CVL 4026
THE LAW OF SUCCESSION

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ELSA Malta President: Alec Carter

ELSA Malta Secretary General: David Camilleri

Treasurer: Jake Mallia

Writer: Emma de Gabriele

CVL 4046 - The Law of Succession

Introductory Lecture and Course Overview

The Law of Succession is an extensive law with most of it having been passed down from Roman law. Along the way various amendments were made but the main body of law was enacted in 1868 and remains largely unchanged. The majority of the amendments that occurred did so from 1995 onwards.

Through this series of lectures, the law of succession will be tackled as it stands today, minimising references to outdated notions for comparison purposes only. This is important to consider as it means certain old judgments predicated on such past notions are either invalid or do not have the same bearing as in the past. To tackle the subject effectively, the lectures will follow the sequence of the Civil Code, which is inherently extremely logical.

General Principles

To understand the law of succession it is important to have a grasp of certain fundamental principles:

- When does succession take place?

  Logically, this seems easy to answer: succession takes place when a person dies. However, in actual fact, it is more nuanced than that and involves exploration into when a person is deemed to have died. This creates significant legal issues that will be elucidated, for example, if a person disappears and isn't heard from for a significant amount of time, are they considered to be dead for the purposes of succession?

  In some countries they distinguish between donations made consequent to death and succession by operation of law. They call testate succession a way of disposing property by donation. It is and can be considered a donation made *causa mortis*.

- What is patrimony and what can be transferred/inherited?

  Patrimony is an abstract concept which largely developed in the tradition of the French Civil Code by legal authors Aubry and Rau. In fact, it is not defined under Maltese law. It

refers to the rights and obligations that a person has over things, understood in the sense of assets and liabilities, that exists throughout the entirely of a person's existence, even though the content of the patrimony changes with the acquisition of new rights and the disposal of others. Every person has a patrimony because every person has the same capacity to be the subject or rights and obligations in relation to things.

In the case of the case of **Howard Marshall Charitable Remainder Annuity Trust (1998)** decided by the Supreme Court of Louisiana, a definition was given of the term patrimony that is widely accepted:

> *The patrimony is 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.*

This definition mirrors the concept of patrimony developed by Aubry and Rau in the 19th Century. Their theory is based on three important rules about the relationship between patrimony and personality:

1. Every person, physical or legal, has a patrimony and that only a person can have a patrimony.
2. No person can have more than one patrimony in as much as a person cannot have more than one personality.
3. Each patrimony is held by a person, physical or legal, whereby the rights and obligation which constitute it have an economic relevance. These rights and obligations have to do with things and therefore can be valued in monetary or financial terms and which can be transferred from on person to another. Only rights which have that kind of character can be the subject of patrimony. They are a legal sense, patrimonial in nature.

- What is the difference between testate and intestate succession?

  The former refers to situations of succession governed by a will and the latter refers to succession where there is no will or no valid will and thus the situation is handled by operation of the law. Intestate succession will see the application of the default rules on succession outlined at law. While different jurisdictions regulate succession in different ways, the Maltese legislator decided to regulate succession based on whether or not there exists a will.

- What degree of control does the law have when it comes to inheritance?

  In some countries, irrespectively of what a person states in their will, the law will nonetheless prevail and dictate what happens. Here, a person is prohibited from creating

a will which is in excess of what the law provides. One such example is in Muslim communities governed by Sharia law: the law overrides the wishes of the testator and in situations of cross border inheritance, it is Sharia law which applies.

In most civil law jurisdictions, we observe a hybrid system whereby there are certain parts or elements of the law that cannot be voided or exceeded but otherwise the will of the testator prevails. This is indicative of the fact that there is a limit as to how much the law can be disposed of yet, the law wishes to grant the testator freedom to make decisions regarding his own assets after he dies, respecting **Article 320** of the Civil Code on ownership which grants the owner an absolute right over their own property.

Conversely, there are other jurisdictions where there are no restrictions at all.

