato di cosa alturi it would also have been valid in respect of that. So this judgment was in itself is relevant both in the case of the mistake in the number and also it is relevant when dealing with rules concerning the legacy of a property belonging to a third party.

- Now a legacy leaving it up to the heir of the third party, the discretion to establish the quantity. I make good in my will and I say I want to leave something to Joe but how much you give Joe will be decided by my elder sister Simone. So Simone has the task of deciding how much to give Joe. That legacy will not be valid.

- But if I say in the will that I want Simon to compensate Joe for the services rendered to me by Joe, then there's an exception. If it is compensation for services rendered, then that clause is allowed, and of course you look at the services rendered, quantify them and compensate.

  - Disposition left entirely to the discretion of the heir.

  - 695. Any testamentary disposition giving to the heir or to a third party absolute discretion in fixing the quantity of the legacy is null, except where it is a legacy made by the testator by way of remuneration for services rendered to him during his last illness

- Now why does the law say during his last illness and not any type of service?

- Because the law here is considering a situation where someone is weak, is sick, the amount of services being rendered at that point in time are very difficult to quantify. He has no amount of time stated to live. The services of course would

have been are very strenuous nature physically and mentally and therefore this person cannot give a figure to the compensation. So he leaves it in trust, he trust his heirs to do the right thing and give pay compensation at only if it's related to a lasting illness.

- Otherwise if this person is receiving services which are not related to his last illness, then it would not be valid. He can say I'm leaving the house to Joe because he looked out to me all my life. That's okay but you quantified but can say I live it up to my heirs to decide how much give to Joe except if it's a service during last illness.

  - Legacy of thing belonging to others.

  - 696. (1) Where the thing forming the subject of a legacy belongs to a person other than the testator, such legacy shall be null, unless it is stated in the will that the testator knew that the thing was not his property, but the property of others, in which case the heir may elect either to acquire the thing bequeathed in order to make delivery thereof to the legatee, or to pay to such legatee the fair value thereof.

  - (2) Where, however, the thing so bequeathed, although belonging to others at the time of the will, is the property of the testator at the time of his death, the legacy shall be valid.

- Now legacy of thing belonging a third party. In Dr Borg Costanzi’s opinion this clause should be removed from our law, it creates nothing but problems and this and unica charta will they just create problem and notification.

- But having said that, our law allows for the situation for me to leave something that doesn't belong to me to my heir. So I can leave you a villa in Madliena. What happens if I do that? If I do that my heirs have an obligation to honour my wishes. If they've accepted the inheritance, they have accepted the rights and the obligations they have to obey.

- So of course they've seen the will and they've seen this clause that I've left a Villa in Madliena that doesn't belong to the inheritance to someone either one of the heirs or someone else. They are under an obligation to try to buy it. So they approach owner of the villa and they say, this person passed away and made this request, do you want to sell your villa? And if he does, then have to buy it and give it to the beneficiary. If the person doesn't want to sell, then the beneficiary will get its value. The problem will arise, ehat happens if the property is partly owned by the testator? So the testator owns only a part, first of all I have to explain that a legato di cosa altrui is only valid if it is specifically stated in the will that this

legato di cosa altrui. Even if it is obviously the thing obviously doesn't belong to him, it has to be expressly, stated in the will.

- So for example, if I make a winner and I say I leave the governments palace to whoever. Everyone knows that government palace doesn't belong to me. But if I don't stay in the world, the government palace doesn't belong to me it is a legato di cosa altrui. If I don't actually write those words down, then legacy will not be valid. The words have to be expressly stated in the will.

- Now on the assumption that the words are expressly stated. What happens if the property partly belongs to the deceased and partly doesn't? If the part that doesn't belongs to outsiders, the heirs have to buy it and if they can't buy it they to compensate the value. But what happens if that share belongs to the heirs themselves?

- So I am an heir for example, there's the house, the matrimonial house which belonged 50% to the mother, 50% to the father. The father passed away first and left his three children as heirs to equal shares, subject to wife Susan. So the wife had 50% of the house, the husband had 50% of the house when the husband died, the children get ⅓ of ½, ⅙ each and the mother passes away, and then how she says I'm leaving the house to my youngest son even though the house doesn't belong to me alone. So she has ½, okay, there's no problem with giving her half to the youngest son. What about remaining, ⅙ from the other children. If the children are heirs they're bound to give up their share and they will not get any compensation. So their share goes to this child and they get nothing for it. They get nothing for it if they own the share equally.

- So in this case there are three children, they each have ⅙. Why? Because the obligation to buy the missing share falls on heirs equally between them. There are three children, each one has a ⅓ obligation in the child when they're at the house, he is by from himself and giving it to himself so to speak. In respect of two, they're going to give it up. So they have ⅙ each and they're giving up their 1/6. If the property is not owned equally there is an adjustment. So if when inheriting the father, the father left, instead of ⅓, ⅓ and ⅓. ½, ⅙ and ⅙, and the one who has ½ obviously has the bigger share.

- In that case, when it comes to the estate of the surviving spouse, his contribution to pay the legacy is going to be bigger than the others. He is going to give up more. So he is entitled to a pro rata contribution from the other heirs, even from the one he is giving the legacy, because one receiving the legacy has to buy it and sell it so has to acquire it and give it. So there is a mathematical complication of a portion.

- If the testator does not state in the will that the property doesn't belong to him alone, in other words doesn't say it's a legato di cosa altrui. The clause is valid only to the extent owned by the testator. So if you owned only one half, and did legato di cosa altrui without saying so, it's only valid for half, only valid for the share he owned.

- When it comes to unica charta will, not we together are doing this. But first one spouse will say these are my wishes. Then the second spouse will say these are my wishes. So then when it comes to the publication of the unica charta will, the notary, will just get clauses is one to five and see this is doing of the one spouse and they can be sort of cut off instead of going to single clause changing to we for the I, and the clause is in the will don't have to be identical. Normally they're identical but it's not always the case.

- Now what happens if there's a legato di cosa altrui but during his lifetime, on her lifetime the person has disposed of the object? In that case that legacy is not valid because it is presumed that once it has testator has disposed of the object he willingly gave away and acted in conflict of what you wished in the will. But it's an issue of timing. Which comes first. You have a will done today and tomorrow I sell, than in that case the clause the win will not be binding but if it is the way around. If I sold the property and later on I did a legato di cosa altrui then of course that clause will be valid.

- On the other hand we have situations where at the moment the will was made the object did not belong to the testator. Say I leave you a house but at the moment I make a will the house is not mine. What counts is the date of death. If at the date of death, that object was mine and that clause valid. If it wasn't it is a legato di cosa altrui, and then you have to see if the rules of legato di cosa altrui have been of aid. So if the point to look at if the moment passes away, not the moment the person is making the will.

- Sometimes the person making a will is uncertain or maybe in good faith believes it's his. Sometimes this happens and that come across the situation where the testator had a company and he is 100% shareholder and he's got 50 properties. Some registered in his name, some registered in the name of his company. But these things happen and he makes a will saying he is leaving the house to my son John and that house is not registers in his name, it says it is in the name of his company. The company is a third party and therefore is legato di cosa altrui, even though it has been done in good faith. So I had a case one time where the name of the building was the name of the company and the guy said, I'm leaving the showroom named ‘XYZ Limited’ to my son, and the court said that the description given ‘XYZ Limited’ was the name of the place but not an identification of the owner. It was clearly a legato di cosa altrui, because it was actually owned

by ‘XYZ Limited’ and the go said that that legacy was not valued because state did not declare legato di cosa altrui.

- So it was definitely done in good faith, and if you ever as a notary are faced this situation, play it safe and state relatedly the testator declares that quite possibly this legacy, all of the legacies are laid out legato di cosa altrui. But nonetheless I want them to be valid and binding. Just put a blanket clause just in case.

  - Legacy of thing belonging to heir or legatee.

  - 697. The provisions of the last preceding article shall also apply if the thing forming the subject of the legacy belongs to the heir, or to the legatee required under the will to give it to a third party

  - Where a part only of the thing bequeathed belongs to the testator.

  - 698. Where a part of the thing bequeathed, or a right over such thing, belongs to the testator, the legacy of such thing shall be valid only to the extent of such part or right, unless it is stated in the will that the testator knew that the thing did not wholly belong to him.

  - Legacy of a thing belonging to others and testator declares as such in the will

  - Legacy of a thing belonging to others and testator does not declare as such in the will

  - Legacy of a thing which belongs to an heir or legatee

  - Legacy of a thing which at time of will was not the testator’s but was his at the time of opening of succession

  - The law here is dealing with a legacy of a res aliena – a thing which does not belong to the testator at the moment of death. If it was not his when the will was drawn up, but he subsequently acquired it during his lifetime it is no longer considered as a res aliena and the legacy is valid and effective. The fact that it was not his when the will was made has no consequence. What matters is that is was his at the moment of his death.

  - The law allows the possibility for a testator to bequeath something which does not belong entirely to him – know as a legato di cosa altrui or of a res aliena.. This right has consistently created a number of problems and has led to countless disputes and in my opinion it should be abolished.

  - No matter how well intended the testator may be, most times it creates nothing but problems and at time injustices.

- It's origin of the legato di cosa altrui can be traced as far back as Justinian who envisaged the Legatum per damnatum where basically a testator was able to leave anything – even that which did not belong to him.

- KEEP IN MIND:

- The law distinguishes between whether the testator is aware and so declares that he is not the sole owner and those where he is not aware and therefore does not so declare.

- Sometimes the situation is unclear in the mind of the testator:

- EG if he is the 100% shareholder or a Ltd Co which owns property.

- Who does the property belong to?

- if the testator is aware that the thing is not his or no wholly his, he may still bequeath it as long as he admits that he is not the sole owner in the will.

- This goes against the principle of absoluteness of ownership secured under Art 320 of the Civil Code. Here such owner may find that a testator is willing such thing to someone else. A testator is forcing the owner to pass the thing over to the legatee. The justification to this is the principle of the supremacy of a will. If the heirs have accepted the inheritance unconditionally, the testator's word is law and therefore binds them.

- Now conceptually the legato di cosa altrui goes against the rules of ownership, Article 320 of the civil code says that you're the absolute owner. So you inherited ⅙ from your mother. ⅙ and the her share belongs to you and then the father passes away and he orders you to give up your 1/6. If you accept your father's inheritance, you are bound if the clause has been validated by the victim. So it is a situation created by law, which is going against your absolute right of ownership.

- Which makes it inconsistent. Normally when you own something it is yours and our can interfere and in order to give up has to be a public purpose and paid compensation. But in this case is being given by order of the person who inherited you either accept the will, if you accept it, you are bound by it. If you not have with will, then you renounce and take reserve portion, and if you do that, then of course you not bound the legacy.

  - The evidence of the declaration must come solely and entirely from the will itself though there have been judgements which have stated that the court may also make reference to other wills which were made by the testator. However,

evidence from extraneous acts or deeds done by the testator in his lifetime have no weight or bearing – no matter how strong such evidence may be.

- The moment (punctum temporis) at which one is to ascertain whether the testator fully owned the thing is the moment of opening of succession
- If the object of a legato di cosa alturi is fully or partly owned by a party extraneos to the inheritance the situation is clear. The heirs have a choice. The can either obtain the thing and pass it on the legatee or else give the legatee the value thereof – the value as at date of opening of succession.
- It is the duty and obligation of the heirs to implement the will and grant possession of the legacies even if the object is not fully owned by the testator.
- Albert Camilleri vs John Camilleri APP 14/11/2000
- Legacy of house in which she owned an undivided ½ – condition- to pay LM 5000 to the “estate”.
- IF NO DECLARATION IS MADE AND ONLY PART BELONGS TO TESTATOR:
- Maria Galea vs Angelo Mizzi (Magt Gozo 15/3/2015) and also Borg vs Rizzo
- Valid only for the part actually belonging to the testator
- WILL THE HEIRS BE COMPENSATED?
- HOW IS IT WORKED OUT IF THE ITEM BELONG TO ONE OF MANY HEIRS?
- WHAT IF THE LEGATEE IS NOT AN HEIR?
- WHAT IF THERE ARE CROSS-LEGATEES?
- See thesis by (Notary) Francesca Cachia Zammit Ref 17LLD026

• Regarding legacies there is a good thesis by the Notary Francesca Cachia Zammit, called 'Legal issues with regard to testamentary dispositions by singular title under Maltese law’ (https://www.um.edu.mt/library/oar/handle/123456789/28563)

24th April 2023

Lecture 15.

- Law of Succession

- Lecture 17
- Types of legacies
- Dr Peter Borg Costanzi
- Legacy of an indeterminate thing.
- 699. Where the thing forming the subject of a legacy is an indeterminate movable thing included in a genus or species, such legacy is valid, even though no thing pertaining to such genus or species existed in the estate of the testator at the time of the will or is found to exist at the time of the death of the testator.
- EG: If a farmer owns a herd of cows and leaves a legacy of one of them without specifying which one.
- Not owned at time of will
- Not owned at time of death of testator

- Today we're going to go through some specific situations that deal with legacies, as we may recall it is possible when making a will the testator may dispose of something by universal title or by a singular title. In the former disposing by universal title, the beneficiary is considered to be an heir. If the disposition is by a singular title, so you have a specific object or objects that are identified or identifiable, then in that case that is considered to be a legacy.
- Not just now but even before our laws were drafted, and as a result when our laws were drafted in 1868, there were various provisions dealing with legacies and conditions in legacies. As though there was a specific situation, so as though there was a Court case and an issue arose, let's draft a section of the law to cater for this situation.
- The first one we will deal with is the legacy of an indeterminate thing, an issue had arisen at some point in tome where someone left something which wasn't clearly identified and the law was enacted to make provision for this point.
- The law as we shall see, is always in favour of the legacy so when in doubt as to whether the legacy exists the law was to protect that legacy when it comes to the value however it will take the safest route and act with caution, so it will give you the right but it will give you the minimum of that right.
- Here we have a case of a legacy of an indeterminate moveable included in the genus of species. As well, genus is a latin word meaning a collection, a group of stuff, a stamp collection, a collectivity, something collected. I leave you a stamp

from my stamp collection, you don't know which stamp has been left but it is one from a group of things and the law also states that it is valid as long as it exists at the date of opening of succession, at the death of the dead of the testator so take for example, I have a stamp collection and Im an avid stamp collector. Every year every stamp collection that comes out I collect, I have the covers and I collect English and Maltese stamps, and there was a new stamp issue of King Charles and I got the mint edition of the stamp.

- When I wrote my will I didn't own the stamp of King Charles so the issue would arise if I would leave a stamp collection, will it include the stamp of King Charles? Yes if I owned it at the time of my death, at the time of my will I didn't own the object, I didn't even know if it would exist but at the time I die it was there. So this is one situation.
- Here we have the reverse effect, I'll leave an object which is indeterminate which I own at the time of making the will but is not found when I pass away,
-
  - Where thing bequeathed is not found to exist in estate of testator.
  - 700. (1) Where the testator shall have bequeathed as belonging to him any determinate thing, or any thing included in a given genus or species, the legacy shall have no effect, if the thing is not found to exist in the estate of the testator at the time of his death
  - (Does this partially contradict Art 699?).
  - (2) If the thing is found to exist in the estate of the testator at the time of his death, but not in the quantity specified in the will, the legacy shall have effect to the extent of the quantity so existing.
  - Ie: I leave 100 cows but at time of death there are only 50.
- Here, there is then the reverse effect. I leave an object which is indeterminate, which I own at the time of making the will but is not found when I pass away. We have seen something similar in earlier lectures, if the testator has disposed of the object, or part of the collection during his lifetime then it is clear that there is a conflict. On the one hand in his will he left something worth €100 but when he passed away there was only €5 left. In that case it is valid for the €5, and it is deemed that because he disposed of those €95 he really wanted to change the effect of this will. If I leave £100 but then there is only 50, it is valid for only 50. There is no obligation on the heirs to give the value of the remaining €95.

- Remember last time that we dealt with the legato di cosa altrui where we said that it is valid as long as the testator states that it is a legato di cosa altrui. So I leave 100 cows even though I know they do not all belong to me. In that case, the legacy is valid for all the 100 cows.

- Here we have a slightly different situation. I leave my 100 cows but I sold 50 of them. The other 50 do not belong to me anymore but I left you 100. The fact that it is not a legato di cosa altrui means it is only valid for what is left. But if the testator says, “I leave 100 cows and if my herd is reduced by the time I die I will leave you the value of 100 cows” in that case you will get the value of 100 cows. So it depends on the wording of the will.

- You have to look at the wording of the will. If the will gives a specific number that is the maximum you will get the specific number. If I have disposed of part of them willingly of course, then it does not apply for the part of this issue.

  - Legacy of thing or quantity to be taken from a specified place.

  - 701. Where the subject of the legacy is a thing or a quantity to be taken from a specified place, such legacy shall only have effect if such thing is found therein; and, if only a part thereof is found in the place specified by the testator, it shall only have effect to the extent of such part.

  - the validity of this type of legacy is dependent on the possibility of it’s execution

  - Vide Camilla Mallia vs Carlo Mamo et App Civ 25/1921.

  - If the testator herself removed the things and put them elsewhere, the bequest lapses. She could easily have put them back or done a new will. The fact that she did not do so renders the bequest unenforcible.

- A typical clause in some wills is, “inħallilek kollox mill-għatba ‘il-ġewwa eskluzi deheb, ħaġar prezzjuż u titoli li jipprezentawhom.” “I leave you everything from the front door inwards excluding money, jewellery and titles presenting them” and there is a garage and in this garage there is a car. Is this car included? There is a garden and in this garden there is a precious statue by Michelangelo, is that included?

- These issues have arisen in Court. One of the issues that the Court went into is that there was a case where some objects were removed form the house by the testator himself. He removed them, so it seemed to imply that because he removed the objects he was excluding those objects from the legacy; and an issue arose. In one case, of Camilla Mallia vs Carlo Mamo et decided by the Court of Appeal (Civil) in 1921, the reasoning of the Court was that once the testator

removed the objects there was a clear conflict in the will, the testator could have easily put them back if she wanted to, she did not and therefore it implies that she did not want those objects to be included and therefore the objects which were not found in the house were not included.

- Giovanna Miller vs Wisq Rev Kan Don Giuseppe Farugia et PA 10/6/1939
- Not merely physical possession.
- Also includes objects which are normally in that place but which temporarily held elswhere- see intention of the party – money/objects kept temporily by a 3rd party for safe keeping but which werenormally held in the house
- Marianna Micallef vs Giuseppe Zammit et PA 7/5/1951 confirmed in Appeal 12/11/1951)
- Il-ghatba 'l gewwa: includes everyhing including a sheep, honey, bee-keeping materials.
- In interpreting a will, l-interpreti "ghandu jippenetra l-intenzjoni legittima tat-testaur, li hija l-ligi li tirregolaha"
- The word HOUSE includes he adjacent annexed property and accessory to it. It would include a adjoining field and garage

- However, in a subsequent case, that of Giovanna Miller vs Wisq Rev Kan Don Giuseppe Farrugia et, decided by the First Hall Civil Court on the 10th of October 1939, the reasoning was different. In the Miller vs Don Giuseppe case, some objects were temporarily removed. It was clear that they were temporarily removed. The Court heard evidence on this point and the Court had no doubt that the removal of the objects was temporary because of the specific situation, which implied that the testator was going to get them back but did not manage. So in that case, the Court looked at the intention of the testator, why did the testator remove the objects. In this case, the Court held that they were deemed to have been included even though they were not physically in the house.
- Another situation was in the case of Marianna Micallef vs Giuseppe Zammit et, decided by the First Hall Civil Court on the 7th of May 1951, and confirmed in Appeal on the 12th of November 1951. This was the case of a priest who had a house and quite a substantial garden with the house and he also had a garage. The issue arose whether the contents of the garage and of the garden, the fields were included. He had honey pots, stuff relating to honey and the issue arose to what was included. The Court said that these items were included. in arriving at this conclusion, the Court considered what is the house, mill-ghatba 'il gewwa tad-

dar, so how big was this house? Was the garage part and parcel of the house? Was the field part and parcel of the house? The Court in this case considered that they were. This was the way that this priest lived, this was his lifestyle. He lived alone, he lived in this place, this was his lifetime. For him the house, garage and garden was one big residence. That one big residence everything inside it was included.

- There was another issue regarding the car, a house with an adjoining garage and the owner owned a car, sometimes he'd park it in the street in front of the garage, sometimes he parked it in the garage, not always the same. As it would happen when he died, it was parked in the garage and the dispute arose "imma that car is solely parked in front of the house, very rarely did he park it, the court said, it took a straightforward approach, the car was parked in the garage, the garage was adjacent to the house, it interconnects with the house, this was his residence once the car was inside the garage then it was included in the legacy.
  - Legacy of a thing belonging to legatee.
  - 702. (1) Where the subject of the legacy is a thing which, at the time of the will, was already the property of the legatee, such legacy shall be null.
  - (2) If the legatee shall have acquired the thing forming the subject of the legacy at any time after the will, either from the testator himself under an onerous title, or from any other person under any title whatsoever, he shall, in the event of the existence of the circumstances referred to in article 696 (legato di cosa altrui) be entitled to claim the value of such thing, notwithstanding the provisions of article 743.(Normally it would have the effect of annulling the legacy)
  - (3) Where the legatee shall have acquired the thing from the testator under a gratuitous title, the legacy shall be considered to be adeemed. (ADEMPIT)
- Another situation, leafy of a thing belonging to a legatee. This is when I leave you something that is already yours. It is null. How can I give you something that when I made the will is already yours? It is null.
- If the testator does that, the legatee cannot claim its value as compensation. It is as though that legacy is not written. So if I leave someone his computer that is already his and I pass away, you cannot go to the heirs and say that your computer is worth €700 and so they have to give you that amount. That was your prior to the making of the will and it is null and void.
- However, if after making the will I sell it, so I own the computer and I sell it, then in that case that legacy will be valued and you will be compensated for the value

of the computer. If I have given it to you during my lifetime, by donation, the legacy is adeemed. It has been fulfilled so you cannot enforce it.

- Av Dr Lorenzo Cauchi vs Alfredo Vella – PA 30/10/1948 (Judge Tancred Gouder)
- The deceased, Teresa Bugeja owned an undivided half share in a 81 Zurrireq Rd, B'Bugia and left it to plaintiff who was her lawyer as compensation for services he had rendered
- The property was sold by judicial auction and the plaintiff himself acquired it.
- After Teresa Bugeja passed away he claimed the legacy and since the thing did not belong to the deceased at the moment of her death, he claimed the value.
- Outcome: Court decided in his favour and said that
- 1. this was not a legato di cosa altrui(Art 696)
- 2. Art 702 (2) applies.
- 3. Art 743 does not apply because Art 702 says so

- Now this was an interesting case, Dr Lorenzo Cauchi was a lawyer by profession, and Teresa Bugeja was a client of his, he did work for her and she paid him. She made a will, and said that in order to compensate Dr Cauchi for the services rendered she is giving him her half in the house which she owned in 81, Zurrieq Road, Birzebbugia. There was a case against her, she owed money, she lost and the house was sold by judicial auction to enforce her claim. So a third party had sued her. The lawyer bought the property in subbasta.
- So, she was the owner of half of this house, when she died she was not the owner, and the property was owned by the lawyer. The issue arose whether that legacy was valid?
- The Court said one, when the will was done she was the owner so it is not a legato di cosa altrui, you examine whether it is a legato di cosa altrui at the will was made, the timeline is then. When making the will, was I the owner or not? If I was not the owner and I left property which was not mine I would have to say it. If it remained not mine and I did not say it then it would not be valid, if I acquired it later on it wasn't a problem
- Secondly, the property was acquired by the lawyer, he did not receive it by donation, he had to buy it. The Court concluded that he was entitled to the value

of the property at the same price he paid, as he was a legatee but his legacy was equivalent to the price he paid for the object.

- Article 743 does not apply because Art 702 says so.
  - Legacy of a debt due to testator.
  - 703. Where the subject of the legacy is a sum owing to the testator, or consists in discharging a debtor from a debt due to the testator, the legacy shall only have effect with regard to such portion of the debt as shall still be owing at the time of the death of the testator.
  - Dr Gius Vassallo et vs Nicola Tanti – 13/1/1911 APP
  - You take stock of the extent of the debt as it stands at the time of death and not at the time of the making of the will. If the will is clear there is no room for interpretation.
- Now legacy of a debt due to the testator, what happens if I own money from the person making the will and he leaves a legacy saying that he is going to give me €100,000 as a legacy?
- First of all, if it is going to be in satisfaction of a debt, it has to be written as such, you have got to write it in the will. If you do not write it, it is presumed that the money was a gift. When dealing with legacies constantly you will come across the principle that a legacy is a gift. So if you are going to deviate from that principle there must be proof, and proof has to come from the will itself. So if it is going to be compensation for payment of a debt, the will has to state that it is compensation for the payment of a debt.
  - For example, and this happens quite often someone is being looked after by a family member, tifla xebba ma żżewgitx baqgħet tgħix miegħ u għamlet l-aħħar għaxar snin ta ’ħajjitha tieħu ħsiebi, and this woman dedicated her last ten years looking after me. In my will I said that I would like to compensate her for the services she rendered to me by giving her the house. That is a remuneratory legacy it is a legacy in settlement of a debt. I owe compensation for the services rendered and instead of giving her money, I have given her the house. So I am acknowledging the liability and I am paying it, and it is valid.
- Let us say that I am owed a €100,000 and the legacy is worth €50,000. If I take the legacy, am I extinguishing my right to claim anything else?

- Normally, when it comes to payment of a debt, if I set the payment of a debt and put a condition, and you accept the money without any reservation that condition is fulfilled.

- For example, I owe you €10,000 and I send a letter to you with a cheque of €8000 instead of €10,000 and I write a letter saying: “Dear Joe, here is a cheque for €8000. This is all I have, I do not have anymore money. Please accept this in full and final settlement.” If you cash that cheque it is done, you accepted the €8000 in full and final settlement.

- Does this apply to a legacy in payment of a debt? In the legacy in payment of a debt, if the debt is higher, you take what is given to you as at payment of account, and you are entitled to sue for the rights.

- Then, say for example, I make a will and I say “I am leaving you a legacy equivalent to the amount of money I owe you”, and when I make the will, the amount due is a €100,000. When I pass away, from a €100,000 it came to €20,000. How much is the legacy? Is it a €100,000 or is it €20,000? The law says that it is €20,000.

- So if the liability has been reduced, and I am leaving you a sum to close off the liability, if I forgive the liability then the amount forgiven is the reduced amount. So this is the concept the other way round where the person making the will is owes money and not when he is owed money, he owes money.

- So here we are talking about money due to the testator. So someone has to pay the testator. In his will, he says that he forgives those liabilities. Any money owed to him by his children is forgiven. When he made the will, one child owed a €100, the other child owed €50, and the other child owed €80. The ones who owed the smaller amount paid off, and the one who owed €100 paid nothing. So you have three people who owed money when the will was made, two of them were good enough and paid and the one of them who owed the most is the one who paid the least. In my will the testator writes down that he is forgiving all the liabilities. The first two cannot complain and say “it’s not fair because we paid and our brother did not pay a single penny.” That was the will. If he owed €100, those €100 are forgiven. If I owed nothing, nothing is forgiven because it is settled. So you see the moment of date of death, that is the amount that has been forgiven, not the amount due when the will was made. This issue arose in the case of Dr Gius Vassallo et vs Nicola Tanti, decided by the Court of Appeal on the 13th of January 1911.

  - Legacy of a thing or sum as due by testator to legatee.

- 704. (1) Where the testator bequeaths by way of legacy any determinate thing or sum, as due by him to the legatee, the legacy is valid, even though such thing or sum is not due. – (no reservation re Art 696)

- (2) If such thing or sum is due by the testator, the legatee acquires a new action for the recovery of the thing or sum due to him, and, where otherwise the thing or sum would not have been exigible except after the lapse of a certain time, or if the payment thereof was dependent upon the fulfilment of a condition, the legatee shall not be bound to wait until the expiration of such time, or the fulfilment of such condition.

- (3) The legacy, however, shall be ineffectual if the testator shall pay the debt at any time after the will.

- If the person making the will owes money, so if I owe money to the legatee, for that to be considered as a payment of a liability, I have to state that I am paying you off. If there is no liability, it is still valid.