These differences are important in relation to cross border inheritances, i.e. inheritances not regulated by Maltese law. Here, we turn to regard private international law. Within the EU, inheritance is governed by **EU Regulation 650/2012** which dictates that both the formal validity and the substantive validity of an inheritance is regulated or is possibly regulated by a foreign jurisdiction even though the property is situated in Malta. This results in a scenario whereby the substantive part is possibly regulated by a foreign jurisdiction even though the property is situated in Malta or else where a will is made in Malta not according to Maltese law but is still valid in accordance with some other European law and therefore, is considered valid. In situations outside the European Union, we note that the standard rule was as follows: formal validity of a will is determined in relation to the *lex situs* while the substantive validity calls for the *lex domicilii*.

General Overview

The sections of the Civil Code dealing with succession are as follows:

A: *Testate Succession*

B: *Intestate Succession*

C: *Provisions Common to Testate and Intestate Succession*

D: *Cross Border Inheritance & Private International Law*

E: *Trusts*

Testate Succession Overview

The most important element of testate succession is the fact that it deals with wills:

Wills

Wills are regulated both by the Civil Code, Chapter 16 of the Laws of Malta, and the Notarial Profession and Notarial Archives Act, Chapter 55 of the Laws of Malta. These two laws must be looked at in parallel because they regulate the same situation but one goes into slightly more detail. We note, however, that there are certain instances of conflict that hopefully, will be eliminated in due course.

Within this section, we will analyse what makes a will a will, namely:

- The formal validity of a will;
- The capacity needed to make a will;
- The capacity needed to inherit;
- The concept of unworthiness, i.e. what conditions at law can preclude an heir from receiving their inheritance on the basis of unworthiness.

Property

In this regard, we will question:

- The property that can be disposed of and the exceptions that exist in this regard;
- Whether you can leave property that doesn’t belong to you;
- The minimum portion must be reserved to a spouse or to a descendant and the guaranteed rights such are entitled to when they are claimed;
- The legal implications of abatement, i.e. when the deceased person has made donations in his lifetime or included legacies in the will that go beyond what he can dispose of, i.e. the division of the estate into the disposable portion and the non-disposable portion;
- The notion of dishersion, i.e. when the testator excludes a person from their will, and the grounds under which this is possible at law. This is a continuation of unworthiness.

Heirs and Legatees

The law includes extensive provisions about the following that have been inherited from Roman Law, that will be analysed:

- The identification of the heirs;
- The rights and obligations of the heirs;
- Who may be an heir;
- What arises if there is no institution of an heir;
- The difference between an heir and a legatee;
- What a legatee is and the effects of being one;
- Whether a person can be both an heir and a legatee;
- How the transfer takes place;
- Whether an heir or legatee can renounce the inheritance.

🌿 Conditions in the Will

Here, we analyse:

- What happens if there is a condition in the will;
- What types of conditions can be lawfully inserted within a will and which are precluded;
- What the effects of these conditions are.

🌿 Accretion

Accretion comes from the word accrue and relates to succession in the following way: Person X leaves their estate to their three children: A, B and C. B has no descendants and passes away before X. That person's share accrues in favour of the surviving siblings A and C and doesn't remain vacant.

🌿 Revocation and Lapse of Testamentary Dispositions

This considers issues such as:

- What happens if a will is revoked?
- What happens if the will lapses in whole or in part?

- What are the rights of children who were not yet born when the will was made?
- What arises when there are two wills which are inconsistent with one another?

🌿 Substitution and Entails

Substitution tackles the right to substitute Person A and Person B in a will. For example, the testator does not want to leave his property to his children and instead decides to leave it to his grandchildren. Another situation is when the testator leaves his property to his children, but one child predeceases him, resulting in his place in the will to be substituted by his children. We question whether the testator can provided for the substitution.

Entailed property is the predecessor of a trust: it is property that passes from generation to generation according to an original will. For example, take the British Royal Family, King Charles was proclaimed King because of an old contract that outlines how a person becomes King or Queen that continues to regulate the situation today. This also takes into consideration the property of the crown. King Charles is unable to dispose of the land he possesses by virtue of his title as such is regulated by the original contract in perpetuity. Therefore, while each holder has the right to enjoy the property, selling it is very closely regulated. This is also known as *fede commesse*.

Today, the law prohibits the establishment of an entail. The process began in the 1950s in part, whereby it was noted that all present entails would pass 50% by entail for a generation and the rest by the rules of succession, and completely closed off in the 1970s whereby it was determined that the 50% which passed by entail are finished and therefore, all 100% of the property would pass according to the rules of inheritance. The main reasons for this were twofold: the system was incredible unjust and since the possessor was not technically the owner as the property continued to move in perpetuity to successive owners, succession tax never fell due.

🌿 Testamentary Executors

This refers to individuals who are appointed to administer the estate. This means that they are in command of the estate and give out the property according to the wishes of the person making the will. In order to ensure that there is no abuse, there are several rules to be abided by and controls in place to ensure that the person is duly abiding by the wishes of the testator and is not retaining any part of the estate for themselves.

🌿 The Opening and Publication of Wills

Firstly, we distinguish between three types of wills under Maltese law:

> Public Wills are those made and registered in the Public Registry. While the contents of the will *per se* aren't disclosed, the fact that Person X made a will and the notary who drew it up are public information. In order to find out the contents of the will, a person will need to ask the notary on the production of a death certificate.
>
> Secret Wills are those which are registered with the Court of Voluntary Jurisdiction. Here, no one knowns that a will has been made except for the person who made it. It is placed in a sealed envelope with the details of the writer on the front and is placed in a safe at the Court. This isn't made public and the only way for it to be accessed is to provide a death certificate to the Court.
>
> Privileged Wills are those made under extraordinary circumstances that the law validates under certain conditions.

In this section, we will consider:

- How secret and privileged wills are published;
- What arises when there is a will but no institution of an heir;
- What arises when the death of a person is uncertain.

Intestate Succession Overview

This deals with situations where a person dies and has left no will, i.e. outlines the default position at law in relation to succession and the associated rights of descendants, ascendants, spouses etc.

It will involve analysis as to:

- Who has a right to succeed: Of the Capacity to Succeed;
- What representation is and how it operates: Of Representation;
- The default positions of descendants and spouses: Of Succession by Descendants and Surviving Spouses;
- The default position of ascendants and collaterals: Of Succession by Ascendants and Collaterals;
- What arises when no one claims the inheritance and what constitutes a vacant inheritance: Of the Rights of the Government/Vacant Inheritance.

Provisions Common to Testate Succession and Intestate Succession Overview

1. The Opening of Successions : When and how does this take place?
2. Continuance of Possession in the person of the Heir.
3. Transfer of Patrimony: Is there a difference between assets and liabilities?
4. Prescription of certain Actions
5. How does one Accept an inheritance or is presumed to have accepted?
6. How can one renounce to an inheritance and what are the effects? Is this reversible?
7. Acceptance of inheritance with the Benefit of Inventory
8. Separation of estates and the Rights of Creditors
9. Of Partition
10. Of Collation
11. Of the Payment of Debts
12. Effects of Partition and of Warranty of Shares
13. Partitions made by Parents or other Ascendants among their Descendants

Of Cross-Border Successions – Civil Code and EU Regulation 650/2012 Overview

Within this section, we will be discussing:

- Formal and substantial validity
- Wills within the EU in relation to property, beneficiaries and taxes
- Wills outside the EU
- The European Certificate on Succession

Of Successions: General Provisions

The Maltese Code was initially drafted in 1868 and while it is easy to read, behind its simplicity there exists a great depth of meaning.

When dealing with succession, the first section of articles make up the general provisions.

Defining Succession

Firstly, we take into account **Article 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.*

Within this article, there exists the basis of the entire law of succession outlining its elements to be:

- The Estate
- Of a Person
- Deceased
- Devolution
    - By the disposition of man
    - By the operation of law

The French author Pothier defined inheritance as:

> *A transfer of all active and passive rights*.