- Say for example, I think that I owe you money, and I make a will and in my will I write down that I am going to leave you €100,000 for how much I owe you. In actual fact, I do not owe you a thing. You will still be entitled to received that €100,000 because it will be considered as a gift, It depends on the wording of the legacy. If in the will I write down that I am leaving you a sum equivalent to the amount I owe you then of course, the amount is adjusted. But if I leave a sum and say that I am leaving you this sum because this is what I owe you then it will be a gift. But then we have a problem here.

- Last week we saw, we examined the validity of a will if it is done as a result of an inducement, I've written something in my will because I was induced into that situation, I had a belief, that there was a given state of facts and because of these facts I made a will, now if I genuinely believed I owed you the money, and I was wrong, you can argue, contrary to the rest of the debt, you can argue that since that disposition was done and was induced solely because I thought I was a debtor and I would not have left you that €100,000 if I weren't your debtor then of course you can challenge that disposition. So here you have on the one hand a clause saying such thing or sum is not due, and on the other hand you have another part of the law saying if a legacy has been done as a result of an inducement which turns out to be false than that legacy turns out to be invalid.

- So there may be situations, not always there may be situations where this situation will occur, of course if there was a liability, a real genuine one and I paid it off, then that legacy if it's not removed, will be considered as a gift. Since I paid it off I had the possibility of changing my will if I wanted to and I didn't I left it as it

was, once I left if as it was it is considered to be as something I wanted to subsist, I want it to remain and since I wanted it to remain even though no money is due to the legatee that part will be considered to be a gift.

- The general principle is that a Legacy is given as a liberality.
- If it is in settlement of a a liability then it is not a liberality but a payment of what is due
- He court has the power to look into it and see if it truly a payment of liability or gift – relevant when calculating the reserved portion and also hen dealing with forfeiture /unica charta wills.
- Vide Vincenzo Attard vs Michelina Agius PA 31/10/1952 Judge A Magri
- Gaetano Spiteri vs Carmelo Spiteri PA 8/2/1956 – Judgement reversed in appeal on a different issue 28/6/1957.
- If the liability is not actually due it is considered as a gift and not a payment of a debt.

- The general principle is that a legacy is given as a liberality. If it is in settlement of a a liability then it is not a liberality but a payment of what is due. The Court has the power to look into it and see if it truly a payment of liability or gift – relevant when calculating the reserved portion and also then dealing with forfeiture /unica charta wills. This power is given to the Courts because there may be situations where the remuneratory legacy is abused of – I fictitiously state that there is a liability when in fact there is none. In those situations will look into it and see whether that legacy was genuine or not, whether the amount of the gift reflects the amount due or not, whether it was a gift or whether it was a payment of a debt.
  - Legacy of debt to creditor.
  - 705. (1) Where the testator, without mentioning the debt due by him, makes a legacy in favour of his creditor, such legacy shall not be deemed to have been made in satisfaction of the debt due to the legatee.
  - Salvatore Bugeja vs Giuseppe Farrugia Souchet et PA 9/6/1916
  - A legacy is deemed to be a gift. For it to be considered as a payment of a debt, this must be expressly stated in the will itself
- In fact to corroborate what was stated above, in article 705(1) the law first states that if there is a legacy to a creditor, so I give money or a gift to someone I owed money to, unless in the will I say that I am doing it in payment of the debt, it is a

legacy of a gift. For it to be considered as a payment of a debt, this must be expressly stated in the will. The Court is not allowed to make any inferences from external evidence.

- In fact in the Spiteri case, this is exactly what happened, at firs instance the Court said that the legacy of the creditor was in satisfaction of the debt, in appeal the Court said no you have to look at the wording of the will the will is clear that there's no room for interpretation in this case since the testator did not say that the legacy was in payment of the debt, it was not re-surrendered.
    - Legacy to servant.
    - (2) A legacy made in favour of a servant, shall not be deemed to have been made in satisfaction of his wages.
    - Vincenza Fenech vs Carmela Caruana PA 7/10/1921
    - A legacy to be a gift and just because a legacy was given to the maid did not mean that it was in satisfaction of her wages.
    - Furthermore, even if it were, if the legacy is not sufficient to pay the liability, the creditor is entitled to sue for the remaining balance
    - Ester Farrugia vs Nutar Dr Carmelo Farrugia noe – Ap 14/2/1938.
    - There is a presumption in favour of liberality – if it is to be considered as a payment of a debt it must result from the will itself and no extraneous evidence is admissible
- Then we have legacies in favour of servants, legacies in favour of maids, recently Dr Borg Costanzi came across a recent one regarding Villa Bettina in Gudia, the tower of Bettina, there's this tower, in Gudia, it's built if you look at it it's built like hajt tas-sejjieh, it's quite a tall tower, and rumour has it that Bettina, was married to a knight, and he built this tower so that when he was in Valletta in the Auberge he would wave to her, and physically you could stand on top of this tower you can see Valletta and they actually waved to each other, from the Auberge in Valletta and from the tower, of course it was his way to control his wife to make sure that she's home, in any case, eventually there's a long story with Bettina, but she was known for having famous parties, even the inquisitor would be invited, of course to have these special ceremonies she had to depend on the household staff, on the maids, of which she had many and she made a will saying I leave my maids any item of silver in the house, that they choose and if any of my heirs create problems, they are disinherited. So, this is how highly she thought of her maids

and in fact they took whatever they wanted to take within reason and no one could contest it.

- But, this position in favour of maids are not uncommon, maybe nowadays not so common because it's difficult to find a maid but in the past up until 40/50 years ago it was very common for maids to leave the village and go and live with the family. They'd have a little room on the roof and maybe once a month they go visit their family in the weekend, so the maid became almost like a member of the family, they'd be very close, they would end up knowing everything. And of course this familiarity brings with it a kind of moral obligation to gift the maid the fantastic service that was given to the family the law wanted to protect the maids and disputes have arisen.
- The first thing the law says is that a gift in favour of a maid is not presumed to be compensation for her services, so if the maid wasn't paid she could sue for her wages. The gift was presumed to be made in the spirit of liberality and the law stated very clearly.
- In case law they went a bit further and they said if the gift wasn't enough the maid could sue for the remaining balance, the issue re-arose in the Testa Farrugia case but the court went one step further, for it to be considered as payment it has to be expressly written in the will if its not written in the will its a gift and no extraneous evidence was allowed, only the will could speak.
    - Giuseppe Pirotta VS Maria Preca – PA 26/1/939
    - Legat renumeratorju: the court has the power to ascertain if such services were actually rendered. If they were not, the legacy is still valid but it is deemd to have been made as a gift.
    - Vide also Joseph Brincat vs Maria Zammit – PA 16/2/1965
    - Antonio Bianco vs Dr Arturo Valenzia – PA 4/11/1983
    - If the will does not state that the legacy is renumeratory, the beneficiary is entitled to both the egacy as well as to get paid his credit.
    - Vide manuel Bonello vs Giuseppa Bonello (Mag Gozo Su) 22/2/2013 and more emphatically in Frances Mizzi vs Rose Ann Galea et (App 2/5/2016) whioch reversed judgement in 1st instance
- There are other judgements, remuneratory legacies, the courts had the power to see if its a gift or payment as we explained before.
    - Legatum liberationis to include only debts due at the time of the will.

- 706. Where the legacy consists in discharging the debtor from the debts due by him to the testator, such legacy shall be deemed to include only such debts as were due to the testator at the time of the will, and not such other debts as may have been subsequently contracted.

- It all depends on the wording of the legacy. This is presumption but if testator stated:

- “I discharge my son Joe from all debts which may be due to me at the moment of my death”

- This is an interesting section, again dealing with a legacy of a debt, liability. I write a section in my will and I free you from all of my liabilities due to me. In that case, it is only valid up to the maximum that was due to me when I made the will. if the liability kept increasing, it does not apply for the increase.

- So if you borrowed €10 from me today and later on today I made the will and I forgave those €10 and then next week you borrowed another €50, it only applies for the initial €10. It does not apply for the subsequent €50, that is unless the will says otherwise because if the will says, “I discharge my son Joe from all debts which may be due to me at the moment of my death”, so I am clearly putting a specific moment of time, the moment of my death, in that case the wording of the will will prevail and if the liabilities keep increasing until I die, it is the incremented value which prevails.

- So this is a presumption, it is not absolute. The presumption is that you take stock at the moment the will was made but then you have got to read the wording of the legacy itself. Can the legacy as its written be interpreted differently? And if it can it will be interpreted differently.

  - Legacy of maintenance.

  - 707. A legacy of maintenance shall include food, clothing, habitation, and other necessaries during the life of the legatee; and it may also, according to circumstances, include the education of the legatee according to his condition.

  - NECESSARIES DURING THE LIFE OF THE LEGATEE

  - YOU HAVE TO EXAMINE THE CIRCUMSTANCES OF RTHE LEGATEE IN CROSS RELATION TO THE EXTENT OF THE ESTATE

- So what about a legacy of maintenance? I leave a legacy and I impose an obligation on the heirs to look after one of my children who is handicapped, or one of my children who is still a minor. My elder children all studied, went to university

and even went to a university abroad. I do not mention in my will the extent of the maintenance. In that case you have got to look at the family standard and the assets of the testator, his social standing, his lifestyle, how he would have brought up the child if he was alive and whether he could afford to do that.

- So presumably it will include of course a combination of food and clothing, those are the necessities, but if the testator paid for private education and there is money to pay for private education, then it includes also private education. It depends on the circumstances. So fictitiously you have got to look at what the testator would have had in mind when providing for the obligation on the heirs to maintain the minor child.

  - Legacy of immovable increased by subsequent acquisitions.

  - 708. Where the testator who has bequeathed the ownership of an immovable property, has subsequently increased such property by further acquisitions, such acquisitions, even though contiguous, shall not be deemed to form part of the legacy, unless a fresh bequest is made.

  - The moment -

  - not the date of death

  - but when the will was made

  - Vide Carmel Said vs Nutar Dr Giuseppe Cauchi PA 30/1/1958. Acquisitions made after the will are not included.

- Now, another type of legacy that is given relevance is the legacy of an immoveable property and later on after the will the testator buys more proper to the property close. So I have a house and then the shop underneath my house comes up for sale and I buy it and I convert this shop into a living room.

- Later on, the land at the back comes up for sale and I buy it and I extend my garden at the back. In the will I leave my house. At the moment when I die, the house includes what was once a shop and what was once a field. In this case, the presumption is that the new acquisitions are not included in the legacy, that is the presumption. The moment to look at what the legacy consists in, in this case, is the date of the making of the will. Unless the will says otherwise, new acquisitions are not included. The will may include new acquisitions, it may state, the house as it is today or as may be in the future as a result of new acquisitions, it can state it, yes, but if it is not stated then it is as if it was when I made the will.

- If I do benefikati, for example, I have a terraced house in Swieqi, I demolish it and now there is a block of five flats. When the house was built at the moment I made the will was a two-storey house, ground floor, first floor and a roof, now there are five floors, four flats and a penthouse. What does the legacy consist of? is it only ground floor and first floor? Or does it include also flats three, four and five?

- It includes flats three, four and five because they are not acquisitions. The law here is only talking about ‘subsequently increased such property by further acquisitions’. In this case, the property owned remained the same, the same footprint. It is just as that the owner has developed it. Since there was no further acquisitions, then what was the house now becomes a block of flats and the legatee will get a block of flats because there were no acquisitions.

- On the other hand, let us say when buying the terraced house there was a servitude, altius non tollendi. So when he bought the terraced house he could not build further floors and when he made the will that was the situation. Later on he went to the person who owned the servitude, the owner of the dominant tenement, and they agreed to remove this servitude and a contract was done. In that case there is an acquisition, an acquisition in the form of a release of the servitude, and the other floors will not be included. So when talking about further acquisitions it is either property that is acquired by inheritance or if he acquired any pre-rights on that property or remove any obligations from it.

  - Pre-legacy to heir.

  - 709. The testator may leave a pre-legacy to his heir and, in any such case, the heir, with regard to such pre-legacy, shall be considered as a legatee..

  - In practice this clause has to be cross related with Art 696 – legato di cosa altrui.

  - The law is here fictitously stating that as far as the legacy is concerned, the beneficiary is considered as a legatee as opposed to an heir

- Another situation, a pre-legacy to an heir. When dealing with legacies, we call them pre-legacies when the beneficiary is also an heir. So there are three children who are heirs and the testator leaves a gift to one of them. That gift is called a pre-legacy.

- Who has to pay the pre-legacy? Take for example, I leave my child who is also an heir, a pre-legacy of €3,000, and I have three children. So one of my children is going to get €3,000. Who has to pay it? When it comes to the liabilities of an estate, liabilities are in proportion to the share in the heir/estate. We go back to our second year lectures, article 495A and 495B dealing with the methods of

termination of co-ownership, when dealing with methods of termination of co-ownership arising from inheritance in this case the law says that if you inherit property and more than three years have passed and there is no lawsuit requesting the revocation of the estate and there are no usufructs, then an heir is the owner of his individual part. So if I have ⅓, I have ⅓ of the table ⅓ of the chair, ⅓ of the house, ⅓ of the field, ⅓ of every single item. And I can sell that ⅓ of the chair, ⅓ of the house, ⅓ of the field and ⅓ of the house and it would not be a suspended sale, we may recall that before these amendments were made in 2010, a sale of part of a common property which was inherited was held in suspended animation. You will only know that a buyer has actually bought a title when there was a physical division of the estate. When it was divided you know it was assigned, if I got the title then the sale is valid, if it didn't the buyer bought thin air and I just give him a refund of his money. With the new law he joins n the division, he is one of the signatories, if the property is going to sell then he gets the value at the date of the selling.

- When you have an asset you are a co-owner in everything, when it comes to liabilities its as though the division took place immediately and you owe the liability according to your share, if 10 people owe money I owe each one of them ¼, if I owe them each ¼, and I can't say we haven't divided I don't know what I'm going to get, with liabilities the share is fixed on date of death, with assets, you have to wait three years.

- Here we have a situation where the legatee is a creditor, he is entitled to get his €3,000. So that is clear, he is going to get his €3,000. Who is going to pay it? The heirs have to pay it each according to their share, if there are three heirs and they are in equal shares, ⅓ each, each one has to pay ⅓ but the legatee who is also an heir and he will say hang on a minute I got a legacy of €3,000 but I'm an heir and I'm not going to get €3,000, I'm only going to get €2,000 because the other €1,000 I'm going to pay to myself. I am a debtor and I am going to pay me my own €1,000. This is what the law is saying here, if you are a pre-legacy meaning you are a legatee and an heir as far as your share is concerned you ignore it.

- So take the situation where I have a gift of €3,000 there are three children but in my estate my father said you get 50% but the other two siblings get 25% each. From that €3,000 I only get €1,500 because I am an heir of 50% so fictitiously I paid myself, it doesn't come out of the estate and then it divides, or it does actually in fact, it does come out of the estate and divide and the result is exactly the same, why?

- Take the example where the estate value is €10,000. Estate worth €10,000, legacy worth €3,000. There are two children, equal shares, 50%-50%, and I have a legacy of €3,000 and I claim my €3,000. So I write to the estate give me €3,000.

From the €10,000 it goes down to €7,000. From the €10,000 it went down to €7,000. €7,000/2 = €3,500. So I get €3,000 as a legacy and €3,500 as an heir and there were €10,000. That is one exercise, now let's do it the other way round. There is €10,000 and we divide it by 2, €5,000 each and I said that the heir pays himself, so from €1,000 I pay myself, so my €5,000 remain the same, but I get another €1,500 from my sibling, so it comes to €6,500. Is the result the same? Yes.

- Let's start again, is it the same or not, did they come the same or not? Yes so you have 10,000 - 3,000 = 7,000. 7,000/2 is 3,500. 3,500+3,000 = 6,500. The first exercise is 6,500. The second exercise, 10,000/2 = 5,000. 5,000 + 1,500 = 6,500. So in actual fact here the law says that the legatee shall be considered to be a legatee it's talking about the way of how the payment is affected.
  - Giovanna Carabott vs Generoso Carabott PA 29/11/1947
  - A pre legacy is paid by the heirs in their respective share. The legatee has to bear the burden to the extent of his share as heir.
  - Joseph Borg vs Carmelo Borg PA 24/4/1998
  - When interpreting a legacy,
  - when in doubt whether the legacy exists – interpretation in faavour of the legacy
  - if the doubt is to the extent of the legacy – interpretation in favour of heirs
  - Rose Alden vs Raphael Pace – PA 731/95 PS - 27/6/2003
  - Left the house to the son – did not include the adjoining garage but includes the front garden.
- These are some judgements that refer to the above.
  - OF CONDITIONAL OR LIMITED DISPOSITIONS
  - Dispositions may be pure or conditional.
  - 710. Any disposition, by universal or singular title, may be either pure or conditional.
  - Universal title
  - Singular title
  - Pure

- conditional
- Impossible conditions, etc.
- 711. (1) Where the condition is impossible, or contrary to law or morals, it shall vitiate the disposition to which it is attached.
- (2) Where the condition is unintelligible it shall be considered as if it had not been attached.
- Impossibilia nemo tenetur
- This also takes us back to Art 588 – wills to be made according to "the rules laid down by law"
- Condition must be intelligible.

- A legacy has a disposition of the will, with heirs, maybe what is called our or conditional, it could be a simple appointment or gift, or maybe have strings attached. So it could be an heir, so if this is the general rule, set by the law saying that you can put a condition.
- First of all, if the condition is impossible it has no effect. In fact the law says if it is impossible contrary to law or morals.
- The word contrary to law, or morals it's not only impossible to form issues,.
- For example, let's say drug trafficking, and all my money and my seat comes from drug trafficking. Proceedings, criminal proceedings are taken against me for drug trafficking and there is a freezing order. In my will, I leave my estate to my children, on condition that I might be committed, so there is the condition, of course if I'm alive when the case is decided and I'm acquitted then that condition has come about. But what happens if I pass away before the criminal case is decided? There is no conviction, so there is no court judgement committing me, the freezing order has no effect.
- An issue arises whether the proceedings from my criminality can be inherited, is it contrary to the law? Does the court have the power to examine my assets and where they came from? If there's a dispute regarding my inheritance, will the court enforce the legality or illegality of my assets? The laws will not.
- Similar reasoning, you will find in judgements dealing with presta nomine, where a typical example is, there was a law its still there but the impact is now limited where for a non-maltese to buy property in Malta, he needed what is Called an Acquisition of Immoveable Property Permit, and the foreigner will only be entitled

to get a permit if the property was above a certain threshold and he was purchasing it for his own residence. A foreigner was not allowed to buy a separate property. so if this foreigner wanted to buy a separate property, he couldn't do so. There were instances where foreigners would have very good friends and they'll tell their friends or a lawyer where they agreed that the property would be bought in the name of someone else, so the foreigner would have physical ownership of the property, they could enjoy it but the legal ownership was not be registered in his name.

- There have been disputes on this where subsequently the foreigner would ask the third party to put the property in his name, the law changed when we joined the EU most of these situations involved British people, because of joining the EU and the UK was part of the EU, this obstacle was removed and therefore it was possible for a British person to own more than one property and so at that point these Brits asked the presta nomine to put the property back in their name.

- In most instances it happened, but there were cases where it did not and they went to court and there's caselaw on this point and the court denied the request, it said when the contract was done, it was based on an illegality you were doing it to bypass the law, had you bought the property in your name that contract would have been null, therefore if by putting a presta nomine and looking behind appearances that contract would be null because it was illegal, the court will not endorse an illegality. It will not be complicit to this scheme and it denied the request. There was one instance where the property was owned by the lawyer and the lawyer kept it, the brit sued for the money, and again the court said when the transaction was done it was based on illegality, case dismissed. When dealing with PIL, we also came across this situation, there was a case regarding a cheque where someone was playing cards and he lost and paid the loss with a cheque and the cheque was not honoured and there was a dispute as to the validity of the obligation. The court said gambling is illegal and therefore I am not going to endorse for a request of payment on an illegality.

- In this case, in the example of when the drug trafficker's estate, came to a discussion, of course you have to bring it to evidence, the heirs are not going to bring evidence. If you are asked to give advice, this would be one of the sessions you won't even notice it but if you remember article 588, dealing with validity of a will, this was one of the first sections we've dealt with. It says wills must be made according to the rules laid down in the law, so again we have the issue of illegality, so it's not a new concept that there has to be a condition/obligation which is valid according to law and the courts will never recognise and give effect to something illegal. Normally, the courts perceive something illegal not only when they indorse

it but they will also report it and request for proceedings to be taken. When these proceedings are taken is another matter but the power is there.

- Now of course if there is a condition, if there is a string attached it has to be an understandable one, it has to make sense. A condition is an exception not a rule, so if you have lack of clarity that lack of clarity will go against the condition, if you can't really deduce and make sense of that condition you ignore it and give effect to the rest of the legacy.

  - Condition in restraint of marriage.

  - 712. (1) A condition prohibiting a first or a subsequent marriage shall be considered as if it had not been attached.

  - A FIRST OR SUBSEQUENT MARRIAGE:

- Conditions in restraint of marriage, Dr. Borg Costanzi cannot imagine this happening, but it shall be considered as though it had not been attached, so if I say I appoint you as my heir if you don't remarry, it's as though that condition doesn't exist. But there have been exceptions to this rule

  - (2) Nevertheless, where a legacy consisting in a right of usufruct, use, or habitation, or in a pension or other periodical payment, is contingent on the legatee remaining, and limited to the period during which he or she remains a bachelor or spinster, or a widower or widow, the legatee shall be entitled to enjoy the legacy only as long as he or she shall remain a bachelor or spinster, or a widower or widow.

- First of all, if you have a usufruct use, or habitation, or in a pension or other periodical payment, an annuity, in that case, you can state this benefit subsists as long as you don't remarry. For example husband and wife leave the usufruct as long as they don't remarry. If one of them remarries they can but they lose the usufruct. In that case the condition would be valid. This is not an uncommon fruit.

  - (3) A condition in restraint of remarriage, attached to a testamentary disposition by one of the spouses in favour of the other, shall be valid.

  - This applies to any type of will and not just a unica charta will.

  - Giovanni Camilleri vs Vincenzo Angelo Bugeja App 26/6/1944

  - Condition that the beneficiary does not marry a person of a certain clas or condition is valid and is done in the interests of the "vanta[[, interess, dekor u dinjita 'tal-gatifikat stress".

- Vde Toullier Vl III p 98: condtion that the person can only marry a person from a certain village and that the marriage takes place that village is valid

- A condition in restraint of remarriage, attached to a testamentary disposition by one of the spouses in favour of the other, shall be valid. Here we start getting the exceptions. So you have a unica charta will, and the spouses leave certain benefits to each other as long as none of them remarries, so we have the exceptions. You're not telling that person not to remarry but you're telling that person if you remarry you won't get the benefit from my will. So what happens? Does the surviving spouse lose the reserved portion? No the reserved portion's guaranteed, you lose the benefit from the will. It is the same rule when dealing with forfeiture when there's an unwarranted change in the unica charta will, the same rule, the same procedure.

- But this rule doesn't only apply to unica charta wills it applies to any, so the general rule where a person can't remarry does not apply in respect to spouses and doesn't apply in respect of usufruct habitation and annuities. And the reasoning behind it is that this protects the dignity of the survivor. Ghal vantaġġ, interess, dekor u dinjita 'tal-gatifikat stress. There has been caselaw also where there wasn't an impediment to marry but a clause stating that you can only marry a person of a certain class. I am a noble person and say she can only marry someone who is noble. That condition is valid, it will not restrain the marriage, it is saying it will only be able to marry in a certain class or there was another case where the testator said you can only marry someone from this village and the wedding has to take place in this village and the courts have held this condition to be valid. In today's day and age of course it doesn't have much meaning with lack of identity, but in the past it was important. When you have someone making a will saying that I want you to do this, with some people it is a very important thing to them, something that goes to their very bones, without discussion so don't put it down even though you may be tempted to feel stupid or childish.

  - Condition restraining heir from availing himself of benefit of inventory.

  - 713. Any condition restraining the heir from availing himself of the benefit of inventory shall be considered as if it had not been attached.

  - Acceptance of an inheritance with the benefit of inventory (Art 877 et seq)

- Condition restraining heir from availing himself of benefit of inventory, for example I make a will, I know that I have a bunch of liabilities and I want to make sure they get paid so I say whoever inherits me cannot inherit me with the benefit of inventory, if you inherit me you have to pay all my liabilities. That clause carries

no weight so the right to inherit with benefit of inventory is always safeguarded. The testator cannot put the condition to remove that right.

- Limitation of commencement or cessation of institution of heir.

- 714. If, in any testamentary disposition by universal title, the testator shall fix a day on or from which the institution of the heir shall commence or cease, such limitation shall be considered as if it had not been attached.

- Condition suspending the execution of the disposition.

- 717. A condition which, in the intention of the testator, is merely meant to suspend the execution of the testamentary disposition, shall not operate so as to bar the heir or legatee from acquiring, even before the fulfilment of the condition, a vested right transmissible to the heirs of such heir or legatee.

- We can have someone thinking there must have been a case, of course now you can't do it, where someone says you are my heir but you only become my heir 300 days after I die and if you don't survive me for more than a week you don't inherit. In some jurisdictions this is allowed, and we dealt with this when dealing with people who died in the same incident, or maybe one survives longer than the other there are some jurisdictions which say that if you die within so many days as the first one, as a result of the same incident its as though you died at the same time. There's a car crash, head on collision, the husband died on impact and the wife is taken to hospital, and is in a coma and she dies a week later without getting out of the coma, in some countries it's as though she died at the same time.

  - If I make a will and I say in my will, I leave everything to my wife provided that she survives me by more than 25 days, in Malta it's not, if your there I can't limit the benefit it this way because of the clause, once the person has become an heir that right of an heir commences upon my death and I cannot say if you don't survive the 25 days your right to an heir seizes. So my wife in that case despite what I've written will inherit immediately and despite dying after 25 days what she inherited from me will go to her heirs.

- Section 717 is a bit more difficult, so someone makes a will, and says that and I say that the will that you will be entitled to enjoy the property once you hit the age of 18 and you're 17, so you have to wait. The 17 year old dies six months after me, he doesn't reach 18. The law here is saying that that 17 year old has a vested right, even before the fulfilment of their obligations and that vested right goes to the 17 year old's heirs, but the condition hasn't been fulfilled yet. You have to wait till the condition is fulfilled. The example given is not an ideal example because in this case the beneficiary itself has passed away, but there are other instances

where the condition will occur but the beneficiary passes away before the condition occurs.

- For example I say that you will be able to get this legacy when my house is built and it's still in the course of construction when the architect issues a completion certificate if I pass away, the beneficiary passes away before the house is completed. That beneficiary has a vested right, when the conditions completed when the house is built and the architect issues a compliance certificate, at that point my heirs, the legatee's heirs will get the benefit. They will inherit either the legacy or become heirs. So the condition has been fulfilled but the personal title to it dies before the condition occurs. The heir or the legatee has a vested right, he's not yet an heir or a legatee he just has a vested right, the right will pass on to that legatee or heirs chance. Here the law makes it clear that that right arises even before the coniditon is fulfilled.
- Law of Succession
- Conditions in Wills – Contd
- Effects of legacies & Payment thereof
- Dr Peter Borg Costanzi
- Disposition on condition of mutual benefit, is null.
- 715. Any testamentary disposition, whether by universal or singular title, made by the testator on condition that he shall in return benefit by the will of the heir or legatee, is null.
- You cannot ascertain this condition until the beneficiary passes away.
- How does this impact on UNICA CHARTA WILLS?
- Note: NULL not ANNULABLE

- A disposition in a will of a mutual benefit. So, I leave my estate to you on condition that you leave your estate to me, that's one, I can't tell you what to do and that condition will be null.
- It's the testamentary disposition that is null not the condition which is null. If I leave something to you on condition that you need to leave something to me, that clause is null. You have no clause. When the law says null, it's null not annullable. You can ignore it immediately. No matter how much time has passed, that clause, the nullity of that clause is never time barred, it's always null. What is null is always null.

- Disposition depending upon an uncertain event.
- 716. Any testamentary disposition made subject to a condition depending upon an uncertain event, and being such that, in the intention of the testator, the validity thereof is dependent upon the happening or non-happening of such event, shall be ineffectual if the person, in whose favour it is made, dies before the fulfilment of the condition.
- Condition: an uncertain event
- Valid as long as beneficiary is still alive
- at the moment of the fulfilment/not- fulfilment of the condition
- Not date of opening of succession.