However, this definition is considered by many to be too simplistic. We can consider inheritance to be when the heir steps into the shoes of the deceased from a patrimonial aspect, i.e. in relation to anything having economic value by the courts.

The Estate

When questioning what ‘an estate’ is, we turn to regard the law of property and the law of things, paying special attention to the concept of patrimony. Here, we take into consideration the landmark definition outlined in the **Howard Marshall Case** by Judge Knoll:

> *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.*

The notion of patrimony is therefore, very close to estate. One difference is that obviously, since the *de cujus* has passed away, we are not talking about *potential* rights and liberties but those in existence. We discuss a universality of rights and obligations having economic value attached to a person which is transferred by inheritance upon death.

This raises the question whether all rights and obligations are regulated by the law of inheritance and can potentially be transferred. The answer is no. There are certain rights that are intrinsic to a person, such as the right to marriage and to life, that when a person dies, the

right dies with them. This indicates that not everything can be transferred. This highlights the difference between patrimony and personality.

Another right that isn't dealt with under the law of succession is the right to nobility. Under Maltese law, this cannot form the basis of a subject to be decided by law and thus, the courts are excluded from the regulation of issues arising relating to the transfer of titles of nobility. In fact, the nobility in Malta have set up their own rules through the Committee of Privileges of Maltese Nobility. Amongst its duties, this Committee is in charge of determining how the devolution of title works. Very often, such noble families have family trees going back hundreds of years so securing the title becomes a point of pride. This wasn't always the situation and prior to the promulgation of this law, members of these families used to litigate on the inheriting of titles with some cases also going up to the Privy Council.

This was particularly important in the past due to the existing of entailed property. This property would be inherited down the bloodline and thus, securing the title was of utmost importance as it also meant wealth and property. One of the major benefits of an entail, as with trusts, is that the property remains consolidated. With an inheritance, it is likely that the estate will continue to be divided the more it passes down, and in situations where the property cannot be divided, it will be sold and the expenses divided. If the family has no assets to buy out the property, it will cease to form part of the estate and will be transferred. There are also disadvantages to entailed property. Say a person leaves entailed property that is to pass down to the firstborn of their direct bloodline, in scenarios where the heir is compassionate and responsible, they may choose to manage the estate's income for the benefit of the entire family, assuming the role of a *bonus paterfamilias*. However, if the designated heir is self-centred or easily exploited, the remaining family members could find themselves in dire financial straits. This dichotomy is often evident in affluent noble families, where the titleholder wields considerable control. Such arrangements can lead to inequitable outcomes.

Entails have been abolished, this issue is no longer very relevant. Occasionally, certain disputes still arise such as that of **Fenech Adami v. Gatt** where the court had to decide whether a property was entailed or not. This dispute initially arose in 1972 with the court being charged with deciding what type of entailed property the case centred around. In this regard, Ganado and Mifsud Bonnici had conflicting opinions. While the Court of First Instance didn't go into the issue and claimed there was no proof of the entail ever having been created since the original document wasn't presented in court and was untraceable, the Court of Appeal referred to a decision taken by the Committee of Privileges of Maltese Nobility. While technically, it is not allowed to do so, the Court of Appeal argued that since the Committee that deals with nobility looked into the matter and made the decision that the title of the Count passed from A to B that therefore this document must exist since they would have needed it to make such a decision. The Court endorsed the decision without going into

the merits of the case by stating it was a universal entail and that the plaintiff was entitled to a share of the estate. This was then sent back to the First Hall to see how the property ought to be divided.

Another interesting case is one that was decided by Silvio Meli in the early 2010s which was the oldest case in court records. In the 1400s, Calleja made a will dictating that his estate would pass down the bloodline perpetually, a customary entailment. He specified that if his direct bloodline from his second marriage were to cease, inheritance would revert to the bloodline of his first marriage, and failing that, to his siblings. In the late 1800s, his direct descendants dried up with the last holder being the only one with access to the registers and records of the estate. Its important to note that at this time, there existed no Public Registry and therefore, the only way to figure out what estate a family holds is by going through the records that would be stored in their own collections. The title holder has a strong position in this regard as he is aware of the contents of the records which in general were kept fairly secret to avoid others challenging them and taking inventory. Once the bloodline officially dried up, a dispute arose between the heirs of the 'last man standing' by law and the descendants of the sister of Calleja, interestingly enough with the 'last man standing' also being a member of the direct bloodline of the sister. While the claim was for full ownership, if the opposition was successful, he would only own half. In 1905 the case was filed and continued until 1930 when the court grew tired of the incessant back and forth and struck off the case for taking too long. In 1932, some of the plaintiffs filed a new case. The biggest issue that was run into was the issue of the family tree. While in 1933, the court appointed an individual court expert to establish the family tree and the consistency of the estate (even though this may not have been accurate since the person who held the records outlining the estate was reluctant to show them as it would go against his interest), following the war where the expert was treated badly for being pro-Italian, he decided to stop practising law and as a result the case once again was stopped in 1942. Ultimately the case was decided in 2014.

In relation to the consideration of estate, we also question what arises when something of value comes about as a result of death (i.e. , assets paid as a result of a person's death) such as a life insurance policy. In such a scenario, the gratuity of the policy is paid after the death of the policy-holder and therefore, it is questioned whether it can be defined as part of the estate or not. In the judgement **Scerri v. Rowe (1926)**, it was decided that life insurance forms part of the estate and moves according to the rules of inheritance.

When considering how the estate can be transmitted we note that it can either be disposed of by universal title or by singular title. When an estate is disposed of by singular title, the testator identifies a singular object or items and leaves such object or items to a person. The name of such a title is legacy. If the testator disposes of the estate by universal title, then the will doesn't define or list all the items in his patrimony but instead leaves a share of the

property to an heir. If transmission happens by universal title, no matter what the will calls the bequest, the person inheriting is an heir.

Of a Person

We note that at law, a person can be either a physical person or a legal person - someone or something having legal personality. We note that only natural persons are able to leave a will and that a testator is only able to bequest unto a person (be they natural or legal). For example, a company is unable to leave a will. Likewise, a testator is unable to bequeath his estate to a dog as they are not a person, however, he is able to leave his estate to a voluntary organisation that cares for dogs.

The notion of natural person is therefore important as it is a condition for the creation of a will. While the factors making a human being so aren't defined at law, we note that under **Article 601**, those who aren't born viable are incapable of receiving a will:

> *Those who are not born viable are incapable of receiving by will.*
>
> *In case of doubt, those who are born alive shall be presumed to be viable.*

Additionally, **Article 1747** highlights that a person who is born inviable is incapable of receiving by donation:

> *Those who are not born viable, are also incapable of receiving by donation.*
>
> *In case of doubt, those who are born alive shall be presumed to be viable.*

We question what makes a person viable and how long a person must survive in order to be considered so. Here, a number of criteria can be analysed including: Is a time frame in order to determine viability? For a person to be viable, is it important that they live with independent existence? In this regard, it is difficult to provide an answer since the law doesn't explicitly state what constitutes viability, unlike other foreign jurisdictions where birth and validity go hand in hand since in Malta the mere fact of birth is insufficient to determine viability.

Thus, we question what makes a person viable and note that such a test is one which is brought before the court will have to be weighed according to the circumstances. For example, those children who die shortly after birth will likely not be considered viable since they didn't enjoy any form of independent existence but when dealing with the matter of the Reserved Portion, it may have an impact on the case. Nevertheless, if you go to the Public Registry, one will have the opportunity to examine the death certificates of newborn babies who die shortly after birth. The likelihood is that such will not be considered viable. This is mainly important for the purposes of calculating the Reserved Portion.

Pacifici Mazzoni (1870) discussed the notion of conception and birth noting that the former has legal importance but alone doesn't render a foetus viable. In order for a foetus to be considered a person there must be a birth. Once such occurs, the child is entitled to inherit, even if the birth occurs after the death of the person being inherited. In some instances, the court will look at whether conception occurred before the death of the *de cujus* for the court to acknowledge the child as being theirs, with certain legal presumptions being put into place in this regard: if a child is born before the 300th day from when the husband is physically prevented from copulating, the child is presumed to belong to the husband.