- Section 716 seemingly contradicts something we just said, if there's a will, which is conditioned on an uncertain event, and the beneficiary dies before that uncertain event takes place, then that will, that disposition is without effect. It's not null, it's without effect. So there's no vested right over here.
  - For example, I make a will and I say I'm going to leave you a €1,000,000 if the green party wins the next general election and you say it's impossible, everything is possible. The beneficiary dies before the elections take place, it's uncertain whether the green party will win or not, if the validity of the will is dependent on that condition, I give it to you because you support the green party, then in that case if the beneficiary dies before the elections that is without effect, there's no vested right that right doesn't pass on to that beneficiary's heirs. It is valid as long as the beneficiary is alive, so if the beneficiary lives to the general elections and the green party is elected, that condition is valid and that will will take effect, but you've got to see if he's alive when the condition is fulfilled not when the succession is open, when the condition is fulfilled. If there's an election and the green party doesn't win the condition wasn't fulfilled, but if it wins you have to see if the beneficiary was alive. If he was alive it's fulfilled, if he wasn't it isn't.
  - Where heir or legatee is bound to give security for fulfilment of condition.
  - 718. If the testator has left the inheritance or legacy subject to the obligation that the heir or legatee shall forbear from doing or from giving a specified thing, the heir or legatee shall be bound to give sufficient security, for the fulfilment of such obligation, by means of sureties or by means of a hypothecation or pledge

in favour of the persons in whom, in case of non-fulfilment, the inheritance or legacy would vest.

- Vide Giuseppe Riccardo Bugeja vs Bugeja APP24/10/2016
- Obligation to do/Forbear from doing imposed on legatee/heir
- Security: Hypothecation/pledge
- In favour of person who stands to benefit in case of non-fulfilment

- There could be a condition in the will where the beneficiary has to refrain from doing something, he has to provide a guarantee, a guarantee that he won't breach this condition.
  - So for example if in the will I say you will only inherit me if you're marrying a girl from Sliema, and I'm engaged to be married and the person dies, I can be asked to give a guarantee, I inherit yes but I can be asked to gie a guarantee in case I don't marry a girl from Sliema and I marry someone from Bubaqra instead, and in that case of course there's a condition that it cannot be breached and if I give a guarantee then that guarantee will kick in and I have to refund what I've received, that is a security it can be by pledge. The guarantee has to be in favour of the person who will benefit if that obligation is not fulfilled. If I breached that condition who will benefit? I have to give them a guarantee. Dr. Borg Costanzi has never heard of this happening in his career.
  - Condition suspending the execution of the disposition
  - 717. A condition which, in the intention of the testator, is merely meant to suspend the execution of the testamentary disposition, shall not operate so as to bar the heir or legatee from acquiring, even before the fulfilment of the condition, a vested right transmissible to the heirs of such heir or legatee.
  - Suspensive condition: Legatee/heir has a vested right even before the fulfilment of the condition
  - Person charged with delivery of conditional legacy must give security.
  - 719. Likewise, where a legacy is bequeathed conditionally, or as not exigible before a certain time, the person charged with the payment of the legacy, may be compelled to furnish security as aforesaid in favour of the legatee.
  - Legacy under a suspensive condition

- Legatee can ask heir to provide a suitable guarantee that the legacy will be paid once the condition is fulfilled

- Again here we have a repetition of what we said before. It is a condition, you have to wait for a period of time to pass, the heir or legatee has a vested right and in that case if a legatee passes away that right will go to the heirs. So when it comes to guarantees or security this applies to legacies under the suspensive condition and vice versa, the legatee himself, can ask the heirs providing the guarantee. In other words if I have to wait to get my inheritance and I ask the heirs to guarantee that when I get my inheritance I will final it and it doesn't disappear into thin air, if I have a legacy of a house but I have to wait for a condition to be fulfilled to get that house I can ask the heir to give a guarantee that that house will not be dissolved, that when that condition is fulfilled I will get the house.

  - Appointment of administrator in certain cases.

  - 720. (1) If the heir has been instituted subject to a condition of the nature of those mentioned in article 716, there shall be appointed an administrator of the inheritance until such condition is fulfilled or it is certain that it cannot be fulfilled.

  - (2) An administrator shall also be appointed when the heir or the legatee fails to give the security required under the last two preceding articles, as well as in the case in which the instituted heir is the immediate issue, as yet unconceived, of a person living at the time of the death of the testator as provided in article 600.

  - (3) Such administrator shall have the same powers and duties as the curator of a vacant inheritance, subject to any other direction which, according to circumstances, the court shall deem fit to give.

  - Administrator appointed:

  - 1.When the Legacy contingent on the happening of an event (Art 716)

  - 2.When the heir/legatee fails to give security (Art 718,719)

  - 3.Cases where the instituted heir is as yet unconceived at the time(Art 600)

  - Duties and obligations

  - Conditions:

  - The testator is controlling the heirs/legatees after his death

- 1. The legacy vests from the date of death and is transferable to the legatee's heirs
- 2. Conditional legacy vests upon fulfilment of the condition. But see clauses 717,718,719
- 3. Legacy of an indeterminate thing included in a genus or species: Choice left to the heir/3rd party -not bound to give the best/cannot give the worst.
- 4. If choice not made – left to the Court's discretion
- 5. If will states that the choice is left to the legatee he can chose the best. If none exists the choice then falls on the heir
- 6. Alternative legacies: Unless the will states otherwise, the choice is left to the heir
- 7. Once the choice is made it is irrevocable.
- 8. It is up to the heir to request possession. In the case on an immovable. Possession is by public deed. (immissjoni fil-pussess).
- Maurice Busuttil vs Joseph Meli App 5/10/1998
- Consequences of: Immissjoni fil-pussess – serves as proof that legatee has accepted the legacy and the objct has been delivered.
- Paul Vella vs Grace Everest APP 27/1/2017. Legacy of a sum equivalent to ¼ value of an immovable property.Value date is date of opening of succession
- Francesca Saveria Cini vs George Cini PA 25/2/2016. Distinction between ownership and possession.
- 9. Costs of delivery of rhe legacy – charged to the estate unless the will states otherwise – including the taxes.
- 10. Fruits/Interests on the thing bequeathed.
- General Rule: The run from the date claimed or from the date promised
- Exceptions:
- a)Where the will states otherwise

- b)Where the thing is a tenement, capital sum or other thing capable of producing fruits
- Dr Pasquale Mifsud ns Negt Riccarda Castagna APP 26/4/1889
- Does not apply to an imbecil who is represented by the heir because the fault in claiming the legacy lay with the heir himself.
- Clementina Psaila vs Andreana Ellul PA 16/1/1957 – interests run fromt eh date of service of judicial letter See also Avv Albert Ganado vs Betrice Borg (PA 21/1/1970)
- Dr Pasquale Mifsud ns Negt Riccarda Castagna APP 26/4/1889
- Does not apply to an imbecil who is represented by the heir because the fault in claiming the legacy lay with the heir himself.
- Clementina Psaila vs Andreana Ellul PA 16/1/1957 – interests run fromt eh date of service of judicial letter See also Avv Albert Ganado vs Betrice Borg (PA 21/1/1970)
- 13. Legacy of a thing includes it’s accessories.
- If I bequeath a fishing boat it includes the compass, GPS, fishfinder, fishing gear and would also include the berth
- 14. Embellishments - new constructions- enlargement of tenement made AFTER the will. The presumption is to the contrary unless the will states otherwise
- 15. Burdens on the thing
- A) Right of usufruct or annuity - stays
- B) a hypothec – heir to remove it unless will states otherwise
- 16. Expenses of delivery – charged to the estate but are not taken into consideration when calculating the reserved portion
- 17. Who is bound to pay the legacy? (Art 735)
- General rule: all the heirs – each according to his share.
- If the will puts the obligation on one heir, then he alone shall be responsible.

- What about compensation: This takes us to the Other heirs to contribute.
- 18. Usufruct/Pension can be bequeathed
- A: free from garnishee – ever of creditors of the legatee.
- B: as inalienable
- To have effect this must be specifically stated in the will

28th April 2023

Lecture 16.

- Law of Succession
- Conditions in Wills – Contd
- Effects of legacies & Payment thereof
- Dr Peter Borg Costanzi
- Disposition on condition of mutual benefit, is null.
- 715. Any testamentary disposition, whether by universal or singular title, made by the testator on condition that he shall in return benefit by the will of the heir or legatee, is null
- You cannot ascertain this condition until the beneficiary passes away.
- How does this impact on UNICA CHARTA WILLS?
- Note: NULL not ANNULABLE

- We started this part, article 715, Any testamentary disposition whether by universal or singular title, made by the testator on condition that he shall in return benefit by the will of the heir or legatee, is null. We did this already.
- The clauses just to repeat a bit, the clauses we are going to deal now are sections of the law which deal with individual situations. Its as though, historically a number of situations have occurred and they enacted a section for that particular situation.
- What happens if. And the question put here is can I make a will and I leave something to someone on condition that someone gives me something back. Of course, that condition the law doesn't allow it so you can’t make a will leaving a gift to someone on condition on condition that that someone leaves you a benefit

back. That clause is null, that condition is null. Its not the whole will that will be rendered null, just that particular condition.

- Now when we're dealing with unica charta wills, we saiid that there was a kind of reciprocal obligation between the spouses and that is why the law used to, the law actually stipulates certain consequences if a spouse revokes or changes the effects of a unica charta will without being authorised under the old law, or if the changes are made if such person is not allowed to make the changes. You will remember that under the old law the right to change had to be granted if it wasn't not granted then you couldn't if you did then you would forfeit, under the new law the right to revoke is a right, and you will only be, you'll only suffer the consequences of a revocation if there's an express condition in the unica charta will saying you can't. So if you look at old caselaw and old judgements keep this in mind, because old judgements of course give a different result based to the new law.

- You'll note that the law states that the condition, the testamentary disposition is null, not annullable, it's null. When something is null it is null on day one and no matter how much time passes it will always remain null. There's no time bar, there's no prescription whereas if something is annullable, it is presumed to be valid until someone challenges it. When the law says it may be annulled or it may be challenged it implies that it is valid but until it is challenged and challenged successfully then that clause will remain valid.

- In that case a challenge on validity depends on the reason why that challenge is being made, whether it's based on fraud, on mistake, simulation, in each situation there is a timber, there's a prescriptive period. So when something is annullable, of course you have to look at the time bar, usually it's a very sort time period, sometimes as short as two years, sometimes its a bit longer but when something is null its totally different. When the law says is null those words is null have a big significance. Its not often that in the law you will find an express statement of nullity both in succession law and even for example in procedure sometimes you may come across a situation were the defendant will say the lawsuit is null, nullity is something that has to result from an express letter in the law, if the law says it is null then it is null but if the law says it may be annulled then of course it's totally different, if the law doesn't provide for nullity then it is not null. Maybe it's something else but to null.

  - Disposition depending upon an uncertain event.

  - 716. Any testamentary disposition made subject to a condition depending upon an uncertain event, and being such that, in the intention of the testator, the validity thereof is dependent upon the happening or non-happening of such

event, shall be ineffectual if the person, in whose favour it is made, dies before the fulfilment of the condition.

- Condition: an uncertain event
- Valid as long as beneficiary is still alive
- at the moment of the fulfilment/not- fulfilment of the condition
- Not date of opening of succession.

- Now you can have a condition in the will, a testamentary disposition, so it could be both in respect of an heir and in respect of a legatee which is dependant on something which has not happened yet, maybe uncertain, might not even happen.
- Now this benefit is only valid if the beneficiary is still alive when the condition takes place. This is a presumption of course, the general rule is that if there's the condition depending on something to happen which has not happened as yet if the person passes away before that condition is fulfilled then the condition, the disposition doesn't come into effect it is ineffectual.
  - EG: A testator leaves legacy (eg a sum of money) to his grandchild on the condition that such grandchild successfully becomes a Doctor.
  - The grandchild will only get the legacy if he actually becomes a doctor.
  - If he grandchild dies before then, then the condition has not been fulfilled and the legacy is therefore ineffectual.
  - APP dec 27/5/2016 Rik 168/10 Philip Said vs Andreana Galea.
  - Testator owned property in common with her siblings. In her will she stated that if the property were divided and she got a part, a nephew would be able to purchase such land by title of legacy. Apart from the doubts the court had on the wording of the legacy, the Court held that once the division had not taken place the legacy was ineffectual.
- Here we gave an example, I leave a sum of money to my grandchildren on the condition that the grandchild, studies, goes to university and becomes a doctor. If that child dies before ever making it to university then that gift never passes, that condition has not been fulfilled, that child has died and therefore it has no effect.
- There was a case decided not so long ago relatively speaking where there was a condition in the will, which this woman who passed away was a co-heir with her own siblings and she and her siblings had not divided the property yet between

them. They were still discussing, and she said in her will that if I divide with my siblings, and I get a part of this property I want it to go to my nephew, the wording of the will was a bit weird, it said my nephew is entitled to buy it, it's though she gave him a right of first refusal. Apart from whether that benefit carried any weight, it transpired that during her lifetime she and her siblings eventually decided not to divide the property because the property was not big enough for each of them to get a suitable portion. So they went to architects, they tried to divide the land, but the way it was split up would was rendered that the value of the property would have had the effect of the property losing its value so they decided to leave it in common. She passed away and the issue arose as to whether this legacy could go to the nephew. The court said that the legacy when the will was done, was dependent on an uncertain event, the decision of the property and she getting her share. Once she passed away she couldn't divide anymore, she was dead so she didn't receive her property in kind. The court said, that condition was not fulfilled, it said that the testator herself later on agreed with the siblings not to divide and therefore the legacy was without effect. It went to appeal and the judgement was confirmed in appeal.

- Condition suspending the execution of the disposition
- 717. A condition which, in the intention of the testator, is merely meant to suspend the execution of the testamentary disposition, shall not operate so as to bar the heir or legatee from acquiring, even before the fulfilment of the condition, a vested right transmissible to the heirs of such heir or legatee.
- Suspensive condition: Legatee/heir has a vested right even before the fulfilment of the condition
- App dec 28/11/2008 -No 10/2006 Victor Cauchi noe vs Mario Tabone
- The court deemed as valid a condition where the Testator ordered that upon the death of his wife, the house would be sold and proceeds given to Dar tal-provvidenza.

- A condition suspending the execution of a disposition, again, we're talking about testamentary disposition, not only legacies but even appointing of heirs. Now here it says if there is a disposition which is conditional, the one who is going to get the benefit, hopes that someday they will get that benefit and therefore they have a right to ensure that if that condition is fulfilled he will find the object or the money that has been left to him. So, he has a vested right, the court said, the law says he has a vested right. What does this mean? Normally in order to institute proceedings, not normally always, a plaintiff must have a juridicial interest, an interest which is legal actual and direct so he myst have a right which is valid

today and which is one pertaining to him and according to law. The right must exist today, and if I am going to be an heir only if a condition is fulfilled, I am not yet an heir because the condition has not yet been fulfilled. If the will says you get €10,000 if you become a doctor, I'm not a doctor yet so I don't get my €10,000 yet there's no direct claim but the law says you have a vested interest. This vested interest gives you sufficient juridical interest to protect the asset in case the condition is fulfilled and of course if this condition gives a benefit down the line then, even the heirs of the legatee or the heir will be able to have that vested right.

- There was the case Cauchi vs Tabone, in this case it's a bit not quite the same but it came up, there was a will and the husband wrote in his will that when he wife died, in other words he was preempting a situation where he died first and his wife died after him his house would be sold and the benefits go to the dar tal-providenza so of course the condition was, the event that was yet to happen was the death of his wife. If his wife died first it would have been a different situation probably in his will he would have left the property to dar tal-providenza directly but he anticipated the situation where he died first and so he wanted to delay the benefit payable to the dar tal-providenza, and the condition was wait till my wife dies. When my wife dies the money goes to dar tal-providenza. The house would be sold at that time. The court said it was a valid condition and it ordered that the proceeds of the sale of the house will go to the dar tal-providenza. It's quite a lengthy judgement, there's a lot, when dealing with caselaw, especially in succession, you will find that most judgements don't deal only with one item or aspect, you will come across five, ten, fifteen different concepts so when you read a judgement, it will take you across various parts of the law of succession and this is only one specific part, of course the judgement said other things as well.

  - Where heir or legatee is bound to give security for fulfilment of condition.

  - 718. If the testator has left the inheritance or legacy subject to the obligation that the heir or legatee shall forbear from doing or from giving a specified thing, the heir or legatee shall be bound to give sufficient security, for the fulfilment of such obligation, by means of sureties or by means of a hypothecation or pledge in favour of the persons in whom, in case of non-fulfilment, the inheritance or legacy would vest.

  - Obligation to do/Forbear from doing imposed on legatee/heir

  - Security: Hypothecation/pledge

  - In favour of person who stands to benefit in case of non-fulfilment

- Now this is another pigeonhole situation, if there's a condition that the heir has to forbade from doing or giving a specific thing, so the testator is saying you will get something on condition you won't do this. There's an obligation on the heir. In the example Dr Borg Costanzi gave, he said for example I leave you a villa as long as you don't contest the elections, you don't put your name down as a candidate and you never know when this may happen, for as long as you're alive at the age of 99 you may go put your name down to contest the elections.

- So this obligation not to do something will carry for as long as the beneficiary is alive and at any time he may break it and if the will says if you break it, you lose it and someone else will get the benefit, then the person who is bound by that condition has to give a guarantee. The law says shall be bound to give sufficient security, so this is an obligation and this obligation will remain unless the will states otherwise, it is possible for the will to say there's no need to give security I exempt you from giving security, you're exempt. Most probably the testator would not want to exempt, once the testator has inserted the condition, it means for the testator this was an important condition. He wants his wish to be obeyed. He is ready to give you the gift only as long as you don't do something, if you break my wishes you're not going to get the gift and of course the testator would want to make sure that after he passes away the situation is obeyed and normally, Dr. Borg Costanzi would say a testator would not exempt a beneficiary from giving security. Security will be given in a form of a hypothec or a pledge, so in actual fact the beneficiary will still physically enjoy the property but if something goes wrong there's this hypothec which will keep him in track.

    - Take for example a person has been given a house, an immoveable property and there's a hypothec on the house to secure this obligation and this guy has a house on condition that he doesn't contest the elections and wants to sell it, would you buy it from him? You know that his right to ownership is conditional on an event which he cannot do. What's to stop this guy from selling the property and going to contest the elections next day? If he does taht he loses the house, so he sold it to me and suddenly the condition is breached and he loses his right to the property so you bought something from someone with a dubious title, with a title which is not secure so you don't buy it.

- So this hypothec carries a lot of weight, and in order to be safe, he would have to get the consent of the other party. The person who would stand to benefit in case of non fulfilment. In that case, the person who stands to gain in the event of non-fulfilment would be in a position to give his or her consent and if both of them sign, it's a safe situation. So the person who stands to gain, if there's nonfulfillment, if there's a breach, has certain power, that person holds a will and can keep the original beneficiary in line.

- The testator bequeaths by title of legacy a property to his grandson on condition that the grandson does put his name down to become a political candidate, and that if his grandson does not abide by said condition, then the property is to go to his grand-daughter.
- In his case the grandson SHALL BE BOUND to give security (hypothec or pledge) in favour of the grand-daughter to ensure that should he default, the grand-daughter will be able to obtain the benefit in issue.
- Person charged with delivery of conditional legacy must give security.
- 719. Likewise, where a legacy is bequeathed conditionally, or as not exigible before a certain time, the person charged with the payment of the legacy, may be compelled to furnish security as aforesaid in favour of the legatee.
- Legacy under a suspensive condition
- Legatee MAY ASK the heir to provide a suitable guarantee that the legacy will be paid once the condition is fulfilled
- Vide Giuseppe Riccardo Bugeja vs Bugeja APP 24/10/1916
- LEGATO AI FIGLI NATI E NASCITURI DELL'ATTORE E AD ALTRI PERSONE.

- On the other hand there's a corresponding obligation on the other way round. So here we saw, just now we saw a situation where someone has been told not to do something and if he does that thing he loses, in this case we're looking at a situation where a person will get something if a condition is fulfilled. The condition has not fulfilled, or the time has not arisen yet maybe, security was actually given. Maybe they say you'll get the benefit when you're 24, when you're mature enough to be able to handle the value of the estate. In that case, the beneficiaries can request the guarantee.
- Now in this case, the guarantee is facultative, they may ask for it they don't have to ask for it, the guarantee does not have to be given it is only given if the beneficiaries ask for it. Now this situation has arisen, there's a case quoted here Bugeja vs Bugeja, but it has arisen more recently than that. There was a famous inheritance of Scicluna, ic-cisk they called him (Giuseppe Scicluna). He was a very wealthy person, he used to buy a lot of property in the 1800's and 1900's by judicial auction. Huge areas of land all of them by auction and apart from being very rich in cash, he owned all the way from Hilton till St. George's bay, all parts, Westin Dragonara, the Casino. When he died his will provided that he left his estate to the children born and yet to be born of his own children. So to his

potential grandchildren. Which meant in order to find out who benefited, all his children had to die, as long as one of his children was still alive you could't know who the grandchildren were and that occurred around 10 years ago, so for around 40 years or more his estate was hung and there was a curator, an administrator approved by the Civil Court Second Hall and he had to give security by means of a general hypothec, so security was actually given. Thank god that estate now has been liquidated, the family have divided and the grandchildren are getting the benefits from the grandfather. Incidentally the will was done with the legal assistance of Prof. Caruana who was the one who proofread the Caruana Galizia notes. He was an expert in Succession Law.

- Appointment of administrator in certain cases.
- 720. (1) If the heir has been instituted subject to a condition of the nature of those mentioned in article 716, there shall be appointed an administrator of the inheritance until such condition is fulfilled or it is certain that it cannot be fulfilled.
- (2) An administrator shall also be appointed when the heir or the legatee fails to give the security required under the last two preceding articles, as well as in the case in which the instituted heir is the immediate issue, as yet unconceived, of a person living at the time of the death of the testator as provided in article 600.
- (3) Such administrator shall have the same powers and duties as the curator of a vacant inheritance, subject to any other direction which, according to circumstances, the court shall deem fit to give.
- Administrator appointed:
- 1.When the Legacy contingent on the happening of an event (Art 716)
- 2.When the heir/legatee fails to give security (Art 718,719)
- 3.Cases where the instituted heir is as yet unconceived at the time(Art 600)
- Duties and obligations : same as a curator of a vacant inheritance (Art 903 et seq)

- Now, appointment of administrator in certain casesThe law provides for a degree of protection if there are conditional legacies and there's a fear that something may happen to the inheritance, the law provides for a situation where if things are looking funny you can ask for an administrator to be appointed, this sometimes happens, not often but it does happen.

- There was a recent judgement, it was a case against, the defendant's name was Lilian Claire Miceli, but the plaintiff we have no idea, decided by Judge Loraine Schembri Orland. Where there was a dispute on the ownership of certain items in the inheritance and eventually, the court resolved that dispute and said who the items belonged to, the parties couldn't agree that either of them could be trusted and the court appointed an administrator to handle the estate on behalf of all the beneficiaries.

- The administrator, had the same obligations and rights as a curator of a vacant inheritance. This is one of the sections, one of the cross sections, as there are cross sections even in the code of procedure which deals with curators. Normally a curator, normally the obligations of a curator and an administrator are that they have to draw up an inventory, a record of what the estate or items consist in. Normally they have to render account on an annual basis and say what they've done in their administration and the rendering of accounts is subjected to the scrutiny of the court and normally, the curator or administrator would have to do a general legal hypothec over their property present and future to ensure the proper administration of the property, not always but very often this is what happens.

- In order to sell property, the curator would require permission from court, the court will also direct not only whether the sale can go through but what is to happen with the money, whether it stays in the general account or whether it's paid off to any beneficiaries. So the situation is controlled and scrutinised by the court.

  - When the testator puts Conditions he is controlling the heirs/legatees after his death:

  - Is this right?

  - Can the heirs do anything about it?

  - The bequest is a gift or is it a right?

- So when a testator is putting a condition mini the will, he is controlling the heirs and legatees, the heirs and the legatees are owners, they own the object that has been left to them but that ownership is controlled. So that right is not absolute, the testator has conditioned that gift. As a rule of thumb Dr. Borg Costanzi would recommend that in our practice we try to avoid these situations as they create nothing but problems and headaches, and if a person wants to give a gift or do something do it in his lifetime. But try to keep a will as simple and straightforward as possible. The less conditions there are the better.

- But of course people have different ideas, they'll come to you for advice, they'll want to discuss their own estate and what they want the more they have the less they know what they want to do. You'll be surprised how these incredibly rich people are so confused on what they want to do with their estate, they might have an idea in principle. I don't want my kids or my grand children or relatives to squander it because I've worked really hard for this estate but at the end of the day really and truly there's not much you can do you just have to trust in the beneficiaries doing the right thing.

- Once you're gone, you're gone, and you can have all the conditions in the world in the will, if all the beneficiaries agree between them, they can by pass the will. So they have a will putting condition one, condition two, condition three, condition four. At the end of the day you also have the heirs, if all the legatees and all the heirs agree between themselves, they can practically re-write the will between them.

- Now, this concept of re-writing the will, what we call a deed of variation, it is not something that is known in Malta. Normally, and if you look at case law you will find that the courts will say you have to respect the wishes of the testator, the will is the law and it has to be interpreted in favour of validity. If you can understand the wishes from the will then those wishes have to apply.

  - In England for example, the heirs can agree between themselves and say we are varying the will. Which is a bit alien to us as how can a beneficiary write a will for someone who is dead, but they can re-write it, it is a legal fiction and they can do what is known as a legal variation.

  - For example a husband and wife have one child and the spouses leave everything to each other and they also agree that the survivor leaves everything to that one child, so you have husband to wife if the husband dies first and wife to the child, you have two inheritances and in some properties, succession taxes are being paid twice. First from the husband to the wife, succession taxes, and then from the wife to the daughter, again succession taxes.

  - In England the tax rate is 40% on the word estate. So, if you are domiciled in England, and your estate is regulated by English law, you're going to pay 40% tax on the inheritance of the husband and another 40% inheritance tax on the inheritance of the mother, 80%. How do you get around it especially if the husband and wife die very soon after each other. the child can do a deed of variation, if there's one child he or she can do it on their own, and they say I will vary the will of my father and stipulating that my mother does not inherit my father and that I inherit my father directly. If the mother is still alive the daughter can do it with the mother. So even after the mother dies the child can do the

deed of variation of the inheritance of the father. It's crazy but it's done and it's happened and in that way, this child will pay succession duty on the inheritance of the father on his half, and pay succession duty on the estate of the mother on her half, but at least the half of her father is not subjected to succession duty and it's safe.

- In England it's possible, now in Malta this concept of deed of variation hasn't really caught on but there are situations which have happened where all the parties named in the will and all the heirs at law, agree between them. You have this crazy will all kinds of conditions and obligations, and they don't like it, they sit at the table, calm down, come to their senses and say we don't want any of this nonsense let's agree between us and they say we are not agreeing with this will this is how we want the estate to be divided and they do this. If all the interested parties, are signatories to this agreement, no one can challenge it. If it is signed by all the heirs and all the legatees, there's no one else who has a legal interest to challenge this agreement. So despite the fact that you have all these rules regarding conditions, keep in mind that there's nothing to stop all these conditions from being done away with if all the parties concerned sign. You may have a condition which says I leave my estate to all my children who are born and yet to be born of course in that case you have to wait, you don't know who they are but if you have a condition saying you get the house only if you become a doctor. There's nothing to stop this person and the heirs from agreeing differently and they say we know that this condition but we still think you should get the house because instead of becoming a doctor you became a psychologist and of course its a different degree and they say you still deserved it, you still studied, you're still in the healthcare type of work, we think you should get it there's nothing stopping them from agreeing as long as all the interested parties sign and are happy it's fine.

  - OF THE EFFECTS OF LEGACIES AND OF THE PAYMENT THEREOF

  - Arts 721 - 736

  - 721. (1) Any pure and simple legacy shall vest the legatee, as from the day of the death of the testator, with the right to receive the thing bequeathed, transmissible to the heirs of such legatee, or to any person claiming under him.

  - (2) Where the legacy is made conditionally, such right shall not vest in the legatee before the fulfilment of the condition.

- Now, when does the legacy, when does the right to a legacy start? And the law says and pure and simple legally. Pure and simple, so we're talking about a legacy

which is not conditional. A pure and simple legacy is due from day one. From the date of death of the testator.

- Subsection (2), if there is a condition you have to wait for the condition.
  - App – 29/3/2023 – Rik 1274/18 GM Odette Abela v. Josephine Cassar
  - Għalhekk, ġjaladarba l-proprjeta` tal-legat tgħaddi mill-ewwel għand il-legatarju mal-mewt tat-testatur, din qatt ma tifforma parti mill eredita` indiviża li tgħaddi għand il-werrieta. Għalhekk, l-att ta 'immissjoni fil-pussess ma jikkostitwixxix qasma, la totali u lanqas parzjali. U ma jikkonċernax lill-werrieta. Tant hu hekk, li l-legatarju jista 'jitlob l-immissjoni fil-pussess anke jekk l-eredita` tkun ġjaċenti, u ċjoe` qabel ma tkun maqsuma. L-istess kunsiderazzjonijiet li jgħoddu għal-legat jgħoddu wkoll għall-prelegat, minkejja li t-titolari tal-prelegat ikun tabilfors ko-werriet.
  - Vide also discussion re klawsola komminatorja – if anyone challenges the will, he/she loses all benefits and will only be entitled to the reserved porion.
  - It was alleged that the co-defendants had challenged the validity of the will because their father could not write but could only read. The court decided that the law had to be interpreted and applied in favor of validity “marġini wiesgħa” and in these circumstances the co-defendants did not lose their rights under the will.
- In the Odette Abela case quoted here which was decided in appeal recently, the issue arose whether the legacy formed part of the estate for the purpose of calculating what was to be divided between the heirs. The court said that when you come to divide and distribute the estate, the items in the legacy have to be taken out. What does this mean?
- Let’s say, there’s a legacy on a plot of land and this is one plot from the plan which has ten plots, so one plot has to go to one individual and there’s nine other plots left to be divided in the heirs. When you come to divide the estate, you don’t divide the estate by ten and then each one of the heirs gives a little bit to make up that one plot, the first thing you do is take that one plot out and that is the legacy, you remove it and then you divide the remaining nine.
- Similarly if there’s money in the bank and there’s €10,000 in the bank and I leave a legacy of €1,000, you don’t divide the whole €10,000 by the number of heirs, first you take the legacy, the €1,000 and then you divide the €9,000 between the heirs. This is what this judgement is saying, that is the legal concept of how the legacy is to be considered. Of course in practice, if there’s money in the bank, the parties will go to a lawyer or a notary and the money will come to the notary’s

account/lawyers' account and everything will come to them and cheques will be issues according to the parents' wishes. So it is only conceptually that there is this idea. But it is clear that the legacy is a standalone obligation.

- In this judgement there was a very interesting judgement on what we call the clausola cominatoria, it is a punitive clause. Which would state that you don't inherit if you do something. In this case there was a clause which said if anyone would try to contest my will that person will not inherit me but you will only get the reserved portion. It's not an uncommon clause.

- In this case some of the heirs challenged the will because in his will he left Odette Abela a whole bunch of legacies and of course she was hugely favoured and they wanted to challenge this will, and it transpired that the testator could not write and the will was not done according to the formalities of a person who could not write but he could sign. In earlier lectures we mentioned the situation where there's a discrepancy in the English and maltese language in this case, but this judgement did not go into it.

- In this judgement the court said that the wishes of the testator must be protected, this is like a golden rule, and therefore when interpreting and applying the will, you have to be as flexible as possible in order to give effect to the wishes of the testator. The court used the words 'marġini wiesa', give a lot of space for interpretation and it said once he could sign those were his wishes and they had to be obeyed. It also said that since there was a dispute as to whether he could write or not, and the discussion arose as to whether a simple signature constituted capacity to write, the court of appeal said that that was a justified discussion. It wasn't frivolous, there was some reason to it, and despite the fact that the request was denied, the court did not say that they forfeited the right to the estate, he said because it was a fair argument to make so it said the will is to be protected, the signature is enough, three it was an interesting point, it was worth discussing because you brought it up it doesn't mean that you lose your rights the fact that you lost was of course, had these effect but didn't to deprive you from your rights.

- What does this mean? That when you have this type of clause, the fact that the testator says if anyone contests my will, you will lose, that person will lose the benefits under the will and sometimes this is really big if that person is not an heir at law there's no reserved portion. It's only to the descendants and the spouse, if this person is a nephew, he has no reserved portion so if that nephew does not get his benefit under the will he will get nothing but there's an even stronger rule that if you have a right, you have a right to a remedy and if you go to court and say look, that person was not capable of making the will because he was insane at the time, if they tried to challenge it, if its not frivolous and vexatious, because if it's frivolous and vexatious and has no substance whatsoever, then it's a

different thing but if there is some point to be made, if the evidence is a bit dicey and can go one way or another and the court feels that your argument has some kind of justification, you may be proven wrong but not 100% wrong, in that case then the court will say yes, you had the right to come to court and you had the right to have this aspect examined and because you have sought to have this aspect examined doesn't mean that you automatically forfeit your rights under the will. If you've done it without any substance whatsoever you will lose the benefit but if there was some substance to your claims then the court will not apply this kind of clause. So they have to look at the facts and whether the lawsuit was done in good faith or bad faith.

- Paul Vella vs Grace Everest App 27/1/2017 Rik 677/01

- This was a legacy of equivalent to ¼ of the value of a property and not the immovable itself

- La darba l-jedd tal-atturi ikkristallizza ruħu mal-ftuħ tal-wirt u kien oġġettivament determinabbli f'dak il-waqt, ma jistax jinbidel bil-mogħdija taż-żmien. Fi kliem ieħor, l-atturi ma kellhomx l-għażla li jħallu ż-żmien jgħaddi qabel ma jitolbu l-ħlas tal-legat biex b'hekk il-legat jiżdied fil-valur, ladarba l-legat kien biss ta ' jedd ta 'kreditu u mhux ta 'ius in re. Iż-żmien relevanti għalhekk huwa ż-żmien ta 'meta nfetaħ il-wirt u l-atturi għandhom jedd għal sehem tal-valur kif kien dakinhar; jistgħu biss jitolbu l-imgħax fuqu taħt l-art. 728(b) jekk il-legat jitqies ta 'kapital."

- Another case quoted here, Vella vs Everest, this case was quoted quite well in this particular area, you'll find it quoted in other judgements. In this case, the dispute arose as to the value of the legacy. Now the law says that the legacy, the right to the legacy arises on the moment of the death of the testator so when he dies he can claim it, a pure and simple legacy, and in this case there was a legacy where the beneficiary was given ¼ of the value of a property as a legacy. The legatee took his time, and waited a few years and then sued and by that time the value of the property went up. The point in discussion was what was the value date? Was it the value date at date of death or was it the value date when the case was going to be decided? There was a huge difference. The court looked at this section of the law, it said a pure and simple legacy is due on the moment of death of the testator, that is the value date. The value date is the date of death of the testator and a legatee, is not entitled to delay going to court in order to claim an appreciated value of the property. He was given a value, a credit.

- Had the wording been, I leave ¼ of the house in ownership it would have been different. Because you are being left a specific item, not money. If you are being left a credit, the value is the date of succession, of opening of succession but if

you're left an item you own that item from day one. So you get the appreciated value and if you sell it twenty years later you get the price of twenty years later because it was yours from day one.

- So you have to see the wording of the will, how was the word written? In this case the court made emphasis on this point and it made a distinction on the wording, it said this was a value in credit, it was a credit value it was not a share in the property indicating that had the legacy been a share in the property the result would have been different.
  - 1. The legacy vests from the date of death and is transferable to the legatee's heirs
  - 2. Conditional legacy vests upon fulfilment of the condition. But see clauses 717,718,719
- Now another point to make, once the legacy, a puree and simple legacy vests to the testator it belongs to the legatee. The legatee can dispose of it during his life time or his will so it's his from day one. If there's a condition of course you have to see when the condition is fulfilled.
  - 722. (1) Where the subject of the legacy is an indeterminate thing, included in a given genus or species, the right of selection shall belong to the heir, who cannot be compelled to deliver a thing of the best quality, but cannot offer a thing of the worst quality.
  - (2) The same rule shall apply where the right of selection is left to a third party.
  - (3) Where such third party refuses or is, in consequence of death or other impediment, unable to make the selection, such selection shall be made by the court, according to the rule laid down in sub-article (1).
  - 723. Where the right of selection is left to the legatee, he may select the best of the things of the given genus or species existing in the inheritance: but if there be none, he cannot select one of the best quality
- Another pigeon hole is, if the legacy is of something from a genus or species, I leave you a cow from my herd. Which cow can I take?
  - Legacy of an indeterminate thing included in a genus or species:
  - A: Choice left to the heir/3rd party -not bound to give the best/cannot give the worst.
  - B: If choice not made – left to the Court's discretion

- C: If will states that the choice is left to the legatee he can chose the best. If none exists the choice then falls on the heir

- There are three scenarios, one if the choice is left to the legatee or heir he can choose anyone he likes, anything he likes, but he can't choose the best and he can't be made to chose the worst, he has to choose an average one. So if you've been left the option to choose an item of jewellery, choose any item of the jewellery from my box, you can't take the very best one and the heirs can't tell you take this rubbish one, look at something in between. Neither the best nor the worst. If you don't make the choice then the court will have the discretion to make the choice for you.

- On the other hand, if the legatee is left a choice he can choose the best one. So, if I say choose any cow, then of course it's neither the best or the worst. If on the other hand I tell you, (this law is funny) choose any cow and I leave the selection entirely up to you then you can choose the best. The law seems a bit phase, unclear under here, and Dr. Borg Costanzi cannot visualise a situation distinguishing between one and the other. If in my will I say I leave you a cow from my herd, it means I'm leaving the choice up to you, the selection is up to you and it's all going to boil down on how the clause is written in the will. If it is clear that the choice is up to me, then I can choose even the best one. If it's not clear then I have to choose an average one.

- Now, how this works out in practice, normally if someone is going to go to an extreme of giving me a choice, it's going to be something of personal choice. Something that I like, and I'm going to trust your judgement to choose something that you like, that is pleasing to you. I would imagine that that is the one you're entitled to take but yet in 722(1) it seems to be a little bit different. Dr. Borg Costanzi can't see a practical situation of how this can be applied. To play it safe you have to use common sense, read the will if the will is clear of course then you can choose whatever you like, if it's not clear don't go for the very best and avoid conflict.

  - PA MCH – 12/11/2013 Cit 1633/1995 Giovanna Farrugia vs Carmelo Farrugia

  - Hemm imbaghad il-kwistjoni dwar il-jedd imholli mid decujus Giuseppe Camilleri lill-konvenut Carmelo Farrugia li jaghzel hu l-partijiet mill-gardina li jassenja lil kull wiehed mil-legatarji l-ohra bi hlas tal-istess legat.

  - Fi kliem it testatur, il-konvenut inghata 'd-dritt ... li jassenja lill imsemmija erbgha hutu l-ohra dik il-porzjoni mill-istess gjardina li joghgob lilu ghas-saldu ta ' sehemhom rispettiv mill-istess gjardina '(fol. 37). Mill-kumpless tal-provi, il-Qorti

jidhrilha li l-konvenut abbuza minn dan il-jedd moghti lilu mit-testatur biex ikollu skuza ghaliex ma jhallasx il-legati mhollija lil hutu minn Giuseppe Camilleri.

- Huwa evidenti mix-xiehda tieghu li lkonvenut mill-bidu nett ried jappropria ruhu mill-gardina kollha, anke jekk kien jaf li parti minnha ma tappartjenix lilu, u li kien obbligat jghaddi parti minnha lill-atturi, u lil hutu l-ohra

- Now, a case arose recently Farrugia vs Farrugia, where there was some land and the father said I leave it up to my son to decide how he's going to divide the land between his siblings. So he left the choice to be made by one of the heirs, one heir decides how to dish out, it's like going to lunch on Sunday and you have someone dishing out the food, and he left this dishing out process to one of the sons. But this one son had the physical employment of this property so he refused to dish out the food, he kept it himself. He said my father left it out to me, and he said meta nkun komdu naqsam, he spoke to architects to see how to divide but he never actually put it into effect. Eventually they got fed up and went to court, the court said two things which was weird. It said one in actual fact the choice has been made, even though he never told his siblings because its transpired that this son had engaged architects and formed a plan of division. So, as far as that condition was concerned that condition was fulfilled. But it also said that as a result of this proposed, or intended division the value of the land would have depreciated. It was not a comfortable division, and therefore it ordered the licitation of the property that the property is sold. So at the end of the day it was justice by Solomon, the baby couldn't be divided so it was sold off. Kulhadd spicca b'xejn, because they had to sell it.

  - 724. In the case of alternative legacies, the right of selection shall be deemed to be given to the heir.

  - 725. (1) Where the heir or legatee to whom the right of selection belongs, has not been able to make such selection, the right thereof shall vest in his heir.

  - (2) The selection, once made, shall be irrevocable.

  - (3) Even where in the estate of the testator there shall be only one of the things included in the genus or species, the heir or legatee having the right of selection, shall not, in the absence of an express disposition to the contrary, be entitled to select other than the thing existing in the estate

- Now another situation is alternative legacies, I give you options, option A and option B, choose one. You have five questions to answer choose three. In that case you can choose anyone you like.

  - Alternative legacies:

- Unless the will states otherwise, the choice is left to the heir
- Once the choice is made it is irrevocable.

- Once you make your choice you're committed you can't change your mind. Once you start answering your question, you can't change your mind no I don't like this question I want to answer another one. So we have a choice, take your time once you make it you're stuck with it.
  - 726. (1) The legatee must demand of the heir possession of the thing bequeathed.
  - (2) In the case of immovable property the legatee may demand the grant of such possession be made by means of a public deed.
  - (3) Unless the testator shall have otherwise provided the expenses relative to the deed shall be borne by the legatee.
- Article 726(1), this is a clause that gives rise to problems every now and then, he legatee must demand of the heir possession of the thing bequeathed. In case of immovable property the legatee may demand the grant of such possession be made by means of a public deed and stated otherwise testator shall have otherwise provided the expenses relative to the deed shall be borne by the legatee.
- The kuntratt tal-immissjoni fil-pussess. If you have a legatee of an immovable property, there's nothing to show in the public registry that you have received that object unless there's a public deed. This is the kuntratt tal-immissjoni fil-pussess, you don't have to do it, the validity of the legacy does not depend on this contract, if you have physical possession of the object it's enough. If you have a legacy of a house and you're living there you have possession already but you can demand/ask the heirs to do a contract so that the fact that it is mine is reflected in a public deed and the heirs give me/vest me with legal possession, a contract of seisin.
- In that case the contract is done and my name is on the deed, that contract has to be paid by the legatee. He has to pay for it unless the will states otherwise, the will can say that it is to be paid by the estate, the will can say then that contract is paid by the legatee so he has to pay the notary, and as far as succession taxes are concerned, that is something we'll come to later. Apart from that if it's an object, if it's money he can ask for it. If he doesn't have possession of the object or the money this right is prescribed by the lapse of ten years. If you don't have possession, if you have possession then it's not prescribed.

- Now, keep in mind that prescription is a defence it can only be raised by the defendant. The plaintiff cannot raise the plea of prescription, except the thirty years prescription. So, this is only in respect of extinctive prescription.

- Let's explain. A legatee has to claim the legacy within ten years, fifteen years pass, can I file a lawsuit to state that the legatee has forfeited the legacy because ten years have elapse? The plaintiff cannot invoke prescription, and the court will say you have no right to payment. On the other hand, if the defendant, if the legatee sues me I can tell him your claim is time barred because ten years have elapsed. So I can only raise that defence if I am a defendant, if a claim has been made against me, if no claim has been made against me I don't even need to do it it's mine still but what happens if there's a legacy of a house, in favour of one legatee and this legatee doesn't possess it and doesn't claim it and I come to sell it and the buyer will say imma dak legat, x'prova għandi li dan il-legat mhux se jithallas u inti m'għandek xejn, u int tgħid dak għadda ż-żmien u ma ġiex għalih. Imma first of all if I am sued I can waive prescription and if you go to court, I can't claim that it's time barred because I'm the plaintiff, at most what I can do I can say there's this right, this right has not been claimed, I don't know if this right is still binding or not, please give the defendant a time limit within which to claim and in default he will have perpetual silence, what they call the kawza ta' jattanza, a jactitation claim.

- There's a sanction in the law dealing entirely with this type of lawsuit where the court will give a time limit to a person to sue a person has a right but hasn't exercised it, it's just there and writing but it doesn't mean anything and I don't know where I stand whether that right is valid or not and I want legal certainty, to get legal certainty, there is a procedure.

- A case arose, (this has nothing to do with succession), with AirMalta and the lockerby case where it was alleged that a baggage was picked up from Malta on a flight to Germany was then put onto a plain from Germany to Scotland and whilst flying to Scotland it exploded, and it was alleged that once this luggage left from Malta, AirMalta was negligent in verifying the baggage and AirMalta received judicial letters from the heirs of the persons who died claiming damages, of course over 100 people died, you can imagine the extent of the claims and it would have wiped AirMalta. They only did a judicial letter. AirMalta said we want to know where we stand, we cannot send just judicial letters and in our accounts we say there is a claim of hundreds of millions and we do not know where we're going to survive or not, and they did a kawza ta 'jattanza. The court gave the claimants a time limit within which to sue, they said you have this claim you haven't sued yet, so if you want to sue you have three months within which to do so if you don't sue that claim is extinguished, you have what is called perpetual silence and that is

what happened, they didn't get sued and of course that right to claim against AirMalta was extinguished, the same happened in regards to this case.

- It is up to the heir to request possession.
- In the case on an immovable. Possession is by public deed. (immissjoni fil-pussess).
- Maurice Busuttil vs Joseph Meli App 5/10/1998
- Consequences of: Immissjoni fil-pussess – serves as proof that legatee has accepted the legacy and the object has been delivered.
- Francesca Saveria Cini vs George Cini PA 25/2/2016. Distinction between ownership and possession.

- It is up to the heir to request possession.
  - 727. It shall not be lawful for the legatee to claim the fruits of, or interest on the legacy, except from the day on which he shall have, even by a judicial letter, called upon the heir to deliver or pay the legacy, or from the day on which the delivery or payment shall have been promised to him.
  - 728. The interest on, or the fruits of, the thing bequeathed, shall, even in the absence of a judicial intimation, as prescribed in the last preceding article, accrue in favour of the legatee immediately upon the death of the testator in any of the following cases:
  - (a) where the testator shall have expressly so directed;
  - (b) where the subject of the legacy is a tenement, or a capital sum, or any other thing producing fruits.
  - Principle of: In illiquidis non fit mora
- Now, when it comes to interest and fruits. Is the legatee entitled to the interests?
  - For example the legatee inherits a block of flats and these block of flats are rented out at €1,000 a month per flat and he claims his legacy two years later, is he entitled to the rent from date of death tot he date he claims? The law makes provision for these kinds of situation, there are interests he gets the fruit and interests from day one from date of death. If there are no fruits, and there are no interests running, then he'll only get interest from date of the judicial letter.

- It is in observance of the principle or, a bit in observance of the principle that if there is no liquidity, no fruits, no interests actually accruing then they are not due. Of course the will can say otherwise. The will is the will, it's the law but if the law says nothing, if the object is not generating any interest or not generating any fruit.
    - For example I leave you my boat and this boat is moored up at yacht marina is not generating any interests or fruits if anything it's generating expenses and in that case there are no interests payable but if this is boat is being used and is rented out for cruises then of course something comes due and it has to be paid.
    - 10. Fruits/Interests on the thing bequeathed.
    - General Rule: The run from the date claimed or from the date promised
    - Exceptions:
    - a)Where the will states otherwise
    - b)Where the thing is a tenement, capital sum or other thing capable of producing fruits
    - Dr Pasquale Mifsud ns Negt Riccarda Castagna APP 26/4/1889
    - Does not apply to an imbecil who is represented by the heir because the fault in claiming the legacy lay with the heir himself.
    - Clementina Psaila vs Andreana Ellul PA 16/1/1957 – interests run from the date of service of judicial letter See also Avv Albert Ganado vs Beatrice Borg (PA 21/1/1970)
- There was an instance where there were no fruits or interests actually accruing, but the person who had the legacy was an imbecile, a legal imbecile and the curator for this imbecile was the heir himself. He was the curator of the person who was not legally capable and so the heir had no interest in claiming interests on behalf of his ward because he would have to pay money from his own pock and the court said that in this kind of situation, the fault was the fault of the heir and interest accrued from date of death. Otherwise the rule is if there's no interest interest will accrue from the date of service of judicial letter.
    - 729. Where the subject of a legacy is a life annuity or a pension, such annuity or pension shall commence to run from the day of the death of the testator.
    - Legacy of a Life annuity/Pension.

- Runs from date of death.

- If there's a legacy of a pension or a life annuity, I leave you €500 a month for as long as you're alive. You will get that annuity from the date the testator passes away, if you claim it one year later, you will get your part.

  - 730. (1) Where the subject of the legacy is a determinate quantity to be delivered or paid at fixed periods, as every year, every month or at other periods, the first period shall commence to run from the death of the testator, and the legatee shall acquire the right to the whole quantity due for each of the periods, even though he may have been alive at the commencement only of the said period.

  - (2) Nevertheless, the legacy unless it is by way of maintenance cannot be claimed until after the expiration of the period.

  - (3) If the legacy is by way of maintenance, it can be claimed at the commencement of the period.

  - Legacy of a Life annuity/Pension. Runs from date of death.

  - If payment of legacy has been staggered over time, the time starts with the date of death but is paid in arrears and not in advance – unless it is the payment of maintenance

  - payment is for the whole period

- What is interesting is if I leave you €500 a month, and I die on the 15th of the month you will get the whole sum for the whole month even though there's only 15 days left for the whole month, for the whole period. In fact here shall acquire the right to the whole quantity due for each of the periods even though he may have been alive for the commencement only of the said period.

- So if the testator dies on the 29th of the month, the beneficiary will get for the whole of that month.

  - 731. (1) The thing forming the subject of the legacy shall be presumed to have been bequeathed, and shall be delivered, with its necessary accessories and in the condition in which it shall be on the day of the death of the testator.

  - (2) The contrary shall be presumed with regard to embellishments or to new constructions made in the tenement bequeathed, or to a tenement of which the testator shall have enlarged the boundary, including therein new acquisitions

- Now, when you receive something you're presumed to have perceived it with its accessories. But if there are embellishments or new editions they're not included we already saw this in respect of new acquisitions and again it's corroborated over here.
  - Legacy of a thing includes it's accessories.
  - If I bequeath a fishing boat it includes the compass, GPS, fishfinder, fishing gear and would also include the berth
  - Embellishments - new constructions- enlargement of tenement made AFTER the will. The presumption is to the contrary unless the will states otherwise
- Say for example I leave you my fishing boat, but if there are new acquisitions, if I buy a house and give you the house and later on I buy a garage and adjoin it the garage is not included unless the will states otherwise.
  - 732. (1) Where before the will is made or subsequently, a right of usufruct, an annuity, or any other perpetual or temporary burden, shall have been imposed on the thing bequeathed, the legatee shall receive the thing as so encumbered.
  - (2) Where the thing bequeathed is charged with a hypothec in respect of any other debts, the person who is to pay the legacy shall, unless the testator has otherwise directed, be bound to disencumber it.
- Now what if there is a burden on the object bequeathed? And you have to see what type of legacy has been given. If it was a usufruct or an annuity, and the burden was done after the will, then you get the usufruct for the annuity with the burden. On the other hand if it is not a usufruct, if it's a thing then the heirs have to give it without any burdens. Mela, let's say I leave the usufruct of my house to my wife, and there's a bank loan, that usufruct will be subject to this bank loan so to speak the hypothec on the house doesn't disappear just because there is usufruct, you still enjoy usufruct but if the bank enforces the claim, then of course it's going to be problems with that usufruct. On the other hand if I leave you the house, ownership of the house, the heirs have to pay of the bank and give me the house free and unencumbered without any liabilities. Of course unless there is something in the will which states otherwise. But normally if there's a lift, there's a legacy you get it without any burdens, that is the general rule, that is the presumption.
  - 15. Burdens on the thing
  - A) Right of usufruct or annuity - stays

- B) a hypothec – heir to remove it unless will states otherwise
- 733. The expense necessary for the delivery or payment of the legacy shall be charged to the estate, provided this shall not prejudice the rights of the persons in whose favour the law reserves a portion of the hereditary property.
- Expenses of delivery – charged to the estate but are not taken into consideration when calculating the reserved portion
- But see Art 726 (3) – kuntratt tal-immissjoni fil-pussess.

- Now here we have a bit of a conflict, the expenses necessary for the delivery or payment of the legacy shall be charged to the estate provided this shall not prejudice the rights of the persons in whose favour the law reserves a portion of the hereditary property.
- So, if there's a legacy, the costs to deliver the legacy are borne by the estates but these costs are not calculated when valuing the reserved portion and here it says the costs are borne by the estate. Earlier on we saw that the kuntratt tal-immissjoni fil-pussess is paid by the legatee. Mela you have a legacy of a house and you ask for the contract of the immissjoni fil-pussess, you have to pay for the contract and here you have the costs saying that the costs shall be borne by the estate. In order for me to get the legacy, whether there is a contract of immissjoni fil-pussess or not the taxes have to be paid. So even iif there is no contract tal-immissjoni fil-pussess the tax has to be paid. This is a cost that has to be borne by the estate, unless the will says otherwise the tax of the property bequeathed by way of legacy has to be paid by the estate. So when there's the kuntratt tal-immissjoni fil-pussess and at the same time there would be the deed causa mortis (deed to pay the taxes) the heirs pay for the deed causa mortis, and pay the taxes the legatee will pay the notary his fees, the register the kont tal-immissjoni fil-pussess. There are no taxes payable on the contract fl-immissjoni fil-pussess and of course unless the will says otherwise.
  - 17. Who is bound to pay the legacy? (Art 735)
  - General rule: all the heirs – each according to his share.
  - If the will puts the obligation on one heir, then he alone shall be responsible.
  - What about compensation: This takes us to the Other heirs to contribute.
- Who is bound to pay the legacy? The general rule is that a legacy is a liability of the estate and the obligation falls on the heirs each according to his own share. Now, notionally this kind of conflicts with something we said earlier on where Dr

Borg Costanzi said that when distributing the legacy you take the legacy out of the estate first and then you divide. But when taking it out, each heir is only bound to take out his share.

- So if there's an obligation to take out €1,000 and I have ¼ share, I in actual fact have to pay €250 out of that €1,000.

- It is not a joint and several liability. So you don't sue one heir and that one heir has to pay everything. No, each heir according to his share. Earlier on in the lectures quite some time ago a judgement was quoted on this point. Of course again if the will says otherwise then the will says otherwise, so the will can put a notification on a select number of heirs, or one heir or establish different proportions. So the general rule is each heir according to his share unless the will says otherwise. These are all presumptions.

  - 18. Usufruct/Pension can be bequeathed

  - A: free from garnishee – even of creditors of the legatee.

  - B: as inalienable

  - To have effect this must be specifically stated in the will

- Now, a usufruct, a usufruct and a pension. If a usufruct or a pension is bequeathed the creditors cannot garnishee it, ma tistax tagħmel mandat ta' sekwestru. So if the spouse, surveying spouse has a legacy of usufruct, suing that interest from the bank to get the fruits of that have been left to her. It says the usufruct of the house, she can live in the house, that is not something that can be taken away by the creditors, the usufruct itself and a usufruct is something personal, you can't sell it and it terminates of course upon death.

- We do not have a lecture on Monday, and on the 12th of May Dr Borg Costanzi will be abroad, we will have four lectures at most but there should be some lectures from Dr Kurt Xerri and he will be lecturing on intestate succession.

5th May 2023

Lecture 17.

- Law of Succession

- Lecture 19

- Accretion – Arts 737 – 742

- Revocation and lapse of Testamentary Dispositions

- Arts 743-750
- Dr Peter Borg Costanzi

- Hopefully today and Monday it will be the last two lectures we will be given, on Thursday we have a lecture with Kurt Xerri on intestate succession, on Monday week we will be doing a revision lecture. Monday 15th will be the very last lecture unless something crops up but hopefully on Monday we will conclude and then we will have one lecture on intestate succession, probably on the following Monday we will go into some points about intestate succession so it won't be an entire revision lecture but it is an area that is supposed to be covered by someone else. The problem is that this subject is very vast.

- Today we are going to deal with accretion.

- We have already touched on accretion and a few lectures ago there was a court case regarding the interpretation of a will where the testator wrote I leave my estate to my children with the right of accretion and substitution and the dispute arose which applies first, accretion or substitution, if there are a number off people to have been appointed, one of them can't is unable or unwilling to take their share what happens to the share not taken?