Deceased

It is logical that for succession to take place and come into question a person must die. Most often, this is not a contentious issue and the determination of death is fairly easy: to prove someone has died, a death certificate must be obtained as per law and reported to the Public Registry. In this regard, the certificate is considered to be proof as to the death of the individual. However, it takes a while for the certificate to be produced, especially if someone dies under suspicious or unfortunate circumstances and a magisterial inquiry is called for.

It goes without saying, that for succession to take place and come into question, a person must die. In 99% of cases, there are no issues in the determination of death: if one wishes to prove if someone has died, the person must obtain a death certificate. We note that by law when someone is born, gets married or dies, it has to be reported to the Public Registry with the law highlighting that the certificate is proof as to what is stated therein, as per **Article 296 et seq**. However, issues with registration can arise:

- It takes a whole for a death certificate to be produced, especially if someone dies under unfortunate or suspicious circumstances. This is because in such circumstances, the death in not recorded in the Public Registry until the inquiry is over and such is ordered by the magistrate. In such a situation, secondary evidence would need to be used to prove a person has passed away for the purposes of inheritance.
- In the case of persons who disappear where there is no body to be found and a death certificate is not issued, the procedure is also slightly difficult. Here, the question is how to prove whether the person is alive or dead for the purposes of what happens to the estate and whether the family is entitled to inherit. There are various specifications to consider:
    - Absentees - Curators for persons who are absent but are presumed to be alive. This is defined in **Article 193 et seq.**:

      A person who has ceased to appear in Malta and has not been heard of shall, for the purposes of the provisions contained in this Title, be deemed to be an absentee.

- Absentees - Provisional administration of the estate. This is dealt with under **Article 205 et seq**. This argues that if a person has been absent or unheard of for either three or six years, depending on whether he left an attorney or not, the family can file an application before the Court of Voluntary Jurisdiction to appoint a provisional curator and six months later, the court can order that secret and public wills be made accessible. This will allow provisional administration to be granted to the heirs or legatees or the heirs at law if no will was drafted. At minimum this enables the beneficiaries to be able to access the estate, even if the administration is provisional.
- Absentees - Absolute Possession. This is dealt with under **Article 223 et seq**. It notes that if:
  - The person remains absent for six years following the granting of provisional possession;
  - The person is absent and not heard from for ten continuous years;
  - The person is born over 100 years ago and has not been heard of in a year;
  - The person is born more than 80 years ago and is not heard of for six years

  The person is presumed to be dead. For the purposes of inheritance, an application must be filed before the Court of Voluntary Jurisdiction which will give instructions and in such a situation, the administration granted over the estate will no longer be provisional.

  This creates a number of questions such as what happens if an absentee returns or his whereabouts are established? Is the situation returned to the *status quo ante*?

- Another issue arises in relation to commorientes. This refers to two or more people who die in the same incident, for example, a car crash. The question is who is considered to have died first as this can impact the manner in which the estate is divided. This has been a persistent problem for hundreds of years and there are many problems to consider:
  - Are the two considered to have died at the same time?
  - Are age, sex, strength and other physical factors used to presumed who survived longer?
  - Can circumstances affect this?

  Many countries have done away with this predicament by having embedded rules, with many considering the two to have died together. Under Roman law, the decision was taken according to age and sex. Under the old provisions of the Civil Code (i.e. pre 2004) there was a preference of males surviving longer and in the case of the same gender the following applied:

If both were under thirty-five, the elder is presumed to have survived longer.

If both were over thirty-five, the younger is presumed to have survived longer.

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If one was over seventy and one was over seven, the one over seven is presumed to have survived longer.

If one was over seventy and one was under seven, the one over seventy is presumed to have survived longer.

Yet, it is clear that presumptions can give skewed views.