- The rule is that it goes to the others, it accrues in favour of the others unless the rules of representation apply.
  - We're going to go into how accretion operates, when it accrues and when it doesn't.
    - 737. Saving the provisions of article 745 and article 866, where two or more persons have been instituted heirs or named as legatees conjointly, and any one of such persons predeceases the testator, or is incapable of receiving, or refuses the inheritance or the legacy, or has no right thereto owing to the non-fulfilment of the condition under which he was so instituted or named, the share of such person, with the obligations and burdens attaching to it, shall accrue to that of the other co-heirs or co-legatees.
  - The first section is section 737, we're going to read it.
    - What happens if a: CO-HEIR or CO-LEGATEE cannot benefit under the will?
    - What happens to the share or thing he would have inherited?
  - Now the section considers the situation where a co-heir or co-legatee. So here we're not talking only about legacies but even of heirs. What happens if any one

of them cannot benefit? Does it accrue or will the rules of representation apply? This section says, it considers four situations, if the beneficiary dies before the testator, if the beneficiary is incapable of inheriting, if he refuses or if there is a condition and this condition has not been fulfilled.

- 1. Cannot inherit: - Law envisages 4 scenarios:
- If he PRE-DECEASES the testator
- If he is INCAPABLE of inheriting
- If he REFUSES the inheritance or legacy
- If he has no right to receive because CONDITION NOT FULFILLED.

- These are the four scenarios being considered in section 737. Now, if he predeceases it is reasonable to understand, incapacity to inherit we dealt with this in the early lectures, incapacity to inherit for example if someone murders a testator the typical example. Now there are other situations where someone is incapable, the word incapacity is only dealing with the rules of incapacity we're not talking about disherison, disherison is when someone is disinheriting in the will. Here this person has not been disinherited because if they were disinherited there would't be a benefit, it would be contradictory to disinherit someone and then give him a benefit. Here we're talking about incapacity so here we have to talk about the rules relating to incapacity.
  - For example someone, who takes the monastic vows and therefore he is incapable of inheriting, so you have to see those rules of incapacity.
- The third is the refusal to inherit, so you say I don't care I don't want to inherit this person, I refuse to take the legacy, I refuse to take my appointment as an heir, I renounce to this benefit and the fourth if there is a condition. We've dealt with conditions in the previous lecture, they're very technical situations but there may be a condition in the will, you don't like it so you refuse or the condition hasn't arisen, it didn't arise for example you only inherit if you pass your law degree if you own't pass you don't inherit and so the condition has not been fulfilled.
- So if any of those situations arise that person is not going to get the benefit. So what happens to his share? His right to that property or his right to the inheritance, if he has ⅓ of a house, what happens to that ⅓? The law says first you have to look at the rules of representation.
  - FIRST:

- You see whether
- A. Section 745 Applies: Representation
- B. Section 866 Applies: Rights of creditors when one renounces to an inheritance.
- IF NOT:
- Then: the share/thing: with all the rights and obligations attached
- WILL PASS ON TO THE OTHER CO-HEIRS/CO-LEGATEES

- Representation is a right to step into the shoes of the beneficiary and it cross relates with the rules of intestate succession if there is no will, if there is no will who are the heirs at law. If that legatee or that heir was not there, who are his heirs at law?
- So, first the rules of representation will apply, we'll come to it in the next slide and also look at 866 regarding the rights of creditors. If there is a situation where I have been appointed as a universal heir and I owe a lot of money, so in order to avoid my creditors claiming my inheritance I renounce to the inheritance, because I renounce my children when I inherit my father by the rules of representation, so the creditors say hang on you were going to inherit €10,000,000 from your father and suddenly you renounced and you're broke and we can't enforce our claim. Because you renounced you have avoided paying us and in that case under article 866 the creditors of the beneficiary have a right to step into the heirs shoes to the extent of their credit. So you can't use the process of renunciation of inheritance to defraud your own creditors. If the beneficiary has creditors and he renounces, he can't do that deed of renunciation in order to avoid paying his liabilities, if he does the creditors have the right to step in. It will not always will but sometimes it happens.
- So first you've got to see if the rules of representation and rights of creditors apply, if not, if the rules of representation and there are no creditors, then the share will be added to the other beneficiaries.
  - So if for example someone has three children and in his will he leaves everything to his three children, even if it says nothing in the will, iff one of them dies before him and there are no grand children that deceased share, that share of the deceased child will be added to the other two, so they will have ½ each. If the deceased has children, his ⅓ will go to the grandchildren via the rules of the representation. If that ⅓ person renounced and he has creditors that ⅓ can be partly or fully gobbled up by those creditors.

- 738. (1) An institution or a legacy is deemed to be made conjointly, if it depends upon one and the same disposition, and the testator shall not have specified the share of each co-heir or co legatee in the inheritance or in the thing bequeathed.
- (2) The shares are deemed to have been specified, only if the testator has expressly fixed the share of each. The words "in equal parts" or "in equal portions" alone shall not operate so as to bar the right of accretion.

- Now sections 738 creates presumptions on how the legacy is apportioned or how the benefit is apportioned when more than one person has been named.
  - 2. PRESEUMPTION ON JOINT BENEFITS:
  - It a bequest is made in the same disposition:
  - Presumption that all persons therein mentioned are equal unless stated otherwise:
  - Eg: I bequeath by title of legacy to my children, Joseph and Mary and my grand children Robert and Michaela…
  - Eg: I bequeath by title of legacy to my children, Joseph and Mary as to one-third each and my grand children Robert and Michaela as to one-third share between them…"
  - 3. The effect of the clause "In equal shares/portions".
  - Eg: I bequeath by title of legacy to my children, Joseph and Mary and my grand children Robert and Michaela EQUALLY BETWEEN THEM
  - Eg: I bequeath by title of legacy to my children, Joseph and Mary as to TWO THIRDS SHARE EQUALLY BETWEEN THEM and my grand children Robert and Michaela as to one-third share EQUALLY between them
  - 739. A legacy is likewise deemed to be made conjointly if a thing which cannot be divided without injury has been bequeathed by one and the same will to two or more persons, even separately.
  - PRESUMPTION IF THE SAME THING
  - LEFT TO 2 OR MORE PERSONS
  - IN THE SAME WILL EVEN IF IN DIFFERENT parts of the will

- If the object of the LEGACY cannot be conveniently divided.
- EG a Boat, car, painting

- There's a presumption that unless the will states otherwise, if I mentioned two, three, four, five people in the same sentence, they will get an equal benefit unless the will says otherwise, so if I say I leave my estate to my three children and my five grandchildren and I name them so I mention eight people it will be divided ⅛ each because I mention them all without making any distinction.
- On the other hand if you write the will differently, where you say I leave my estate as to ¼ each in favour of my three children, and the remaining ¼ to be divided by my grand children then my children will get ¼ each and my grandchildren however they are will divide that ¼ between them. It depends on the wording of the will.
- If a child is left out and that child is entitled to a reserved portion by law, that child will get a reserved portion unless there are reasons for incapacity to inherit but by default, when the testator names people in the will, those people are considered to be equal.
- A legacy is likewise deemed to be made conjointly if a thing which cannot be divided without injury has been bequeathed by one and the same will to two or more persons, even separately, so it has to be in one will and to two or more persons, in that case if the object cannot be divided the share accrues in favour of the person who can benefit. Which here we're talking about accretion which is I nominate two or more people and one cannot or is unable to inherit in that case what happens to that share? that share, if the object cannot be divided it goes to the remaining persons.
- Say you can't divide a car, or a boat or a painting, there are other things that cannot be divided. If it cannot be divided it goes to the last man standing.
- Now, the law says in the same will even if the appointment is in different parts of the will, sometimes you have a will which says I'm leaving half the boat to A and in another section they say I'm leaving half the boat to B. They're not written in the same clause I'm leaving my boat to A and B. They can either write it in the same clause. I'm leaving my boat to A and B or else you can say in article 5 I leave half the boat to A in article 6, I leave half the boat to B. Even in that case, if it is in the same will this clause will apply so if A or B is incapable or unable to inherit or take that boat it will pass to the other person.
- Conversely, if the share, if the object can be divided, then in that case, it does not accrue.

- Say for example, there's a huge plot of land which is a building site which can easily be divided and I say I leave half this land to A and B and A cannot or is unable to inherit and there is no representation and there are no creditors. Once the land can be divided, A's share will not go to B. It will go to the heirs at law because it can be divided.

- 740. Where the right of accretion takes place, it shall not be lawful for the co-heir or the co-legatee to refuse the accrued share, unless he shall renounce his own original share.

- YOU CANNOT REFUSE AN ACCRUED SHARE UNLESS YOU REFUSE THE WHOLE SHARE

- IMPLICATIONS ESPECIALLY RE LIABILITIES

- Now, this is an interesting clause, sometimes the law comes out with these idea and you say what are they trying to say, but they'll be very specific situations, obviously in the past (who knows when) some problem arose and so a law was given. When there's the right of accretion the co-heir or co-legatee the one whose left cannot refuse the accretion.

- If he's accepted his half he has to take the other half as well. He can't take only part, he either takes it all or nothing.

- The general rule is the rule in the law is if the will says nothing substitution is done first. Substitution according to the rules of intestate succession. If there's no substitution, then it accrues. That is the rule unless the will states otherwise. Substitution by representation.

- Let's say, I make a will I say I leave ⅓ each to my three children, so it's specific. Let's make it more complicated, I leave ½ to child A, ¼ to child B and ¼ to child C so the shares are not equal and therefore in the will I regulated differently. I don't say I leave my three children, I leave my three children in these following shares ¼, ½, and ¼. One of those who has ¼ predeceases and there are no grandchildren, what happens to that ¼? It accrues in favour of the other two in proportion to their own share. So the one who has ½ will get more than the one who has ¼ and they will still be ¼ is to ½ so it will be ⅔ is to ⅓.

- Now this clause we were explaining that we can't refuse accretion is important if there are liabilities, because if there are assets it doesn't make sense to refuse the other half or the other share because you're going to get even more but if it comes with a baggage, and there's a string attached or a liability attached then of course you'll think twice and the liability can be in the form of an obligation.

- So you can have a situation where you get property, for an object but because you've got that object you have to perform or you have to do something or pay something it comes with an obligation.
- If you only inherit ¼ you say uwija ¼ I'll take it, I'll carry it but if you inherit the rest you say iz-zikk I didn't realise that I have to carry all this on my own, I would have thought twice about it, in that case you can't just take part of the assets and the burden and refuse the rest, it's you either take all the liability or neither at all. You either renounce completely to that threat, but if you accept a part you've got to accept the whole.
- These situations to be quite honest are a bit far fetched and in reality Dr Borg Costanzi cannot visualise situations like this arising but hypothetically they can of course.
    - 741. Where the right of accretion does not take place, the vacant portion of the inheritance, with such obligations and burdens as attach to it, shall vest in the heirs-at-law of the testator, and the vacant portion of the legacy, with such obligations and burdens as attach to it, shall, where any of the heirs or any legatee was particularly charged with the payment of the legacy, vest in such heir or legatee, or, where the inheritance was so charged, in all the heirs, in proportion to the share of each in the inheritance.
    - 6. WHERE ACCRETION DOES NOT TAKE PLACE:
    - The share goes to the rest of the heirs on a pro-rata basis
    - OR
    - IF ANY ONE OF THEM WAS CHARGED WITH THE PAYENT OF SUCH LEGACY, SUCH BENEFI WILL VEST IN SUCH HEIR/LEGATEE
    - EG: A and B are married and own a house. They have 3 children. A dies intestate in 2021. B died the following year and left the house to the Maid declaring that it is a legato di cosa altrui
    - What happens if the maid pre-deceased B?
- Now if accretion does not take place the share goes to the heirs on a pro-rata basis, but if one of them was charged with the payment of such legacy, such benefit shall vest in such heir or legatee. What does this mean? If one of them is charged with the payment of the legacy,

- Take the example of someone making a will and leaving his house, leaving a house to three children. Now the house was community of acquests, owned by him and his wife so he only had an undivided half, the other undivided half was of his wife. So in his will he said I'm leaving my house to A, B and C but I know it is not all mine because I only own half, the other half used to belong to my wife. It is a legato di cosa altrui. There is a fault challenged, so when the wife died, her half according to her will went to four children, ⅛ share each. So you have a situation where four children A, B, C and D have ⅛ of a share, the father when he made his will, he left all the house to A, B and C and said it's a legato di cosa altrui. What happens if A is incapable or unwilling to inherit? Where does A's share go? A inherited ⅓ of the house from the father, where does his ⅓ go? Now in this case, D, child D did not benefit from the father's will, but because he's an heir, in other words he did not get the legacy he was an heir, he was bound to give up his ⅛ share in favour of A, B and C. In that case since D had an obligation to give the legacy, if A doesn't take up the legacy that share will partially accrue also in favour of D. It will accrue in favour of B and C and also in favour of D. So in actual fact, what will happen is the pro-rata share that D would have had to give to A will come back to him. D had ⅛ and his ⅛ was going to be divided by 3 between A, B and C. So A, B and C, would have got ⅛ of ⅓ each which is 1/24 each from D. The 1/24 from A will go back to D.

- 742. (1) Where a right of usufruct is bequeathed to two or more persons conjointly, as provided in articles 738 and 739, the provisions of article 382 shall apply, even after the acceptance of the legacy.

- (2) Where the usufruct is not bequeathed to such persons conjointly, the vacant portion shall merge in the ownership.

- Now, usufruct is a bit different, if there's a usufruct, the usufruct is considered to be something very personal and normally it terminates on the death of the usufructuary. I give you the right in usufructuary to the house and when a person dies that usufruct finishes with him and if there's more than one usufructuary, the share of the deceased usufructuary accrues in favour of the survivor and only once the last survivor dies does it consolidate.

- Now this law applies off course when it is left to two or more people conjointly. So if you have a will saying I leave the usufruct to my house to my three children as long as they are unmarried and should one or two pass away, the survivor will keep obtaining the usufruct of the house. If one of them gets married and therefore is no longer entitled to the usufruct that share will accrue in favour of the other two. That is dealing with accretion.

- 7. WHERE THE USUFRUCT IS LEFT TO 2 OR MORE PERSONS CON JOINTLY.
- It only terminates on the death of the last survivor
- When the last beneficiary dies, it consolidates with the bare ownership.
- IT IT IS NOT GIVEN CONJOINTLY, then the vacant usufruct merges with ownership and does not accrue in favour of the surviving usufructuary
- REVOCATION AND LAPSE OF TESTAMENTARY DISPOSITIONS
- Arts 743 - 750

- Now revocation of a will.
  - Besides situations already envisaged, the law provides for others when a will/disposition will lapse:
  - A: EXPRESS
  - OR
  - B: PRESUMED
  - Also:
  - Some cases are GENERAL and apply to ALL cases and others are SPECIFIC and apply only to legacies
- A will can be revoked either expressly or it can be implied. The problems that we'll be tackling are the cases where situations arise which conflict with the will, so there's an implied revocation. No one can be stopped from revoking a will. No one has a right, you can't sign a contract saying you can't revoke your will you always have a right to revoke your will even if it's a unica charta will you have a right to revoke it.
- If it is a unica charta will and you are not allowed to change and you revoke it or you change it your share will go to whoever you want it to go to, you'll only forfeit what you may have inherited from the pre-deceased spouse but your share, your own estate goes wherever you want it to go.
- But normally in a will, we're talking about testate succession, where there is a will. The first clause in 99.99% of all wills is I revoke all my previous wills. That is a standard clause, if you ask any notary for a template you'll find it written already,

that clause is almost automatic. It's very rare that previous wills are not revoked. It is always possible to do additional wills, I refer to my previous wills and I would like to add additions.

- In practice though, notaries tend to consolidate in the sense that, if I've done a previous will, and I go to my notary and I say I want to change a clause, the notary will most probably tell you let's re-write the will because you will most probably get confusion as you will have will number A, then will number 2 try to read them together, if you have more amendments you will try to see which will amends which will and they may not come out clearly so let's see your will from before, let's see what you want to do now, let's revoke you previous one and let's rewrite the will.

- Usually that is what they do and it is the safest and most practical way of doing things. So normally when there is an express provision of the will they make it very clear and there ins't any room for interpretation

- But the problem arises that situations may occur which conflict with the will and you will say but hang on a minute he wrote this in the will but the object was sold so how come yesterday he made a will leaving this house to me and today first thing he did was sell it? Does that conflict with the will? Is the legacy valid or not. The fact that the testator willingly sold it the following day does that mean he changed his mind, does that mean he revoked that part of the will by his subsequent actions and this is what we're going to tackle now.

  - 743. (1) Any alienation of the thing bequeathed whether in whole or in part, made by the testator, even though made by way of sale with the reservation of the power of redemption, or by way of exchange, shall operate as a revocation of the legacy in regard to the subject of the alienation, notwithstanding that such alienation be void, or simulated, or that the thing itself come again to belong to the testator.

  - (2) The same rule shall apply if the testator has converted the thing bequeathed into another in such a manner that it has lost its previous form and designation.

  - PS see section 402

  - 1. ALIENATION OF THE THING

  - A) Alienation (voluntary or forced?)

  - B) In whole or in part

  - C) Even if done with the power of redemption

- Still operates even if
- later on the alienation is void or simulated
- Later on the thing comes back to the testator
- D) same applies if the testator converts the thing so that it has lost “its previous form or designation”
- In these situations the law is presuming that such actions show that the testator has changed his mind

- In fact here we see the case of the sale of the object and keep in mind also section 402, which we dealt with regarding the court case of Dr. Lorenzo Cauchi, you may remember that court case where the lawyer did some work for this client and in her will she left him half a house in Zurrieq or Birzebbugia, and eventually her creditors caught up with her, her house was sold by judicial auction and the lawyer bought it himself.
- The issue arose whether that legacy was valid because the object was sold and in that court case the court said the legacy was still binding and the lawyer was entitled to be compensated up to the value with which he acquired the house. But that was a remuneratory legacy, it was a legacy for payment for services rendered. Over here we’re not talking about a remuneratory legacy, we’re talking about a general rule that if the person making the will later on sells the object, that implies revocation of that part of the will.
- The question asked whether this applies to all types of alienation even if it is forced, of course if the testator does it willingly it’s clear he changed his mind and by his own volition he has sold the object, but what if it is sold by court auction against his wishes of course because no one likes to sell things by court auction normally at least, what if it is forced? It also applies, any alienation. Any transfer in whatever way will render the legacy null. Of course in whole or in part, it is null to the extent of the share disposed of. If all the legacy is sold, all the legacy will not have effect. If only part of the object is sold it will only have effect to the remaining part.
- Interestingly enough, the law also says, that this rendering ineffectual of the legacy will still apply if later on the alienation is declared null or if the testator re-acquires the object.
- So the testator sells the house and later on someone sues and says that that sale was null and void, and that contract is rescinded. Normally we say that what is null produces no effects, nullum est, nullum effectum abet. In this case, that

principle doesn't apply. Once the act of alienation has occurred, that act signified a decision or a situation where the legacy is cancelled.

- This same rule applies if the testator converts the thing so that it has lost its previous form or designation, and this is an interesting point, let's say in the will the testator said I leave my field to the rector of the university, and later on, it becomes a building site and I build a block of flats, the rector gets nothing because i've changed the designation of the land. It is no longer a plot of land, it is no longer a field it is now a block of flats, and because the testator has altered the object, and has not done a new will to reflect this change, it signifies a change of heart, a change of mind which is in conflict with the will.
  - Carmelo Hili vs Antonio Saliba PA 25/11/1925
  - Legacy of a boat
  - Testator sold the boat and acquired another one
  - Atteso che, pertanto, difronte a tale disposizione non e 'dato al giudicante indagar l'intenzione del testatore perdecider secondole circostanze, ma provato il-fatto della alieenazione della cosa legata da parte del testatore,dee rienere revocato il legato
- Here Dr Borg Costanzi has quoted a case, Hili vs Saliba, this guy left a legacy of a boat, this boat something happened to it and he bought another one instead, during his lifetime he had said isma ħallejtlek dgħajsa, but the boat that he owned was different to the boat he owned when the will was made, and the court said that legacy had no effect. It even said that the judge in such a situation had no room for discretion he couldn't interpret the wishes of his testator, because in his life time he said you have this boat, the will was clear, the boat was a different boat therefore the legacy had no effect.
  - Dr Ricardo Farrugia noe vs Profs Dr Joseph Micallef noe
  - PA 31/1/1985
  - A certain Ida Vadala had done a deed of exchange of he object of a legacy (1/8th undivided share in a property)
  - The court referred to Ricci and Pacifici Mazzoni which hold that even in suih circumstances the legacy is deemd to have been frevoked even though , unlike Maltese Law, Italian Law did not expressly mention deeds of exchange

- The reason being that by alienating he object the testator was indiciting a change of mind

- In fact this idea of this judgement was quoted in a subsequent case and reenforced there was this Vadala, and she did a deed of exchange, she swapped property with property, and again the court said this was an alienation and it rendered the legacy ineffectual. In the Dr Ricardo Farrugia vs Professor Joe Micallef, Dr Ricardo Farrugia was a very airdate lawyer and at one point he was appointed as a temporary judge, can't be done anymore but he was appointed as a judge because there was a backlog in the commercial courts and in the civil courts and they appointed him for a specific period of time.

- His judgements were known to be short, sweet and to the point and solid. He had a very nice character and Profs Micallef used to lecture commercial law and company law, he also wrote a book on company law, the European Company.

- So Mrs Vadala, she made a will and left a legacy but she later on after her will did a deed of exchange and the court looked at italian authors and italian law and under italian law unlike maltese law the law doesn't mention deeds of exchange, in our law if you look up the section it specifically says the law mentions including a deed of exchange it specifically indicated just in case there was a doubt under italian law you won't find the words including a deed of exchange and yet italian writers and Italian courts also considered a deed of exchange as a form of alienation.

- The reason why the Italians even considered deeds of exchange to be deed to have an effect of rendering the legacy without effect was because the deed of exchange indicated a change of mind. Once the testator changed his or her mind and transferred the property and did not do a subsequent will, then it was deemed to have revoked or rendered without effect that legacy or benefit.

  - 2. WHAT IF THE THING PERISHES?

  - 744. (1) The legacy shall lapse if the thing bequeathed has entirely perished during the lifetime of the testator.

  - (2) The same rule shall apply if the thing has perished after the death of the testator, without the agency or fault of the heir, even though such heir may have been put in default for delay in the delivery thereof, provided the thing would have equally perished in the possession of the legatee.

  - (3) Where several things have been alternatively bequeathed, the legacy shall subsist, even though there shall remain one only of such things.

- Now, what if the thing perishes? The object in the legacy doesn't exist anymore, and the law distinguishes between when it perishes.
  - A) If during the lifetime of the testator - it lapses
  - B) If after death and before delivery – it also lapses if it is shown that the thing would have perished even had it been delivered.
  - C) things bequeathed alternatively – valid as long as one of the things is still there.
- If the object perishes during the lifetime of the testator then it's gone.
  - For example I leave a legacy of a car, there's a big storm, lots of rain the car is swept up by the floods and its a wreck, it's been destroyed. In that case the legacy ends. It finishes.
- If the object is destroyed after her died, and this is where the problems start arising.
  - So I leave the car to you, but by the time the heirs come and give it to you, it's gone.
- In that case, the beneficiary still gets the benefit of the car, unless it is shown that it would have perished anyway, whether if it was in the hands of the heirs or in the hands of he legatee.
- So to go back again if it perishes during the lifetime it finishes, after the lifetime it still has value unless it would have perished anyway. Now this is a slight shift from the rule of casum sentit dominus. Casus is force majeure which says that if any damage arises as a result of force majeure is borne by the owner. If it's force majeure the owner suffers the loss.
- Over here the law is saying if it's force majeure or whether its held by the heirs or by the legatee it would have been lost then yes the rule applies, but if it was lost, if it would not have been lost if it was in the hands of the legatee then that legacy is valid.
  - Let's try to take maybe not a perfect example but an example. There's a legacy where I leave €100,000. I say I leave you all the money that is, that I have invested in Bank of Valletta and at the moment of my death there are €100,000 in my account so you have a legacy worth €100,000 and Bank of Valletta subsequently, proceedings are taken against the bank, all the assets are frozen because of money laundering and all the assets are confiscated and the issue arises who suffers the loss? Does the legatee get his €100,000 or not? And you

ask yourself, if the funds were given to the legatee, would he have lost them or not? And if the legatee says I wanted my money immediately because I was going to buy a house, I wasn't going to leave my money with Bank of Valletta, I wanted to take it out. In that case he will get his €100,000.

- If for example this forfeiture of Bank of Valletta occurred within two weeks of the testator passing away, and within those two weeks it was impossible for the heirs to put their hands on the money and pass it on to the legatee because the dead certificate has not even been issued yet, let alone searches for wills and all that stuff. Of course in that situation its problem because the heirs will say okay yes they were lost but we weren't able to physically handover, that's not a problem for the legatee, the right to the legacy arises on the moment of death, when the testator dies. That is when his right is created, from that very moment an obligation is created and therefore in this particular situation, the issue of would had perished had it been delivered, the obligation to deliver arises from day one and therefore if it perishes on day two, and would not have perished had it been in the hands of the legatee then the legatee would get the legacy.

- Just to cater for another eventuality, if the testator says I leave you my Ferrari but if my Ferrari is not there you can take my Lamborghini instead. So this is alternate, if the Ferrari is not there you can take the Lamborghini it doesn't mean because one disappears the other goes with it.

  - 3. WHAT IF THE BENEFICIARY PRE-DECEASES THE TESTATOR.

  - 745. (1) A testamentary disposition shall lapse, if the person in whose favour it is made shall not survive the testator.

  - (2) Nevertheless, the descendants of the heir or legatee shall succeed in his place to the inheritance or legacy whenever, in case of intestacy, they would have benefited by the rule of representation, unless the testator has otherwise directed, or unless the subject of the legacy is a right of usufruct, use, or habitation, or any other right which is of its own nature personal.

- Here we're coming back to what was said earlier, regarding the situation where the beneficiary dies before the testator and it takes us to the rules of intestacy and representation, where, there's the presumption that if the person dies the benefit stops, and therefore it accrues but if the beneficiary, if his heirs would have inherited the original testator under the rules of intestate succession, then they will benefit.

  - Presumption is that the benefit lapses UNLESS

  - (this applies both to HEIRS and LEGATEES)

- The descendants of the beneficiary would benefit by representation under the rules of intestacy (expect if the will states otherwise)

- BUT this rule of representation does not apply in the case of Use, Usufruct, Habitation or other such right which of its nature is personal

- Mela, a father leaves an estate to his children and one of his children pre-deceases take the example that the child who died, left his estate to the maid and had no children and was not married, so the child has heirs but there's no one who inherits, who has the right to a reserved portion and the question to ask is, the child's share, the one who died, does the share he would have inherited from his father go to the maid? Does it go to the son's heirs at laws, or does it accrue in favour of the other two children.

- The law is saying here that you have to look at the rules of representation and the rules of intestacy, so you have to go through the law of intestate succession, see if the rules of intestate succession apply, if they apply, then it will go according to the rules of intestate succession, if they don't apply then there's accretion, it accrues in favour of the other two.

- So we're talking here of the rules of intestacy tied up with the rules of representation, you have to tie them up together, not only just the rules of intestacy you have to see when representation applies.

- Now this does not apply if there's a right of use, usufruct or habituation unless the will says otherwise. So if there is a right of use, usufruct or habitation, when the beneficiary dies its dies with him it doesn't go to the heirs by representation or intestacy.

- So, to explain, if it's an issue of ownership you look at the representation and the intestate succession, if its usufruct it stops, it ends, it finishes.

  - Vide: Antonio Ellul vs Rocco Peralta – App inf 10/3/934

  - There is a whole study of the background to this rule and the court made an interesting comparison with the laws in other jurisdictions in the 1800's.

  - Eleonora Buhagiar vs Emmanuele Cassar et PA 16/3/1948

  - Illi l-inda[ini li għandha issir hija dik jekk il-kliem "kieku s-suċċessjoni kienet ab intestato" għandhomx jirriferixxu li jiġu korrelati għas-suċċesjoni tat-testatur ... Jew għas-suċessjoni tal-gratifikat.

  - The court held hat this applied to the former

- Vide also Carmela Abela vs Dr Francis Portanier et noe PA 8/5/1959 where the court did not agree with the legal referees report.

- Here in the case law quoted here, the debate was when the law says the rules of intestate succession and representation, whose succession are we looking at, are we looking at the succession of the father? Or are we looking at the succession of the child? The law here is saying, you look at succession of the father. So, what happens if the child dies and there are no children, the wife does not inherit her father in law under the rules of representation, it goes down the blood line so the wife of the predeceased child does not get the benefit.

- You have a father, three children, one of them is married with no children, A has a wife and no kids and A dies, his wife, A's wife inherits A, that's no problem there, but A's wife does not inherit her father in law under the rules of intestacy and representation. It accrues in favour of the surviving children. If A dies before the father without children, B and C get ½ each and A's wife doesn't get anything from the father in law unless the will doesn't say so, if the will doesn't say so if the son dies without issue and there's nothing it the will then the wife gets nothing from the father in law.

- This is the issue that arose in these three cases, it was argued that the son's heirs, would be entitled to inherit the father and the court said only if they inherit under the rules of representation or intestacy of the father of the deceased's child.

- In fact the court said fejn inharsu għas-suċċesjoni tat-testatur… jew għas-suċessjoni tal-gratifikat? And the court said għas-suċċesjoni tat-testatur. And in fact in Abela vs Portanier, the legal referee recommended differently and the court reversed the recommendation of the legal referee.

  - 4. WHAT IF THE HEIR/LEGATEE RENOUNCES OR IS INCAPABLE?

  - 746. A testamentary disposition shall lapse with regard to the heir or legatee who renounces it, or who is incapable of taking.

  - The benefit lapses in respect of such heir/legatee

  - KIV: (a) he can renounce and reserve the right to the Reserved Portion. In that case he "SHALL" take the legacy on A/c of he RP

  - (b) Creditors not to be prejudiced

- Now what if the heir renounces or is incapable? Then if he renounces or is incapable then it goes to the other beneficiaries. But if the heir renounces and

claims the reserved portion, he is bound to take the legacy as a payment on account on the reserved portion.

- So take for example, there's a legacy of a house in favour of a child and the child renounces and takes the reserved portion and his reserved portion is half a million, he has a credit of half a million. The house is worth a million, so that heir who has now renounced and claimed the reserved portion will get an undivided half share of the house and that's it, no money.

- Mela, a person leaves a house to a child. The house example A is worth €1,000,000 and the reserved portion is worth €500,000. So under example A the house will get an undivided share of half the house up to the value of his reserved portion, now let's say the house instead of being worth €1,000,000 it's worth €250,000, example B. In that case that child would get the house plus €250,000 in cash. So even though the law says if an heir renounces it accrues in favour of the other beneficiaries, there's an exception if he one who renounced is claiming the reserved portion, or can claim and has claimed the reserved portion.

• Also keep in mind that creditors can't be prejudiced by a deed of renunciation. So they have a right to step in as well.

- 747. It shall be lawful for a testator to make provision in his will for the existence or subsequent birth of children or descendants, and such provision may, without prejudice to any right to a share of the reserved portion, distinguish between such children or descendants in the same manner as he could lawfully distinguish between children or descendants of whose existence he is aware or who are already born.

- 748. Where provision is not made in accordance with article 747 and the testator makes disposition by universal or singular title and passes over any children or descendants, whether or not the testator was aware of their existence, and whether or not such children or descendants were born at the time of the making of dispositions, such dispositions shall nonetheless be valid saving the right of the children or descendants so passed over to their share of the reserved portion to which they may be entitled under this Code.

- 5. WHAT IF A PERSON MAKES A WILL AND SUBSEQUENTLY HAS CHILDREN/DESCENDANTS.

- Until 2004 – If someone was childless and here was a subsequent birth of a child /descendants – such birth revoked the will IPSO JURE. This has been changed.

- Now the will subsists: However you can make a will and provide for children/descendants as yet to be born.

- If no provision has been made : they retain the right to the reserved portion

- Even if they were not born at the time of the will

- Even if they were born and the testator did not know about them

• What if a person makes a will and subsequently has children? So when he made the will he had no kids, but later on he had kids or she had kids. Under the old law, until 2004, the will was annulled by the fact that a child was born. The fact that the child was born had the effect of invoking a will, this is no longer the case. The law allows someone to make a will leaving everything to all the children that they may have who are not yet born, you can do that, nagħti lin-naxxituri, born and yet to be born and that clause is valid. If the children are not mentioned in the will or there's no reference to children to be born, they are not heirs. They are entitled to the reserved portion.

  - Take the situation where there's a married couple and they have three children, they're in their forties, they decide they're not going to have any more children and they go and make a will, and they leave everything to their three children. Later on, biżball, għax dawn l-iżballji jsiru, the wife gets pregnant and this new born child is fifteen to twenty years younger than the previous siblings. It happens, its not common but it does happen.

  - This last child is not mentioned in the will because they had no idea that that last child was really going to come, they had decided that they weren't going to have any more children.

• What are the rights of this last child? If the will doesn't make any reference for children yet to be born, this last child is not an heir and they will only get the reserved portion. Of course the siblings can between them agree as they wish but if there's no agreement and they go to court that last child will only get the reserved portion. So very often, a notary drawing up a will, will usually put a clause to protect this possibility and state that the heirs will also be children yet to be born. You'll find it in many wills especially wills made by younger couples.

- Dr Borg Costanzi would always advise a married couple to make a will once they get married, do it immediately.

  - Law of Succession

  - Lecture 20

- Substitution – Arts 751 - 761
- Dr Peter Borg Costanzi
- Substitutio Volgaris:
- In a will, the testator can substitute and heir or legatee if the latter is:
- A) unwilling to accept the inheritance
- B) unable to accept the inheritance.
- MUST BE STATED IN THE WILL. Otherwise substitution will not apply.
- If you only mention one ground, he other will apply as well unless the will states otherwise (Art 754)
- Does not conflict with Art 864 (If one renounces, representation does not apply)

- Here we're going to deal with the rules of substitution and there's what we call vulgar substitution, substitution volgaris or substituto pupillaris regarding children, they're just names just call them substitution. Now the rules of substation are, you'll find them from section 751-761.
- In a will so here' were talking about testate succession, when there's a will so in the will the one making the will can state that I want to have the rules of substitution to apply in these situations. If the heir or legatee is unwilling or/and unable to accept the inheritance and I will say if my heirs are unwilling and/or unable to accept the inheritance instead of A, then B will apply. Its like a logic gate, like bouillon logic. Where the testator says if this situation arises then this is what will happen and if the legate or the heir is unwilling or unable to accept then instead of him getting the benefits someone else will get the benefits.
- First of all, for this to arise, for substitution to arise it has to be stated in the will, it is not automatic, so going by the previous example when we had one of the children dying before the father and having no grandchildren and he had a wife, the wife gets nothing but the testator can say if any of my children pre-decease me and they have no children then the benefit will go to their spouse, then this clause will apply because the testator is substituting the pre-deceased son who is unable to accept the inherence because he's dead and his wife takes his place. But if it's not written in the will it doesn't apply.
- Have a look at article 864 dealing with translation.
  - Eg:

- I bequeath my estate to my three children Sandro, Charlotte and John .
- I bequeath my estate to my three children Sandro, Charlotte and John with the right of vulgar substitution of their respective children and descendants and in the absence of children and descendants with the right of accretion between them.
- What happens is one of them dies before the testator or renounces and
- A)Has children
- B)Does not have children

- In the example given, I give my estate to my three children, Sandro, Charlotte and John with the right of vulgar substitution of their respective children and descendants and in the absence of children and descendants with the right of accretion between them. This is quite clear, three children if anyone dies before me the grandchildren, their own children, if they have no children, if there are no grandchildren then in other words of the deceased child then that share of the pre-deceased child then that share goes to the surviving siblings.
- So if the pre-deceased child has children his or her ⅓ share will go to their grandchildren, if they have no kids then that ⅓ share will go to the surviving two siblings.
  - SBSTITUTIO PUPILLARIS – Art 752
  - -SUBSTITITION OF A MINOR OR A PERSON WITH MENTAL DISORDER OF INSANE.
  - Can only be done by Parents, siblings ascendants, uncle or aunt.
  - In respect of such persons
  - A) IF THEY DIE WITHOUT ISSUE BEFORE ATTAINING THE AGE OF 18
  - OR
  - B) WITH SUCH DISORDER AND STILL NOT BEING ABLE TO MANAGE THEIR OWN AFFAIRS – irrespective of whether they have issue
  - Only applies to the property indicated/inherited and which they could have disposed of.

- Vide Conetta Agius vs Maria Dolores Micallef PA 30/1/1922. if child dies before reaching he age of 18 and Trapani Galea vs Apap Bologna App 4/5/1936 re someone legally unsound

- There's also a section dealing with substitutio pupillaris, in other words I appoint someone else in substitution of my children. I'm not leaving my estate to my kid but to someone else, I'm appointing a substitute and it applies in two situations or it can apply it doesn't have to. It can be made to apply in two situations, for children who are not yet eighteen years old, who are still minors or children who have a mental disorder and you can make a will and say that I'm appointing my child as heir as long as my child survives me and lives to be eighteen years, if my child dies before reaching the age of eighteen then his estate will go to someone else.

- So, let's go back to one of the first lectures, who can make a will? And we looked at the age requirement of a person wanting to make a will, and the general rule is that you have to be eighteen years old to make a will. Though there are situations where someone who is between the age of sixteen and eighteen that person can make a specific type of will with the assistance of a judge as long as that benefit is to compensate for a service received. It's a remuneratory legacy.

- Here we're not talking about that, here the law is envisaging a situation where I'm a father, my children are young and I'm afraid that they will die before hitting the age of eighteen and I don't want my estate to go to the heirs at law of that pre-deceased child. So, in that case if that child is not, dies before hitting eighteen, when the child dies, what that child inherited from me will go according to my will, not according to the rules of interstate succession of that child.

  - Let's take a situation where a father has one kid and in his will he says i'm leaving everything to my kid but if he dies before reaching the age of eighteen, everything goes to my brother, and in that case if he dies before reaching eighteen then what the child inherited from me, only the property will go to my brother, if the child has spent some of it this' spent and gone, but what's left of what the child inherited from me goes to my brother not according to my son's inheritance/rules of intestate succession.

- The same applies with children with a mental disorder, Dr Borg Costanzi would say that when it comes to children with a mental disorder, it does occur and usually,

- There was a case of a client once who was really worried he had one child who was schizophrenic and was at a mental institute but he wanted to make sure that the child was provided for and at the same time he didn't want to leave his estate to the child because if the property went to the child, since the child was in a

mental institute run by the state, the estate would have been eaten up by the state.

- If you own property, and you're in an old people's home or a mental institution there is, you may be made to contribute towards the costs and the contribution can be quite high and the father didn't want it to happen, saying I have property that I've worked for all my life, my son is in a home, okay fine, I want someone so be able to buy him shoes, buy him clothes, take him chocolate, but I don't want my money to go to the government. This person had a very good friend, so he appointed this friend as the heir, in substitution of the child. With the condition that the friend would look after the child and only as long as the child remained an imbecile, if the child recovered from his mental illness then the child would reacquire the right to inherit.

- So we have a mechanism here, to cater for a specific situation where the child is either too young or if the child is mentally sick, in those situations the law provides the possibility of appointing a substitute instead of such child to get the benefit and usually there are conditions attached as well.

- We've mentioned two judgements here, one of them dealt with the case of a child dying before reaching the age of eighteen and the other one regarded the case, it was quite a contested case about a Felicissimo Apap Bologna, the estate. In this one the Trapani vs Apap Bologna, the value of the estate was extremely huge, these were two noble families, owning huge amounts of properties so the value was very high, and there was an issue with regarding exactly this rule of substitution, regarding how it applies in respect of this Felicissimo and again the court applied this section of the law and said that that clause in the will was perfectly valid and binding. Of course, what will happen in this case is that the inheritance is in a way put on hold, in the case of the minor you have to wait until the day he reaches the age of eighteen to know what's going to happen, in the case of the person whose mentally incapable, you have to wait till that person dies, until the person, as long as that person is still alive, hypothetically that person can recover so the condition in effect has a delayed effect.

  - EG: I leave my minor son the villegjatura at 15 Żebbuġ Road, Marsalforn with the right of substitution on favour of my nephew Robert should my son die childless before reaching the age of majority.

  - It only applies to that particular property.

  - Said rules also apply to the RESERVED PORTION.

  - Other rules re substitution:

- 1.You can substitute one with many and vice versa.
- 2.If in the substitution clause you only mention one cause (eg unwilling) it is deemed to include the other (unable) UNLESS YOU SPECIFY TO THE CONTRARY
- 3.If there are obligations imposed on the original nominee, such conditions also bind the substitute UNLESS:
- the will states otherwise or
- they are personal to the nominee.

- Now are the rules of substitution, you can substitute one with many and you can substitute many to one, you can apply the substation of one person with five persons, five persons with five persons and five persons with one person. There is no limitation or numbers, also, the laws says unable or unwilling.
- So substitution, vulgar substitution applies if there's unwillingness or inability, if you only mention only one of them in the will both of them will apply unless you explain one of them. So if you mention one both will apply unless you say I only want this to apply.
- Again if there are obligations on the original nominee the rules of obligation will keep on following down the line, so they are inherited unless they are personal.

8th May 2023

Lecture 18.

- There is one thing Dr. Borg Costanzi wants to correct, we said last time regarding the situation where you skip the child, if the child, you put the condition and you say I leave my son as an heir on condition that he reaches the age of 18, and if he doesn't the property goes to someone else. In the meantime there is an administrator apportioned to look after the estate. In that case in the last lecture we said that the child can spend money, he can't the the child does not have access to the inheritance until he reaches 18, he has to wait, when we spoke about it last time we said it differently. Until the condition is satisfied he is not an heir.
    - 4. Reciprocal substitution in the case of unequal shares.
    - Eg: I I bequeath my estate to my three children Sandro (at to ¼ share), Charlotte and John (as to 1/8th Share each) with the right of vulgar substitution of their respective children and descendants and in the absence of children and descendants with the right of accretion between them.

- Distribution is pro-rata as per original shares.

- When you have a substitution clause, there is no limit on the number of people that can be substituted and if there are conditions on the clause, the conditions follow the substitute unless the will states otherwise. So, if there is a condition attached,

  - For example I leave 'X' to my son as long as he reaches the age of 18 but when he inherits he's got to do something or perform an act.

- That condition will remain attached unless the will says others so instead of going to the son it will go to someone else this someone else will have this obligation attached as though the son has the obligation, unless the will says otherwise, so if the son had to go every year to visit Ta' Pinu, then the legacy in substitution ever year he has to go to Ta' Pinu.

- Now, the substitution doesn't have to be equal, if you don't say anything it is equal, if there's more than one person in substitute, if instead of 'A' I substitute 'B' and 'C', they're equal but I can make the substitution in a different portion there is nothing to stop me, 'B' is to 75%, and 'C' is to 25%. I can change the proportions as I wish if you don't they are equal there is a presumption of equality.

- Now you can have a clause which says, from the example given I I bequeath my estate to my three children Sandro ¼ share, Charlotte and John as to ⅛ Share each, with the right of vulgar substitution of their respective children and descendants and in the absence of children and descendants with the right of accretion between them. So in this case, if the three children survive, they all get the share that is mentioned.

- But what if Sandro had to die? and he's got children, Sandro has a ¼, in that case, Sandro's children will share a ¼ between them. Why? Because that's the rule of vulgar substitution. If Sandro had no children, then his share goes to Charlotte and John and they will divide it equally between them because they are equal between them.

  - But say for example John had to die first, John has ⅛, and he has no children, how is his ⅛ divided? The ⅛ will go to Sandro and Charlotte, Sandro will get double what Charlotte gets. In other words, in the same proportion as was stated in the will. So it will be ⅔, ⅓ in this example.

- According to the original proportion.

  - 4. substitution in favour of an outsider in the case of unequal shares. (Art 756)

- Eg: I I bequeath my estate to my three children Sandro (at to ¼ share), Charlotte and John (as to 1/8th Share each) with the right of vulgar substitution of their respective children and descendants and in the absence of children and any of them dies whilst still minors and without issue, with the further substation in favour of the other children and their spouses (if any)

- What happens if Sandro dies a minor and childless and only Charlotte is married?

- Sandro's share goes 1/3 each to Charlotte, her husband and John.

- Now it all depends on the wording of the will, the wording of the will is the law that regulates the succession and you've got to read the will, see the command that has been given in the will, and of course apply it accordingly. These rules are unusual situations but when they arise they're hot, hot potatoes.

  - ENTAILS

  - AFTER 1864 are prohibited

  - Those BEFORE 1864 – regulated by the law in force

  - Must be read in conjunction With Chapter 130

  - ALSO

  - Any provision by which the heir or legatee is required to preserve and return the inheritance or legacy to a third person shall be considered as if it had not been written.

  - Any provision restraining the heir or legatee from alienating or from disposing by will, shall, subject to the provisions of article 736 (rules to protect a legacy of a usufruct), be considered as if it had not been written.

- Entails, what is entailed property? First of all you can't have entails anymore, they've been abolished and there's the law of trusts instead. Entailed property is a situation where in the original will, the person making the will says I leave my estate to my first born child, and all first born children for generations, it keeps going down, for infinity, like the royal title in England, it's always inherited. You hold the estate in trust just like we're occupying and living in this world and owning it in trust for future generations, but that part aside. If I inherit an entailed property, I have the right to get the fruits from that property but the property isn't mine, I have the right to use it as though I am the owner but I am not the owner.

- Ownership is kind of transit it goes from generation to generation you hold it on trust for all eventual future generations. In order to sell entailed property you need court permission and the court will only granted if you are in need, if you needed money to live. The benefit for entitled property was that it kept the estate united, it wasn't fragmented, so if I am the Count of Bubaqra' and I own a hundred properties and I create an entail, these 100 properties remain 100 properties they're not divided. They pass form generation to generation to generation to generation and it keeps the property whole.

- There was a whole discussion as to whether succession duty is paid because there was said I'm not the owner and I'll only pay succession duty when I sell the property with court authorisation, but until then I'm holding it in trust. Eventually in 1952, a law was passed which said you can't have anymore entails they're prohibited and the existing entails will go 50% according to the entail and 50% according to the rules of succession so those holding the entail became owners of 50%. Then in 1973, a second law was passed saying all existing entails, that remaining 50% was closed off. So today there are no entails existing in Malta anymore. They've all been closed.

- The law is resisting, our civil code in succession resists entailed property and the only exceptions is when it comes to the law on trusts, because in trusts I'm leaving my estate to this generation future generation from generation to generation, for either 99 or 120 years, but for many years of course, and then eventually it will terminate and it will be disposed of to final beneficiaries. So we get clauses, which say Any provision by which the heir or legatee is required to preserve and return the inheritance or legacy to a third person shall be considered as if it had not been written. In other words, if I put a clause which is a form of an entail, I'm leaving it to you but you have to give it to some one else, that obligation to give it to someone else its as though it wasn't written and if I put a clause stopping you from selling its its as though it wasn't written.

- This is an exception dealing with legacies of a usufruct, which we dealt with in previous lectures.

- These are two specific clauses which anticipate people's going round the prohibition of entails.

  - Legacy of a usufruct:

  - You can leave the Usufruct to one person and the bare ownership to another.

- The law here makes a cross reference to Art 331 (ie the clause exempting usufructs from garnishees). If the bare ownership is seized, the usufruct survives.

- There's another clause, which says you can leave a usufruct to one person and bare ownership to another, that's no problem. Dr. Borg Costanzi thinks that one time it was argued that if you leave the usufruct to one person and ownership to someone else it's a kind of entail, in other words you're passing ownership to 'X' but someone else is using it, the law specifically provides that in this case it is not an entail and it is not prohibited.

  - 758 (3) It shall also be lawful for a spouse to make in favour of the surviving spouse a bequest by universal or by singular title, substituting for him or her another beneficiary in the residue still existing at the time of the demise of the surviving spouse. In such case the surviving spouse shall only be restrained from disposing of any thing contained in the disposition, by will or by title of donation.

  - New provision introduced in 2004

- This is an interesting clauses, section 758(3) is an exception to the rule and a husband or a wife.

  - Say for example I'm a wife in my case, I can leave my estate to my husband and I will say in my will what's left after my husband dies goes to someone. So I'm telling my wife, enjoy my estate, spend it, sell it, but if you don't spend it or sell it all whatever's left goes to the people I'm mentioning now and that can be done, it doesn't affect all the estate it can't affect money for example and the wife can sell but she can't donate the property, and she can't leave it in her will. He can't say in her will what he wants to happen in her property I've ordered in the will what's going to happen after he dies, he's the owner of the property during their lifetime, when they die it goes according to my wishes not hers. It is an exception to the will. The law was done in this way in 2004 and they made an exception.

  - A legacy of residue – this is not the typical "legato di residuo"

  - I leave a legacy to my spouse/appoint my spouse as heir

  - Substituting my spouse for my sister

  - In whatever is left of my estate when my spouse passes away

  - In this case my spouse cannot:

- Donate the inherited property
- Make a will in respect of such inherited property
- See definition of “Residue” in Art 758 – eg: does not include cash

- It is a kind of legacy of what’s left, so I'm leaving you what’s left after my wife has eaten, I give her a plate with food she eats to her heart’s content if there is any meat left it is left to you.
- That’s the concept of this section in the law.
  - Consequences in case of breach:
  - Immovables- NULL; but then the law imposes a time bar of 5 years!!!
  - Movable: NULL only is beneficiary in bad faith
  - Any other case: DAMAGES
- Now, if the wife disobeys, what happens? The law says that if the wife donates for example an immoveable that donation is null. Now normally we say that when something is null you don’t need a court judgement, it is null. But the law says that the lawsuit to challenge the validity is powered by the lapse of five years. So if it’s null in actual fact it’s annullable, a court pronouncement and if there’s no lawsuit within 5 years that donation is presumed to be valid.
  - With moveables, say for example there’s this painting by Picasso and she gives it away, it is only null if it is in bad faith so there's an additional requirement. So with immovables good faith and bad faith aren't relevant, if there’s a donation and she’s the party from donating, if she donates it’s invalid.
  - With moveables you have to prove that it was done purposely, that it was done in bad faith
- If th donation, or the will its done in good faith that is valid, good faith is presumed, there's a presumption that there is good faith. If its by donation it’s 5 years from the donation if it’s by the will it’s 5 years from when she dies. With moveables, say for example this painting by Picasso and she gives it away, it is only null if it is in bad faith so there’s an additional requirement, so with immoveables good faith and bad faith are not relevant, if there’s a donation and she’s the party of donating, if she donates it’s invalid. With moveables you have to prove that it was done purposely, that it was done in bad faith, that there was ulterior motive, that the wife knew it wasn’t her’s, she knew it was her husbands and not hers and therefore she was in bad faith when doing the donation. If the donation or the will,

because even in her will it's done in good faith that is valid. Good faith is presumed, there is a presumption that there is good faith.

- Vide APP dec 1/6/2007 No1217/1999 Dr. Joseph Zammit Tabona vs. Professur John Joseph Cremona et

- Oltre dan kif inhu redatt il-legat, jista 'jinghad li l-legat kien wiehed de residuo, u dana peress li t-terzi jibbenefikaw mil-legat "wara l-mewt taghhom it-tnejn", b'dan li allura ssuperstiti ma kienetx limitata fl-uzu li setghet taghmel bilflus, ghax il-legat kien biss ghal dak "li jibqa'". Din il-Qorti ma tarax li, fil-fattizzi partikolari tal-kaz, kien il-hsieb tattestaturi li min jibqa 'haj l-ahhar ma setax jiddisponi millflus kif irid u skond il-bzonnijiet tieghu. Dan mhux kaz ta 'legat li, ghal sehem il-predefunt, kien jiddevolvi favur illegatarji mill-ewwel wara l-mewt tieghu, izda legat li jitqassam wara l-mewt tat-tnejn. Kien ghar-residwu li ttestaturi pprovdew favur terzi f'dan il-legat, u darba hu hekk is-superstiti ikollha l-fakolta` illimitata li tiddisponi b'att 'inter vivos 'mill-istess flus. (ara Bianco v. Grixti, deciza mill-Prim Awla tal-Qorti Civili fit-13 ta 'Gunju, 1935; Kollez. Vol. XXIX. 11.565). Il-fatt li, mill-provi jidher li ssuperstiti ghamlet dak li ghamlet ghax kienet preokkupata bil-qaghda finanzjarja taghha, ghax tajjeb jew hazin, hassitha xotta mil-flus, ikompli jikkonferma, fil-fehma talQorti, il-volonta` tat-testaturi li ma jorbtux idejn xulxin ghall-uzu li setghu jaghmlu mill-flus vita durante.

- There was an interesting judgement, Dr. Joseph Zammit Tabona vs. Professur John Joseph Cremona et, there was a case exactly on this point, and in this case the court went into the good faith of the person concerned and it said there was no bad faith the person needed money to live and it wasn't in bad faith and the donation in question/transfer in question was considered to be valid.

  - 760. It is not forbidden to institute heirs, or bequeath legacies under a condition which cannot be fulfilled except at the time of the death of the heirs or legatees, and to substitute others in their place in the event of the non-fulfilment of the condition.

- It is not forbidden to institute heirs, or bequeath legacies under a condition which cannot be fulfilled except at the time of the death of the heirs or legatees, and to substitute others in their place. What kind of condition can be fulfilled at the death of the heirs or legatees in the event of the non-fulfilment of the condition. What kind of condition can we fulfil at the death of the heirs or legatees?

  - A typical example, would be I leave my estate to all the children that my daughter may have, that condition is valid, or my grandchildren from my

daughter, and you'll only know how many grandchildren my daughter may have when she dies, so that condition is fulfilled upon my daughter's death.

- So again you have a prohibition of an entail but you have the exceptions to the rule where in this case the law allows for this exception but only for one generation. The important thing is that the legatee or heir has to be alive at the time the person making the will passes away, it can't be for the second generation, in other words, I can't leave my estate to any great grandchildren I may have, as long as if I don't have any grandchildren yet when I die.
- Let's explain, when you have this kind of condition to be fulfilled when the heir or legatee dies, that heir or legatee must be alive at the time the testator passes away, that person has to exist at that time, and it is only upon that person's death that you check to see what grandchildren there are.
- You can't do a clause leaving the children of my grandchildren if my grandchildren are not yet born, if the grandchildren are not yet born then in that case that clause is as though it has not been written because you have a creation of an entail.
  - Legacy with a condition which cannot be fulfilled before the beneficiary's death is valid (art 760)
  - EG: I leave my property at Villa Rosa, St Georges Bay to all or any children my son Joseph may bear with the right of substitution in favour of all or any children of my daughter Ann, should Joe die without issue.
  - Vide Antonio Cauchi vs Prof Dr Enrico Vassallo – App 22/1/1937
  - This article of he law over-rides the previous rule that one is only capable of inheriting if born or conceived at the time of opening of succession
  - Burden on Successive usufructs are unenforcible.
  - 761. (1) Any perpetual or limited burden by reason of which the whole usufruct of the inheritance or of the legacy, or a portion of such usufruct, or any other annuity, is to be given to two or more persons successively, shall be considered as if it had not been written.
  - (2) Nevertheless, it is not forbidden to impose the payment of an annuity, whether in perpetuity or for a limited time, for the purpose of creating a sacred patrimony, or of being employed for the relief of the poor, or in reward for virtue or merit, or for any other purpose of public utility, even though the disposition be in favour of persons belonging to a certain class or to certain families.

- (3) Sub-article (1) shall not apply to dispositions in favour of persons called to benefit under a trust or a foundation

- Now the law distinguishes between successive usufructs and conjoint usufructs, in other words I leave a usufruct to ‘A’ and after ‘A’ to ‘B’. The law doesn’t allow it, it doesn’t allow successive usufructs but the law allows conjoint usufructs in other words instead of saying that I say I leave it to ‘A' and ‘B’. So the usufruct starts immediately in favour of both ‘A’ and ‘B’. And if one of them passes away it consolidates in favour of the other.

  - Giuseppe Bugeja vs Apap Bologna – App 24/1/1955

  - Distinguishes between a joint usufruct where accretion takes place upon the demise of one of the nominated usufructuaries. This issue in this lawsuit was not the case. The court stated:

  - U precisament minħabba f’hekk ma jista ikun hemm f’dawk il legati l-karattru tal-fedekomessi li l-liġi riedet tolqot u timpedixxi. Similment l-Qorti tal-Kassazzjoni ta ’Firenze, li kummentat l-art 901 tal-Kodici Civili, simili ghall-art 798 (761) tagħna, issentenzjat li:- “non ha il carattere di usufruto progressivo vietato dall’art 901 c.c. quello che non si trasmette da persona a persona, ma accresce al legatario supersite in forza del nesso congiuntivo stabilito nella disposizione testamentaria”

  - Law of Succession

  - Lecture 21

  - Testamentary Executors – Arts 762-778

  - Opening of Wills – Arts 779-780

  - Revocation of Wills – Arts 781 - 787

  - Dr Peter Borg Costanzi

  - TESTAMENTARY EXECUTORS

  - Arts 762 - 778

- If a testator suspects that there’s going to be problems with the implementation of the will, in other words I leave my estate for example to my five children and I know my five children and I don’t get along, they’re always fighting and can’t agree in anything and I know in particular one of them is always going to object to what

the other four decide, and so it would mean that the implementation of the inheritance gets stuck.

- 1. Appointed by the will
- 2. Executor must have legal capacity to contract
- 3. Minors cannot be testamentary executors
- 4. Cannot start before he is confirmed by Court except in respect of acts to conserve the estate and which cannot be delayed
- 5. Procedure: Inventory/Nota deskrittiva - confirmed on oath
- 6. General Hypothec

- The law provides a salutation to this and anyone making a will can appoint a testamentary executer, a person who will administer the inheritance and distribute it and pay all the legacies he's the one with the cards in his hands and dishes them out. The testamentary executer has full power over the estate, but, he's regulated by the court. If you are appointed as an executor you have to inform the court, (Second Awla, the court of voluntary jurisdiction) and request permission by the court to confirm your appointment and when your appointment is confirmed you have to do a hypothec, a legal hypothec over your property present and future to guarantee you observance over the law.
- In order to do this hypothec the court will need the value so as to establish the value you have to submit your inventory or a list of assets or liabilities, a nota reskrittiva. An inventory is done by public deed if there's immoveable property it doesn't have to be by public deed and you can ask permission by the court to submit a descriptive note, a list a normal note which is confirmed on oath. From this document the court will have a value and the testamentary executor will then have a legal hypothec registered against you.
- So if you go to borrow money from the bank this hypothec will come up, and they say isma ghandek l-ipoteka hawn, its no big deal it's not going to stop you borrowing money, but if something happens and you do something wrong your own estate is going to make good not only the estate that you're investing, your own personal property is going to make good.
- Now the executor must have a legal capacity to contract, trust a legally capable person over the years 18 of age, usually the executor can be one off the heirs themselves, one of the children, the testator will choose the eldest child isma I trust you'd do the right thing se nhalli lilek biex tikkontrolla l-affarijiet. the child can

have an interest. Now the executor cannot do anything except things that cannot wait for example if they have to pay for the funeral, has the power to go to the bank and collect the money to pay for it, or if it's an act to conserve and preserve the estate.

- So acts of conservation are perfectly okay, of course eventually the executor will have to explain why this and that but if it's something that can't wait.

  - An example that actually happened one time there was this old man who lived alone in Attard, and he was the last of his line, there was no one left in the family and in his bedroom he had a chest of drawers, he opened the top drawer of this chest of drawers and he found boxes of gold coins, and on top of everything there was his last will and he died at home. The police were called because that's what happens and they checked the room and they found these boxes of gold coins and they found the will, and in the will there was an executor mentioned, they phoned the executor, he came and because he was the executor of course first the police took over but the executor took control of all the gold coins that there were to protect them and to put them in a vault in the bank, for safe keeping. He could do that even though his appointment was not yet confirmed.

  - 7. To render accounts to the Court

  - 8. Moderate fee – value of estate, unless the will itself makes provision

  - 9. To execute the will and discharge the legacies.

  - 10 to pay liabilities and if need be sell but heirs can intervene

  - 11. May sell – public auction/authorisation of the court.

  - 12. The office is not inherited

  - 13. Expenses borne by the estate

  - 14. Can renounce /be removed for good cause at any time.

- Now the executor has a job when he finishes he's got to inform the court what he's done and any expense has to be documented, has to be received, he's go to explain it, what he collected, how he distributed it, what he spent, everything has to be documented. It is a very tedious exercise to render the account and it has to be done and he will tell the court you honour I've done my job, my homework, I've executed the will this is what I did, these are the documents, please cancel the hypothec, the court will appoint a rivezur, the court will appoint

someone to check could be a lawyer, could be an accountant, usually its a young lawyer. As soon as you graduate you may find yourself being a rivezur, it's a job, very painstaking because you have to check every single item and when that is done you'll do a report and tell the judge I've checked everything, everything tallies, or there's an issue regarding this point, O'm not convinced and you'll put your recommendations and also recommend what fee should be paid to the executor. Eventually the court will show a final degree acquitting the final estate and say okay he did a good job, these are you fees you can get paid. So make sure that when you distribute you leave apart 5% at the very end to be able to be paid for your services.

- The executor may sell the property but always with court authorisation, he can even hold an auction if he wants, with court authorisation. So he can sign a konvenjtu to sell a house or a field for example and in the konvenju he puts a clause, subject to the approval of the court, you submit the konvenju to the court, the court will appoint an architect, if the price and the conditions are good they will say yes, if they're not good the court will say no. The court will not give you a price it will either say yes or no.

- The office of the executor is not an office that can be inherited. So if the testator only mentions one person, and that person dies, that's it there's no more executor but the testator can say I appoint Joe but if Joe doesn't want or he can't then instead of him I appoint Alfred, then in that case there's the substitute there's no problem.

- Once there's an executor, if the executor does not take up his post, he doesn't have to do anything, however, any one buying property from the estate, especially if that person is getting a bank loan, the bank will ask for proof that the executor has renounced. Dr. Borg Costanzi has no idea why they do it but they do it, and in that case you have to go to the executor and the executor will make you a paper, and then he can be renounced or he can be removed if there's a just cause. Jekk tara li qed jaghmel ic-cucati you can file an application in court and he will be removed.

    - 15. If more than one has been appointed: if one dies/is removed/does not accept…..

    - A) the other nominees

    - Failing which

    - B) All the heirs or any other person

    - if they agree – 2nd Awla,

- if they don’t agree – Prim Awla

- Now, if there is an executor and no substitute, if there is, in that case all the heirs between them can agree on an executor, but quite frankly Dr. Borg Costanzi doesn’t see why there’s the need for this, because if they all agree there’s nothing stopping them from giving that person the power of attorney, if they all agree they can file a joint request tell the court this executor has renounced or passed away we agree to appoint someone else instead of him, and the court will abide by that request, if they don’t agree then its a normal court case which quite frankly will be a waste of time.

- What you can do instead of appointing a testamentary executor is to ask the court to appoint an administrator and under the law dealing with co-ownership you will find clauses which empower the court to appoint an administrator and in selecting the administrator the court will hear what the majority have to say so its a majority vote almost and if the majority agree on someone the court will usually appoint that person.

- If there’s an objection and the objection has some validity to it the court will not appoint that person but will choose a third party, an outsider, usually a lawyer.

  - OPENING AND PUBLICATION OF WILLS

  - Arts 779 -780

- These are the sections dealing with the opening and publication of wills.

  - 1.Secret will – procedure

  - 2.Applicable upon

  - death

  - Adjudged long absence – presumed to be dead

  - taking of vows in a Monastic Order or Religious

  - Corporation of regulars

- These sections there are two sections, deal with the procedure to publish a secret will or else the procedure in the case when a person dies, when a person is adjudged it is presumed he is dead or taking vows for a monastic order, so in that case, the law provides that the secret will can be published and that section can deal with how it’s done.

- REVOCATION OF WILLS
- Arts 781- 787
- 1. You can always change your will. You cannot ever renounce to this right
- 2. Any clause stating otherwise – as though not written.
- 3. A will may be revoked/Changed by a subsequent will
- 4. May be revoked by any public deed – eg contract of legal separation
- 5. If you withdraw a Secret will – it loses it's effect

- How do you revoke a will? You always have a right to revoke a will, you can always change it and any contract or will saying that you can't change your mind it's as though that obligation was never written.
- How is a will revoked? you can revoke it by doing a subsequent will, I did a will yesterday I do one today, and revoke all previous wills, that's clear, I can do it by means of a public deed, usually this happens in contracts of legal separation, in most contracts of legal separation there's one clause, a standard clause in our case, you won't find it in the old laws but in the new ones you'll find it. In most contracts of legal separation there's one clause, a standard clause, you won't find it in old cases but in the new ones you'll find it, in the last 20 to 30 years. You'll find the clause saying that the parties hereby renounce to the inheritance from each other and the previous wills are revoked and they even renounce to the reserved portion, and that has never been challenged but at least it cancels all previous wills.
- If you do a secret will and yo want to cancel it you can either do another will or else you can go to court and tell them give me my will, the other will can be any will, if I did a secret will last year I can go to the notary today and do another will no problem, I revoke all secret wills, or else go to the courts, go to the secret registrar explain that you have a will and they will give it to you (by showing the ID Card).
- Once it's taken out of court that will loses its value. It's only valid as long as its in the safe, once it's been given back to me it's nothing, it's a piece of toilet paper it doesn't exist.
- 6. What if the "subsequent" will is void.
- Quod nullum est nullum effectum producit

- Therefore a will which had been revoked by such void will, will become effectual.

- 7. You can revive a revoked will only by making a new one

- 8. If you do not expressly annul previous will, the 2 wills must be read together and in case on inconsistencies, the latter will prevail.

- 9. What if the beneficiaries of a subsequent will pre-decease, are unable to inherit or renounce and thus render the will or part of it ineffectual? This does not revive a previously revoked will.

- Now what happens if the subsequent will is rendered null? So, I did a will last year and another one last week and last week's will is declared null for some reason or another. The null will has no legal effect it does not revoke the previous will. If it's null it is ineffectual, now if I have annulled a previous will and I want to revive it, the only way I can do it is by doing another will.

- So if I had a will and and I did a contract of legal separation and I revoked my previous will and I want to revive my previous will because I reconsulted my my wife I have to do another will. On the other hand if in my later will I don't revoke all previous wills the later will will apply and the previous wills will apply, but if there's a conflict, the later one will win, will be supreme. You apply them both but if they don't tally the last one will count. If for example in my previous will I nominate five heirs as my universal heirs and in my later one I only mention four, it's the later one that will be applied because the two clauses cannot be applied together.

  - But if for example in my first will I say I'm leaving Joanne €10,000 and in my second will I say I'm leaving Joanne €20,000. In that case Joanne will get €30,000. So she gets 10 from one and 20 from another because they both have effect but if I say in my first will I'm leaving my house to Joe and in the second will I say I'm leaving my house to Mary, then Mary will take the house because the first will cannot be given effect. One contradicts the other one, where they don't contradict with each other they will apply together if one overrides the other then it is clear that the second will will apply.

- The question that has arisen is what if the beneficiary in the last will cannot or is unable to inherit?

  - For example I did two wills, and I left my house to Joe in the first will, in my second will where I revoked all previous wills I left my house to Mary, and Mary dies before me and has no children, Joe can't say according to the previous will

I was going to inherit it and since Mary can't inherit it I get it myself, the revoked will is revoked, it doesn't come alive again just because part of the second will cant be applied.

- Vide _ magt sup Gozo – dec 15/7/2015 Rik 102/2010 JVC
- Rhiannon Lewis Vs Paul Scarrow. (daughter vs step-father)
- Wills made: 1/8/2007 ; 24/5/2010; 28/5/2010; Deceased 15/8/2010
- Vide: re validity of will – importance of evidence of notary
- movables given in lifetime –possesso vale titolo presumption
- verbal wishes only have a moral value: - Picasso Drawings:
- Whether or not these drawings were included in any verbal understanding between the respondent and his wife, only respondent knows and yet again the will drawn up on the 28th of May, 2010 confirms that the deceased trusted him in performing whatever they had agreed upon and it is now up to his conscience to do so however the Court has no right at law to declare that these drawing be given to plaintiff under plaintiff's fourth claim.

- There was this interesting case Rhiannon Lewis Vs Paul Scarrow where Rhiannon was the child of the first marriage and her mother remarried and she married Paul Scarrow and an issue arose as to the validity of her will.
- She did three wills, she did one in 2007, where she left her husband as a sole universal heir, then she did a will on the 24th May 2010 when the daughter was visiting her in Gozo, and she left part of her estate to her daughter including the house in Gozo. Four days later this woman went alone to the notary and told the notary I want to change my will and the notary told her you came four days ago and she said yes I want to make a new will, I want to revive my previous will so she did another will because the previous will was revoked and she left her estate to her husband.
- Three issues arose, one was the issue regarding the validity of the will apparently this woman had cancer and it was alleged that when she did the last will she was taking morphine, in fact the evidence it came out that she did take morphine but only some time after the will was done. She died in August and the will was done in May, so that was disputed. The court had no doubt that the last will was valid and when you read this judgement you will see the importance of the testimony of the notary , when the validity of the will is being challenged the main witness is the notary and in this case the notary distinctly remembered having a discussion

with this woman about he fact that she did a will four days before but he said she was adamant that she wanted to change this will.

- So the court ruled that the will was valid, but there was also evidence and this was not contradicted, that this woman had said yes I'm leaving my estate to my husband but my husband is to sell my items amongst them were some Picasso paintings, and to give the proceeds to my daughter but this was not written in the will it was a wish that she made, there was no dispute about this wish, there was very strong evidence that she had said this to many people but she hadn't written it in her will and the court said this is not binding, it is not legally binding and (luckily for us this judgement is written in English, so it is a bit easier) the court said that it is up to the surviving spouse's conscious to honour her wishes, he is not legally bound to do so but if his consciousness troubles him of course then he can do so.

- There was also an issue regarding some jewellery and we had another case about this, a similar case regarding a gold necklace. Where the court had had an interest in this other case, but the court heard a claim that the testator had told her daughter when I die take this necklace, the court said when I die means I am not giving it to you today you will take it upon the death, therefore the gift isn't valid because it was not done in the form of a will.

- Over here we had an almost identical situation but it was not identical in this case the mother gave her daughter a jewellery box with all her jewellery (this is a woman who owned Picasso so you can imagine what jewellery she had) but she gave the box to her daughter and the box was in her daughter's bedroom and the husband went into the daughters room and took the box and he said the jewellery still belonged to my wife and therefore the verbal promise to give the jewellery was not valid, the court came to a different conclusion and the court said on the evidence produced it was satisfied that the jewellery was actually given by the mother during her lifetime so ownership passed. It wasn't delayed ownership, so much so that the box was in the daughters bedroom. And therefore the court concluded that the box of jewellery belonged to the child.

- (This was one of those cases where you had a cut across different parts of the law of inheritance and when you deal with inheritance this is what you'll find, situations taking you to different parts, this judgement is a very good judgement, very well studied, caselaw and you'll learn from it)

  - Law of Succession

  - Lecture 22

  - Renunciation to an Inheritance

- Arts 860 -876
- Dr Peter Borg Costanzi
- 1. Renuciation Cannot Be presumed
- 2. How is it done?
- A: By filing a NOTE in the Court of Voluntary Jurisdiction
- Or
- B: Do Doing a Declaration by means of Public Deed.
- It only effects 3rd Parties when it is registered in the Public Registry.

- How do you renounce to an inheritance?
- Can a person entitled to the reserved portion, in a will a legacy has been made a remuneratory legacy, can the person entitled to the reserved portion challenge the amount of the legacy even iff it doesn't effect? the reserved portion is a guarantee under the law and if someone is going to claim the reserved portion, you can be rest assured that in the will or his life time first person has done his utmost to get as little as possible. Now, if the person did not make a will you're still entitled to claim the reserved portion.
  - For example someone has donated 90% of the property and then you came to see what's left and what's left is a silly amount of course and you say I want to claim my reserved portion and I will challenge all the donations made and all that stuff and claim the reserved portion to the donations but if there is a will, the testator would have been wrecking his brains 'kif se nfottih ghax ma rridx npaxxih' that's where the law steps in, the law guarantees your reserved portion, and any attempt that was done to reduce it will not have effect, the court has the power to see how much these services were and any excess is a gift.
- I'm claiming the reserved portion and in one of the legacies my father left the house to my sister for compensation for services rendered, the house is worth two million and my sister has only helped him out in the last two months, so no way that she could have rendered that much to account the services so it is a hidden donation. The court will value fictitiously those services and say your services are worth €100,000 therefore €1,000,000 - €100,000 is a donation so that will be calculated.

- To renounce there are two ways, and only two ways. You either go to court in the Sekond' Awla and you do a note and renounce or else by public deed, you go to a notary.

- In both cases whether you go to court or whether you go to a notary in both cases, that note of public deed is enrolled in the public registry, in the past you could only renounce by going to court but this was changed. Now you can renounce by going to a notary and making a public deed but it is only effective vis a vis third parties when it is enrolled in the public registry. The obligation to enrol is a recent obligation it wasn't always there, and in the past at least when DR Borg Costanzi started working as a lawyer in order to find out if someone renounced you had to go to the sekond' Awla ask the staff over there to check the records because there was a book, and they would tell you whether that person had renounced or not, that was the only way of finding out. Nowadays it's different the proper and only way of finding out is by checking in the public registry, carrying out searches and this will come out under searches for the 'noti tal-insinwa' the same search as contract of sale and third party are only effected with effect from that date when it is announced in the public registry whether it says renunciation by public deed or renunciation in court.

  - 3. WHAT IF THE HEIR/LEGATEE RENOUNCES?

  - Forfeits all rights under testate/intestate succession

  - This only effects the heir/legatee personally.

  - Representation DOES NOT apply

  - In the act of renunciation, can reserve rights to reserved portion

  - If by an HEIR: considered as though he never was an heir but does not deprive him of the right to claim a LEGACY

  - Rules of Accretion apply

  - However vide:

  - Reserved Portion and imputation of legacies

  - Rights of the creditors

- Now, if you renounce, without any condition, you lose all benefits under the will. And the rules of accretion will apply so you're cut out of the will completely. But you can renounce to the inheritance and claim your reserved portion and in that

case if you renounce the inheritance and claim your reserved portion if there are any legacies in your favour you are bound to take them as a payment on your account of your reserved portion. I am a father and I have two children and I leave one a house and one a car, the one who has the car says it's not fair I want to be paid my reserved portion, in that case they will calculate how much is owed, he has a credit if the credit is €100,000 he will take the car which is worth €20,000 and get the €80,000 in cash but he has to take the car as in payment of account unless of course he agrees otherwise with the other heirs but if there is no agreement he has no choice, the legacy is given to him as a payment on account, there is no choice except if there is a legacy of a usufruct, you can always refuse a legacy of a usufruct.

- If you renounce you renounce, if you renounce without any condition you've renounced to everything including to the received portion, you renounce to the inheritance. If you're an heir you can't renounce to a legacy. Let's say, there is a legacy in the will and I don't want it and I'm also the heir, it's all or nothing. Either I am an heir and in that case I have to take that legacy, or else I claim the reserved portion and then I will still get that legacy as a payment on account, ma nistax nahrab minnha.

- When dealing with renunciation also keep in mind rights of creditors, sometimes if I owe a lot of money, I will renounce the inheritance os that my children will get the inheritance in my stead by rules of representation. Creditors can step in and take the inheritance in my stead so even though I renounce that right doesn't go by force to the heirs by representation.
  - 4. RIGHTS OF CREDITORS
  - A) can step in to the extent of their credit
  - B) they need authorisation from the Court
  - C) the other heirs may chose to pay the creditors off and they will automatically be subrogated
- Of course to step in it's not automatic, they need authorisation by the court, they only step in to the extent to their credit and the other heirs can choose to pay the other creditors off and keep them out.
  - 5. In INTESTATE succession – his share goes to the other heirs at law
  - If the person is the SOLE heir. It falls in favour of the person in the next degree.

- Eg: If there is one Son, and he renounces, the grand children can claim. If there are no descendants, you see if parents, siblings, nephews and nieces etc. You stop at the Degree/level where you find someone.

- When you come to any level the distribution is PER CAPITA not PER STIRPES. You count the heads at that level.

- Let's explain this, let's say there's a legacy of the usufruct in favour of the wife, the wife has usufruct of the matrimonial home and the wife choses to claim the reserved portion, she can take the usufruct if she wants to she doesn't have to, she has a choice. If she takes usufruct of the matrimonial home, the home is not valued when calculating her reserved portion because she has already got her benefit from the matrimonial home, the usufruct, if she doesn't take the usufruct then the house is valued and she will get 25% of the value of the house.

- So if you have a house worth €10,000,000 her reserved portion on the house is €2,500,000 and she may say, isma l'm 75 years old, kemm ghad fadalli hajja jiena ahjar niehu zewg miljuni u nofs flok l-uzufrutt tad-dar, whereas if she's in her 20's and she's living the life of luxury, she may find that she may like this mansion she's inviting her friends and has super parties, she'll think life goes on forever and says I want to keep this mansion and enjoy it and therefore she will keep the house but in calculating the reserved portion the house is not valued at all, the choice is only hers only she can make it she cannot be forced to make a choice.

- If instead of the usufruct the husband told her I'm leaving you the house and the house is worth €220,000 and he has €20,000,000 in the bank, so the reserved portion is 25% of €20,220,000, which is €5,055,000 and the will says she has the house in full settlement of her rights, and she says I want my reserved portion, she is entitled to 5 million, she will take the house as a payment on account and around 4 million in cash, because it was given to her in ownership. If it's given to you in ownership you have no choice. You have to take it you only don't take it if the other heirs agree, in other words you can sit around the table and say I would rather have money instead of the object are you happy to give me money instead? Yes, and they will give you cash but you have to agree, if there is no agreement you have to take the legacy on account.

- In intestate succession, when there's no will if I renounce my share will go to my children by the rules of representation now if my share was ¼ my children will divide that ¼ between them.

- If on the other hand there's one child and this child is dead, if the son has no grandchildren, then you see the next in line. You see if there are any siblings, you see if there are the parents, of the child who died, a father dies and has one son

and his one son died before him. Who inherits the father, his parents if they're still alive, if his parents are gone, his brothers and sisters if they're still alive, if the brothers and sisters are gone the children of his brothers and sisters, his nephews and nieces. You keep going to see when there is someone related.

- Yet there is a funny rule, normally an inheritance goes in a logical way, what we can per stirpes, according to the family three, so if you have three children they will get ⅓ each, if one child has ¼ children that ⅓ is divided by 4 and you keep splitting down the share by the line but when it comes to nephew and nieces, it's different.

  - Say for example someone dies with no children and his parents are dead and he has 4 brothers and sisters. If one of them is still alive, and the others three are dead, the estate will be divided ¼ for the one whose alive and ¼ for each of the one who passed away.

  - So there are five children 1 died and there are 4 children left. Of those four three died already and there are nephews and nieces in these cases, the one who is still alive will get ¼ and in each case of those who died already, their ¼ will go to their children, so child 'A' is ¼, child 'B' who is dead his ¼ goes to his children, according to how many children there are, child 'C' has ¼, they go to the children depending on how many children there are. now if all the brothers and sisters die before me, they go down another level, you look at the nephews and nieces, you count the nephews and nieces and if there are 10, they get ⅒ each. You count the heads, it's called per capita, how many heads there are at that level, so if there were 4 brothers and sisters all 4 have died already, one of them had one child, the other two children, the other four, it's all the same, nephews and nieces ⅒ each. It is a funny system but that's what the law says and we have to accept it.

  - 6. CAN YOU CHANGE YOUR MIND?

  - Yes but only in specific situations:

  - A) only if the right has not lapsed by prescription (10 years)

  - And

  - B) the inheritance has not been accepted by the other heirs

- If you've renounced can you change your mind? I was totally pissed off, I didn't want anything from the estate, I went to court, then I go home my wife tells me I'm crazy and you say hmm at least I'll get my reserved portion.Can you change your mind? Yes, but only if the inheritance hasn't been accepted yet, if the

inheritance has been accepted by someone it blocks my opportunity to change my mind, or if 10 years have elapsed. After 10 years I can't change my mind if no one has accepted the inheritance.

- 7. EFFECT OF CHANGING YOUR MIND
- Shall not prejudice:
- A) rights acquired by 3rd parties over the property
- B) acts validly made by a curator of a vacant inheritance

- If you change your mind it doesn't affect rights acquired by third parties over the property and here we are who asked about curator and it doesn't affect acts validly done by a curator of a vacant inheritance.
- you have an inheritance, no one has claimed it and there was one potential beneficiary and he renounced. The deceased was a co-owner and the majority wanted to sell common property, they filed proceedings in terms of section 495A and the court appoints a curator to represent the vacant inheritance because they don't know whose representing the estate. If the contract is done that contract is valid even if later on I come change my mind and accept that tin hesitance and at most what I get is the proceeds of the sale. I'll get the money deposited because that was an act avidly done by the curator.
- This situation of changing the mind is not something that doesn't happen it does happen, sometimes it's a part of a game, there could be a situation where there are lots of liabilities with the estates and you're not too sure or there could be a situation where the will is so complicated and som any conditions and strings attached that you don't want to show what you're gonna do whether to renounce and accept the inheritance or accept the inheritance according to the will, or claim the reserved portion and if you do renounce even if you renounce and claim the reserved portion, if no one has come forward and say I accept the inheritance you claim the reserved portion and you work out what's owed to you at that point you can't change your mind because someone has accepted inherence and moved on you're stuck with your decision.

- 8. IS THERE IS TIME LIMIT WITHIN WHICH ONE MUST ACCEPT AN INHERITANCE?
- If not in possession - 10 YEARS
- If in possession – time limit TO RENOUNCE IS of 3 months

- You can ask the court to fix a time limit – 1 month which may be extended to a further month. - within which he declares his intentions. If he does not – presumed to have renounced

- Even if the will is challenged so there's this weird will and because of the way th will is written I've renounced the inheritance and claimed the reserved portion, one of the siblings challenges the will and the court declares that will as invalid, so the previous will comes into force when I was treated equally like the others, it's too late, at that point I've already taken my stand and I will get the reserved portion I will not be a co-heir. The question asked is is there a time limit within which one can accept the inheritance. If you're not in possession you have to claim your inheritance in 10 years. If you are in possession of any object in the inheritance you have 3 months from the date of death within which to decide.

- So there's this inheritance, one of the sisters knows what's written in the will even though the will isn't out yet, and she knows she is hugely favoured, they are distressed, they go to the matrimonial home, and she says listen that's your picture frame of when you were married, take it it's yours and I know you like this grandfather clock, why don't you take it? The will hadn't come out yet so you have possession of the object of that inheritance. if you want to renounce you have to give back that object you can't keep it and you have to renounce within three months. Otherwise you can only keep that object if you're an heir even though your sister gave it to you willingly. You have an object forming part of the inheritance and it is inconsistent with your act of renunciation. P

- eople resort to these strings. They happen and if someone has a will in their favour, who put a degree of pressure to convince the person making the will, maybe not making the will null but there would be something for sure for that person to be favoured. So that person knows that he or she has been favoured, knows what's in the will, knows what's coming next that might be challenged or fear that someone will claim the reserved portion and there are problems because of the values involved and so to trick the other person and stop them from doing so they give them some innocuous object and put them in the position where they can't renounce anymore and claim the reserved portion. They have to stay with what was written in the will.

- If someone hasn't renounced and you want to have certainty so someone hasn't either accepted or renounced, you don't know where he stands then you can ask the court to give them a time limit, then a time limit is given which can only be extended by the court for one month. If the time limit passes and you don't decide, you can't claim your inheritance then it's time barred. You can't renounce. Check article 878. There's a presumption in favour of inheritance to start off with but if you're sued and the court gives you a time limit within which to decide and you

don’t, if you don’t do anything you’ve renounced to the inheritance, and it makes sense because if you’ve accepted you would have done something you can’t presume to have it accepted. If you don’t do anything you’re deemed to have renounced.

- 9. WHO CANNOT RENOUNCE?
- A person who has misappropriated or conceals property belonging to the inheritance.
- Even if he renounces, this will not have any effect.
- He will be considered as a “PURE AND UNCONDITIONAL HEIR” ie cannot claim the benefit of inventory.

- A person who has misappropriated or hides property cannot renounce. In other words, let’s say for example my father had a box of gold coins at home, when he dies I go running to the house, steal this box and say I'm renouncing, you can’t and if does renounce and is found to have actually stolen that box of gold coins, firstly he has to return the box and secondly he has to abide by the wishes of the will. He will be considered as a pure and unconditional heir. In other words he can’t even accept the benefits of the inheritance.

- 10. CAN YOU RENOUNCE TO A FUTURE INHERITANCE?
- Art 871 & 984
- You cannot renounce to a future inheritance
- You cannot alienate a future inheritance
- EXCEPTIONS:
- RENUNCIATIONS IN CONTEMPLATION OF MARRIAGE
- (WHERE THE SPOUSE GETS A DOWRY FROM THE PARENTS IN LIEU OF his/her FUTURE INHERITANCE)
- UPON TAKING OF VOWS IN A MONASTIC ORDER

- Now, the general rule is you cannot renounce to a future inheritance, that is the general rule, there are two exceptions one if you are going to get married and your parents give you a gift representing your estate they give you a house as a dowry, that is your inheritance upfront and you renounce to any future inheritance or if you take up monastic vows, at that moment in time, from that moment

onwards you can't inherit except what we saw in monastic vows there's always the possibility of being released and reacquiring the right of the inheritance.

- 11. MEMBERS OF MONASTIC ORDERS.
- We already saw that they are INCAPABLE for such period as they are bound by their vows.
- In Art 872, such a member may renounce UPON TAKING OF VOWS (even if he is a minor)
- EXCEPT: HE CAN RESERVE A LIFE ANNUITY.
- Interestingly, on the death of the PERSON so renouncing, the "ORDER" may claim any unpaid life annuity if the PERSON declared a default of payment and it was not time barred.
- If he does, the law says that this is NOT FINAL and if he is released from his vows, the renunciation is annulled.

- That's it, next week it will be a revision lecture.

15th May 2023

Lecture 19.

- This is a revision lecture. We'll spin through the syllabus.
  - A question regarding collation. We haven't done collation alone, so collation, there are a number of sections dealing with collation, the principle behind collation is to address an injustice, either for the persons claiming the reserved portion or in the normal distribution on inheritance.
  - There are two situations, you can have a normal inheritance but there has been no exemption from collation and some children could have had more valuable gifts than others during the lifetime of the deceased, and therefore when they come to distribute the inheritance some children may say why should be divide equally when you got a Villa in Madliena worth €10,000,000 and I got a car worth €50,000 you should take it into consideration.
  - Collation is an exercise which is only applied as far as Dr. Borg Costanzi knows to the descendants. The children and the grandchildren and it is a mechanism to address an imbalance. Now, if there's a will normally most wills will exempt the children from collation so if you're going to follow the will, the will itself says the

children are exempt from collation , and no coalition takes place if no one contests the will and no one claims the reserved portion there's no collation.

- If someone claims the reserved portion all the donations are taken into consideration in order to establish the quantum of the reserved portion even my donations and the donations in favour of my siblings they're all taken into consideration, they're calculated even donations in favour of the spouse, they can be calculated, and then when I come to take my reserved portion, I have to collate any gifts I received.

    - So if I got a villa in Madliena and its worth €10 million and my reserved portion is €11 million I will get €1 million. The problem that has arisen is that in this part of the law dealing with collation there is a discrepancy on how the property is valued, we have said this Dr. Borg Costanzi thinks that it's a mistake as if you're going to measure something you should use the same ruler you have to use the same ruler you don't use metric for one thing and imperial for other, you should use the same ruler. When it comes to collation, the value as of date of opening of succession. Which Dr Borg Costanzi thinks is wrong, there's no case law or he's not aware on caselaw about this issue and to date they say yes we know it's unfair and it should be fixed but till now it hasn't been fixed.

- As such there's no relevance between coalition and abatement, except if there have been too many gifts and not enough left in the inheritance. There was judgement delivered by judge Mangion, decided two months ago and this person, the deceased a few months before he died did a whole bunch of donations. The person who received those donations didn't even want to be an heir, he wasn't an heir and yet the court ordered either he pays the reserved portion or else he has to sell part of the property donated.

- The donated property is abated to guarantee the reserved portion, so if the testator gave away too much, the recipient of the gift has to give up part of that gift to make good for the reserved portion.

- A point to keep in mind, it's an interesting point, that the law proves that when in doubt you don't collate. So there's a section where that specifically mentioned by the law.

- One other point about collation, the exemption will be found either in the will or the deed of collation itself, so even if there's a contact of collation the donor can exempt that donation from collation and collation will not apply if there's no contestation of the will. Jekk ħadd ma jgħid xejn you don't collate, collation only operates in that case if someone claims the reserved portion if someone claims the reserved portion then you collate.

- Law of Succession
- Revision Lecture

- Let’s go through the basic points.
  - GENERAL PRINCIPLES
  - When does Succession take place?
  - Patrimony – Can one transfer one’s patrimony? Are there exceptions?
  - Law distinguishes between TESTATE and INTESTATE Succession
  - Should this be the case or should the law regulate all?
- When dealing with the lectures, we dealt with when does succession take place, jigifieri meta xi ħadd ikun mejjet, what determines the person dies? what is transferred in the inheritance, what is patrimony? In other words what can be inherited, what objects and thing which cannot be inherited and the mode distinguishes between testate and intestate. The rules are different. Another question to ask is should this be the case or should the law regulate all?
  - A: TESTATE SUCCESSION
  - B: INTESTATE SUCCESSION
  - C: PROVISIONS COMMON TO TESTATE AND INTESTATE SUCCESSIONS
  - D: CROSS BORDER INHERITANCES/PRIVATE INTERNATIONAL LAW
  - E: TRUSTS
- We talked about testate and intestate succession, there’s either testate, intestate succession we did with Dr Kurt, testate we touched on them occasionally but didn’t go into detail, cross border and trusts those are separate subjects dealt with by other modules (m’ghamilnihomx u mhux se namluhom)
  - A: TESTATE SUCCESSION
  - 1.WILLS –
  - Civil Code - Chapt 16 and Notarial Profession and Notarial Archives Act – Chapt 55
  - Types of wills

- What makes a will a will?
- Formal validity of a will.
- Capacity to make a will?
- Capacity to Inherit?
- Unworthyness

- When dealing with wills, the format of wills, keep in mind chapter 16 and chapter 55. So there are two parts of the law not just the civil code.
- What is a will? What makes a will a will? What form is required for a will, what types of wills there are? We dealt with capacity, who can make a will? What age and if you're a minor? what types of will you can make? Who can inherit and we saw the rules of unworthiness, when someone is incapable of inheriting, unworthiness is to be distinguished from disherison.
- Disherison is someone being rendered unable to inherit because it is so written in the will.
- Unworthiness is not written in the will, it is something that the coheirs can raise independent off the wishes of the testators. In fact despite the wishes of the testator but we also saw that there are situations of unworthiness where the testator declared he was aware of them and forgave and we saw how that could be forgiven.
  - Unworthyness:
  - Disherison:
  - 2. RESERVED PORTION
  - Which property may be disposed of?
  - Is there a minimum portion which should be reserved to spouse/descendants?
  - Abatement when you exceed the disposable portion
- Then the problems start, the reserved portion. The moment, in fact we'll come across this in other parts of the law, the moment the law tries to impose you start getting problems. This is one of them the reserved portion, it creates problems but it addresses an obligation.

- When you have a unica charta will, and forfeiture, if the surviving spouse has between inheriting and passing away spent or disposed of what has been inherited by the first spouse, would there be problems for the others? Because the children or people who are to inherit instead of them it's okay? Bazikament jibilqghu kanna.
- What if you have a husband and wife unica charta will and in the will there is a condition that they cannot change the will and if the will is changed there's forfeiture and the husband does change the will, he inherits the wife, spends all the money, spends it not donation because if you donated it tghid forsi you can do something for that donation imma bazikament dan itajjar kollox and eventually they say there's forfeiture but there's nothing to take. There's nothing to enforce because there's no assets left but if there are assets then that's another issue.
    - 3. HEIRS
    - Rights and obligations
    - Persons who may be heirs
    - Things which may be disposed of
    - 4. LEGATEES
    - Meaning and effect. How does transfer take place?
    - Can one be both and heir and a Legatee?
    - What if there is no institution of an Heir?
    - Can an heir/legatee renounce?
- Heirs, what is an heir and what is a legatee, we also went into the the issue of the wording of the will and whilst it is relevant to state whether a person is a legatee it is not determinate in other words someone described as a legatee can be an heir and someone described as an heir can be an legatee, you have to look at the content the content will define whether that person is actually considered to be an heir or a legatee.
- Normally if someone is called an heir he's an heir if someone is called a legatee or a pro-legatee he is a legatee but there are situations where the wording of the will leads you to a different result. The basic distinction between an heir and a legatee is that a legatee is not responsible for the liability of the estate. The only issue a legatee may have is the possibility of abatement in the case of the non-disposable portion being exceeded, in that case you have a risk of abatement.

- If you have an heir or a legatee having a property, are the heirs bound to pay the hypothec? As far as Dr. Borg Costanzi knows, if you get a gift, you get that gift unencumbered. So if my father has the legacy of the house, I'll pay that house without any liabilities, if there's a bank loan on it the heirs have to pay the liability. That is the presumption that you get your legacy free from any liabilities unless the will states otherwise. So the presumption is taht if you get a gift you get it without any interests. The legatee does not pay liability. If there's a legacy of a property you get that gift, if there are liabilities the heirs have to pay it.

- Can an heir or legatee renounce? Of course you can always renounce your legacy, now if you are an heir and in the will you have a legacy you can still take the legacy as a payment of account of the reserved portion. Not only, you have to take that legacy whether you like it or not.

    - Say for example, there's a will and in the legacy there's a legacy leaving me a boat, and I claim the reserved portion. Whether I like it or not I have to take that boat, if my reserved portion is more valuable than the boat the difference will be paid in money but if my reserved portion is less than the boat I don't take the boat. If on he other hand the legacy is in money, you have a legacy of €100,000 and my reserved portion is €50,000. You get €50,000, you get up to the value of your reserved portion.

- But there's a difference with legacies of a usufruct, if it is a usufruct or use of habitation you have a choice, the legatee has a choice and the choice is only of the legatee, he can choose to take that property and enjoy the usufruct or not. If he takes the usufruct, that property is not valued when calculating the reserved portion, it's taken out because you've got your share of the property, (the one claiming the reserved portion). So, let's say there's a usufruct of a penthouse in Tower Road worth €2 million and the lady who has the usufruct is 95 years old, and the life expectancy isn't that great and she has usufruct, if she claims the reserved portion her right is 25%, so the choice is do I take the usufruct and live for another few years or do I take €500,000 and buy stuff. It's a very subjective decision and only the usufructuary can decide, she can take both the usufruct and the reserved portion but the penthouse is not valued if she takes the usufruct so if there's €10,000,000 in the bank and €2,000,000 in property she'll only take the reserved portion on the money in the bank, as far as the property her reserved portion is the usufruct or else she can say I'm not taking the usufruct give me 25% of the property. The choice is on the usufruct, you have a usufruct of a house, to live there for as long as you live, when you die it finishes. So, if you're in your 20's when your life expectancy is another 60/70 years you'll take the usufruct so you don't have to worry where you live, but if you're in your 90's the usufruct isn't worth it, but then you look at the value, if the value is low it's one thing, if the value is

high it's another. So there's a mathematical calculation but then the person having the usufruct can have sentimental value which is priceless, I want to live in this house because I've lived here for so many years, I've got so many memories and if I leave I will end up confused and disorientated, so I want to remain here whatever the costs, it is subjective. But if there are other assets you will get your reserved portion on the other assets, so if there is money in the bank you get the reserved portion from the bank, if there are other properties you get the reserved portion from the properties but the house is not valued. Instead of getting the reserved portion on it you get the usufruct. It's a choice, no one can force you to make that choice it's entirely up to the beneficiary at absolute discretion.

- There was a case, Caroline Farrugia vs Dr Anthony Farrugia this point was discussed about the subjective right of the surviving spouse.
  - Types of wills
  - PUBLIC WILLS
  - SECRET WILLS
  - PRIVILIGED WILLS
  - SPECIAL PROVISIONS RE UNICA CHARTA (PUBLIC) WILLS
- We've shown that there were different types of wills.
- If there are two legatees, if you have a legacy joint conjointly to two legatees, I leave my house to my two children Mary and Joe and Mary dies before me, and the issue arises whether it goes to Mary's heirs or whether Joe gets the full legacy whether there's accretion or representation. If Mary has children the rules of representation will apply, and it will go to Mary's children, if Mary has no children then the rules of accretion will apply.
- If the will says nothing, or it says I appoint my two children by default first representation applies if there's no representation, in other words Mary has no children then it accrues in favour of the survivor.
  - If you have for example, jkollok xi hadd li jaghmel testament u fit-testament dan ghandu tlett t'itfal, u to one of his children he says I'm giving you a legacy of €50,000 and the usufruct of the matrimonial home for as long as you remain unmarried, and I don't appoint him as an heir, it's his benefit. Dan he's not an heir, jgħid, imma s-sena d-dieħla se niżżewweġ u jkolli nitlaq il-barra so mhux worth it niehu l-użufrutt, so he claims his reserved portion, he can choose to keep or not keep the usufruct, only he can decide that point. As far as the

legacy, that is on account of his reserved portion he has no choice, dawk il-flus u dak l-oggett li jkun legit in ownership that comes as a payment on account of the reserved portion. Jaf imur min taht, jista jkun when he calculates the reserved portion it can be less than the monetary gift or the reserved portion can be more. It's a question of potluck.

- If a legacy is taken on account of the reserved portion, doesn't that sort of cancel the effect of the legacy? The question being put is once the person claiming the reserved portion has to take the legacy whether he likes it or not by the fact that he's claiming the reserved portion he's like having his cake and eating it, mela se jiehu legat u reserved portion but on the other hand look at it the other way round, the testator may have said I want this child out of the way, u ma jridux jindahal fl-affarijiet l-ohrajn, mela se jiehu villa wahda biex ma joqghodx jindahal lil hutu fil-hames villel l-ohra.

- Incidentally there was a judgement delivered last week Anton Micallef (or David Micallef) vs Miriam Micallef by judge Audrey Demicoli, decided 12th May 2023 where the testator put a clause in the will, it was a clausula combinatoria, a forfeiture clause where the testator said that in this case the defendant Miriam Micallef, doesn't cooperate with her siblings she will get her reserved portion. Whether she was appointed as an heir and whether they have to apply this and work together, if she doesn't cooperate she loses the benefit of the heir and loses the reserved portion.

- There isn't a lot of legal discussion in this case it's factual but it will show the reasoning of the court.

- If there's an inconsistency between the first and the second, the second one will prevail. The last will is always the one that wins that's the last will so if there's a difference between the first and the second the first one will only apply if there's a conflict with the second one. Take for example you have two wills, in the first will the father leaves the house to child 'A' and in the second will the father leaves another house to child 'B', two different houses to two different children, the first will has not been revoked, so both wills will be applied and both legacies will be given effect 'A' will get one house and 'B' will get another. On the other hand, if the second will revokes previous wills, the first will has no effect, even if the second will, of course it will only have effect if the second will is valid, if the second will is contested and annulled then the first will will take place.

  - If you have a case study, and you have two wills and the case study does not say that one has been revoked then it isn't revoked, even in real life if the second will does not revoke the previous will, the previous wills are not revoked

and then you have to see which applies and when it applies, the last one will always win, if the two conflict the last one will override the first.

- We dealt with public wills, secret will, privileged wills and unica charta wills. Accretion, revocation and lapse, and the right of substitution and entails.
  - 5. CONDITIONS in the will
  - What happens if there is a condition in a will?
  - What types of condition can or cannot be inserted?
  - 6. ACCRETION
  - What is the right of Accretion?
  - Does it operate automatically?
  - What are the effects?
  - REVOCATION AND LAPSE OF TESTAMENTARY DISPOSITIONS
  - What happens if a will is revoked?
  - What if the will lapses in whole or in part?
  - Rights of children who were not yet born when will was made?
  - 8.RIGHT OF SUSTITUTION AND ENTAILS
  - Can the testator provide for the substitution of the named heir/legatee?
  - Is this automatic?
  - Entails: What is an Entail? Compare these provisions to a Trust.
  - Legato di residuo
  - 9. TESTAMENTARY EXECUTORS
  - When can they be appointed and what are their responsibilities?
  - What are their powers? Do these depend on the wording in the will?
  - 10. OPENING AND PUBLICATION OF WILLS
  - How are Secret and Privileged wills published?

- What if there is a will but no institution of an heir?
- What if the death of a person is uncertain?
- B: INTESTATE SUCCESSIONS
- General Provisions
- Of the Capacity to Succeed: Who has a right to inherit?
- Of Representation: what is representation and how does it operate?
- Of Succession by Descendants and the Surviving Spouse
- Of Succession by Ascendants and Collaterals
- Of the Rights of the Government / Vacant inheritance

- When we did intestate succession, we dealt with the articles with Dr. Xerri.
  - C: Provisions common to Testate Successions and to Intestate Successions
  - The Opening of Successions : When and how does this take place?
  - Continuance of Possession in the person of the Heir. Transfer of Patrimony?
  - Prescription of certain Actions
  - How does one Accept an inheritance or is presumed to have accepted?
  - How can one renounce to an inheritance and what are the effects? Is this reversible?
  - Acceptance of inheritance with the Benefit of Inventory
  - Separation of estates – rights of Creditors
- A question which was asked was does the reserved portion apply to intestate succession, of course it will arise when there have been a lot of donations, if there is no will, intestate. If there's no will, normally you wouldn't think that someone is going to claim the reserved portion but if there have been a lot of donations and the estate has been reduced then of course you may think twice and claim the reserved portion. But only if there have been donations.
- In order to claim the reserved portion you have to renounce your inherence. See article 618(3) which states;

- Article 618.

- **618**. (1) Children or other descendants who are incapable of receiving property by will, or who have been disinherited by the testator, or have renounced their share, shall also be taken into account in determining the number of children for the purpose of regulating the reserved portion.

- (2) Saving the provisions of articles 608 and 626 the portions of the children or other descendants who are incapable, or who have been disinherited, or have renounced their share, shall devolve in favour of the other children or descendants taking the reserved portion.

- (3) A child or other descendant who has been instituted heir, who had he not been so instituted would have been entitled to share the reserved portion, shall also be entitled to share therein notwithstanding that he was so instituted.

- This section is stating he obvious, it is saying that basically if you appoint your children as heirs, even if you don't appoint them as heirs whether you will appoint them or not they will always be entitled to a reserved portion. Normally you will say that a person is entitled to the received portion because he is not mentioned in the will as an heir, but if he has been appointed as an heir he can still claim the reserved portion, but first he has to renounce and when he renounces, it's very important he has to reserve the right tot the reserved portion if he doesn't reserve it he doesn't get it, but sometimes it's like stating the obvious.

  - In succession law, many laws have been written because there were problems in the past. What the law is trying o say is that the fact that you have been appointed as an heir doesn't stop you from being entitled to claim the reserved portion, inti mhux marbut bilfors bit-testment. This is what this section is catering for.

- If there's usufruct of an immoveable property, I have the right to use the furniture in the property (as a presumption), but there are specific objects that are excluded unless included. There's a list of items which are presumed to not be included and one of them is collections, you have to do a cross reference to a different part of the law.

- How do you abate donations? Mela, this is very hypothetical, but if you have this hypothetical situation in practice where you have a lot of donations and not enough left in the estate and someone claims the reserved portion and therefore the donations have to be abated, there are many different people not just one, how is the abatement carried out? Who pays what? It is not an easy answer and in fact if you look at the Caruana Galizia notes there is an answer, but it's still

confusing, so it's about common sense, and common sense seems to be in line with what the law is trying to explain, where you look at the value of the donation in relation to the value of the estate.

- So if there is for example, three gifts one of €100, one of €200, one of €300 and in the inheritance there is another €300, so there's €100, €200, €300 and €300 and you have to pay €1,000 how is this going to be paid? It's paid pro rata according to the value of each individual component. So you have to pay €100, how is this calculated? The estate has three. One donation has €300, one donation has €200, and the last has €100, so 300 + 200 + 100 + 300 that's 900, it's 100/9, so ⅑ will be paid by the one who has a gift of €100, 2/9 will be paid by the one who has a gift of 200, 3/9 will be paid by the one who has a gift of 300, and 3/9 by the heirs, so there's another 300.

- If you have three donations one of 100, one of 200, one of 300, and in the estate there's 300 and you have to claim hypothetically 100 who pays the 100? The 100 will be divided into 9. The one who has the donation of 100 pays ⅑, the one who has a donation of 200 pays 2/9, the one who has a donation of 300 pays 3/9 and the heirs pay 3/9. That is, how the abatement exercise will be worked out, both in the case of legatees and in the case of people who have received the gifts by donation.

- This is extremely hypothetical.

- Do you count pre-deceased children, yes as long as they were born viable, let's come back to one of the first lectures, this is important, in the very first lectures we said you can only inherit if you have been born viable and we went into the issue of viability. Now when calculating the reserved portion and counting the number of children you have to count all the children even those who have pre-deceased the testator even though there are no descendants.

- So if there were four children and one died with no grandchildren you sill count four as long as the one you predeceased was born viable. If that pre-deceased child died in 10 minutes of being born because of a huge defect, that child is not counted. There's case law on it, tgħoddhom, unfair as it may seem if there are pre-deceased children and no grand children you still count the predeceased children you even count those children who have renounced and not claimed the reserved portion, you even count the children who have not taken the monastic vows, tgħoddhom.

- Let's say there are five children, u l-ligi tghidlek 5 or more tiehu ½ u wiehed imut qabel u m'ghandux tfal, tgħodd ħamsa. Anke jekk ikun qassis, tgħoddu. Wieħed minnhom joqtol lit-testatur, he's incapable to inherit, unworthy tgħoddu.

- When you are trying to calculate the non disposable portion, you have to take the reserved portion of the children which may be ⅓ or ¼ plus the reserved portion of the spouse which is ¼ how do you calculate it?

- How do you calculate and why do you calculate the non disposable portion? To calculate the non disposable portion, you look at what's left of the inheritance and you fictitiously add the value of donations, mela inti mbgħad ħriġt ammont u tgħid the non disposable portion huwa nofs, jew terz, fil-wirt hemm nofs jew tera? Let's say there are three children, so the non disposable portion for three children is ⅓, the estate, what's left is worth €30,000 and there was €10,000 in donations, so €40,000, ⅓ of 40,000 is 12,000, hemm 12,000 fil-wirt? Hemm, mela jien ma qbiżtux għax hemm €30,000 ghax hemm bizzejjed mela l-issue tal-abatement mhux se tqum ghax you didn't exceed the disposable portion.

- The first exercise to carry out is whether the non disposable portion has been exceeded jiġifieri, li għad fadal biżżejjed ġid fil-wirt li inti se tiggarantixxi l-porzjoni riservata. If there's enough you don't go into the issue of abatement, you only go into the issue of abatement if you exceeded the non disposable portion. It's purely mathematically. With he non disposable portion, you see how many children there are ⅓ or ½ mhux min claims reserved portion trid tara kemm hemm tfal u tghid inti dan l-ammont trid tiggarantih għal uliedek. Ħallejt biżżejjed ġid biex dan l-ammont huwa garantit għal uliedek, jekk inti ħallejtu, you're cleared. But you have to take into consideration the claim of the reserved portion of the wife, so hi għandha ¼ you take a look at the non disposable and the disposable portion, inti ħallejt ġid biex hi tieħu dak il-kwart? Jekk ma ħallejtx tmur iddur il-legati u fuq id-donations, jekk ħallejt il-wirt se jħallas.

- That is why it is important to do this calculation to see if there is going to be abatement of the legacies and the donations. The legacies ghadek ma rajthomx, in calculating the disposable and non-disposable you only look at the estate.

- For donations, you calculate the value of inheritance, those in the will you haven't given them out yet the money's still in the bank, mela hemm €10,000 fil-bank għadek ma qassamthomx, imma jekk int f'ħajtek tajtu dar, dik id-dar trid tara l-valur tagħha f'dak iż-żmien.

- The question is, a unica charta will, and there's a forfeiture clause and the husband and wife leave everything to each other and in the will they say if you die before me, my estate will go to the nuns at St. Ursula, mela I die first and my wife inherits, and the question is why should I be tied up by my wife's will? As far as your own property you're not tied, your half or peripheral property there's no forfeiture but if you change the wishes expressed by your wife then there's forfeiture because she wanted whatever I gave to you to eventually go to the nuns.

If I have broken that promise, I don't get it, I'm not entitled to inherit my wife as long as she's left me the majority of the inheritance.

- The rules of forfeiture apply only if the spouse has inherited the majority of the estate, if it's not the majority of the estate the rules of forfeiture might not apply.
- What happens if there's a will and there's a forfeiture clause and the husband comes to sell the property? Mela int ma tafx jekk hemmx forfeiture jew le għax għadu ħaj. You don't know if he's done another will but that property half was his in his own right and half he inherited from his own wife and he's selling it and you're the notary and doing the contract or you're buying, or your client has asked you for advice and Dr. Borg Costanzi's advice would be get the children to be co-signatories, or anyone who could benefit from that will because if there's forfeiture the husband is deemed not to have inherited the wife so he was never the owner of that half, so that contract of sale, will not be valid for that missing half. Inti xtrajt, mingħalik li xtrajt tajjeb, imma għandek għaxar snin qiegħed in dubju, why ten years? Because if you've bought, you're in possession, you have title and good faith then you have acquisitive prescription and then that property is yours and the problem of forfeiture is not something you have to deal with, the heirs have to deal with it not you. Imma għandek għaxar snin under question.
- What happens when a member of a monastic order quits? That person is deemed to have inherited on day one but he or she cannot challenge any acts that were validly done in between. Jiġifieri if there was a property that was sold he can't challenge that contract of sale, but he is entitled to a share of those proceeds. So a right reserved with effect from day one but he can't challenge anything that had happened in that intervening period. So the heirs will keep his share and they know that if he leaves the order se jkollhom jagħmlu tajjeb. If they come to sell the lawyer or notary will explain it, jgħidu ħa jitlaq jaf idur fuqkom u jkun irid sehmu, jekk ma jitlobx ma jitlobx.
- Jekk inti tvarja it-testment, jekk tvarjah kif tvarjah there's forfeiture even by one cent, even though judgements say there has to be a 'bidla materjali' but the judgements give some leeway in so far as renumeratory legacies, jekk inti ghandek dejn tista thallas, jekk inti ghandek xi ħadd akwista serviġi tista tikkumpensah, imma jekk inti fil-legat hemm miktub it-tfal kemm se jieħduu jien dik ma nistax inbiddilha b'mod sostanzjali, xi ħaġa zgħira tgħaddi imma vera trid tkun xi ħaġa żgħira u minima.
- The question asked is, in the case of a unica charta will with forfeiture if the will makes no provision for what happens next, so dawn jagħtu lil xulxin biss u jieqfu hemm, jekk wieħed mill-ispouses ibiddel it-testment. Hemm ġurisprudenza konflingenti u donnha il-ġurisprudenza tiddistingwixxi bejn meta t-testment isir fil-

ħajja tal-konjugi u wara l-mewt tal-konjugi. Jekk il-bidla ssir fil-ħajja tal-konjuġi, il-qrati hemm sentenza li tgħid li r-raġel tilef dak li wiret mil-mara and it makes sense, imagine a husband and wife do a unica charta will leaving everything to each other, the husband goes five minutes later and does another will and leaves his estate to his girlfriend, as long as he's alive he's covered, if his wife dies first, he's going to inherit her, so his girlfriend will inherit, yet if he dies first, the wife will come up with a big surprise. Hemmhekk the court will at least there was a situation where this occurred and the court said there was a forfeiture, because the will was done during the lifetime of the spouse, but there was another case where the will was done after the death of the spouse and the court said there was no forfeiture, anzi the court said the husband had no choice because there was no will regulating his inheritance. Therefore he was entitled to do a new will, he didn't go against his wife's wishes, he did nothing to undermine the validity of the unica charta will. So forfeiture applies as a way of a kind of guarantee that what the two spouses shave agree together is going to be honoured and no one is tricking the other that is the raison d'être.

- If the will is done after there shouldn't be forfeiture because you're not undermining the wishes of the pre-deceased spouse.

  - C: Provisions common to Testate Successions and to Intestate Successions
  - Of Partition
  - Of Collation
  - Of the Payment of Debts
  - Effects of Partition and of Warranty of Shares
  - Partitions made by Parents or other Ascendants among their Descendants

- For questions we can send Dr. Borg Costanzi an email on the university email.