This was the subject of a case post-WWII: **Zahra et v. Borg (1943)**. Here, there was a husband and wife who had a child. During the war, the wife and child were in the shelter together and died. The wife's parents sued the husband claiming that they inherited their daughter by virtue of being ascendants and therefore, needed to divide the estate between them. This was predicated on the argument that the mother survived longer than the child meaning she inherited the child and the parents inherit her. However, this chain of events was called into question with the husband noting that if the wife died before the child then the child would inherit the wife and he would solely inherit the child. The presumption applied and noted that since the child was a minor, they died before the mother and that thus, the wife's parents got to share the estate with the husband.

This was the situation till 2004 when we adopted the situation as it stands today: people dying in the same instance are presumed not to inherit each other unless evidence can be proved to the contrary. This is provided for through **Article 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.*

This is a *juris tantum* presumption that can be rebutted and the estate is XXX. It is likely that this will be challenged considering that beneficiaries have an interest in finding out who died first, even by a few minutes. In this regard, if proof can be brought forward to this effect, then it can override the presumption. In practise, this is not the most ideal way to avoid disputes as people nonetheless end up arguing. XXX (56:00). The claiming of inheritance is also a problem in this respect.

This follows what is stipulated under the 1989 Hague Convention through **Article 13**:

> *If one or more persons whose successions are governed by different laws die in circumstances where it is uncertain in what order and the different laws provide different or do not provide, none shall inherit.*

The EU Regulation on Succession provides for a similar situation.

Devolution

We now come to the question as to how one inherits.

Firstly, we distinguish between whether succession is an automatic right or whether it must be claimed? The prevalent theory in this regard is that the right to inheritance must be claimed since one can lose inheritance through the lapse of prescription, with the estate going to the state in such a situation.

When considering devolution of inheritance, we note that devolution takes place either by the disposition of man or in default by law. There are only two exceptions in this regard: donations made in contemplation of marriage or a life insurance policy.

This is considered through **Article 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.*

When considering the exceptions, we note that **Article 1793 et seq**. notes that a person can give their daughter a share of the inheritance while they are still alive in favour of their marriage. This is quite antiquated and not often used. In terms of the life insurance policy, we note that **Article 1712 et seq**. outlines that the person taking out the policy designates the beneficiary of the policy on the document itself. This is binding irrespective of what is stated in the will. The only way for this to be changed is to go to the company and change the beneficiary without any further obstacles.

Donations come into effect on the demise of the donor and are irrevocable - you can have a public deed stating that the donation will only come into effect on the death of the donor. The format of the public deed is a donation but since it is done by public deed, it is equivalent to a will, so long as the format is correct.

In discussing testate succession, we consider that the right to make a will is an extension of the absoluteness of the right to ownership. A person can only dispose of an inheritance in whole or in part through a will that only comes into effect upon death. This means that until a person passes away, those inheriting them will have no rights to the inheritance and the property belongs to them only after the person has died. Here, we distinguish between wills and other contracts. Normally in the latter case, there are rights and obligations that kick in the moment the contract is signed, but in a will no transfer takes place until the testator has died. Because of this, one cannot sell their future inheritance or hereditary rights.

While this may seem obvious, in certain scenarios it is anything but. Take the following example:

> *This car is yours if you take care of me until I die* v. *This car will be yours if you take care of me until I die*.

In the former, an obligation is created under a condition. If the condition is broken (i.e. the person doesn't take care of them), the donation can be challenged and reversed, however, the donation has taken place. It is not the transfer of a future right. Conversely, the second scenario doesn't refer to a regular donation but the promise of inheritance upon death. This is not valid unless the testator also included it within the will.

A similar situation arose in the case of **Balzan v. Degiorgio (1959**). Here, a young woman was given a long valuable gold chain with the older person giving it noting that it would become hers when she died so long as she looked after her. This was not included in the will and a question arose as to whether this was a donation that transferred ownership immediately or whether the older woman retained ownership with the promise to pass it on after death, which is invalid if not include in a will. It was determined to be the latter and the court noted that a promise to donate is not a binding obligation. The gold chain was taken from the young woman and was divided between the siblings. This shows the importance of the format (i.e. the formal validity - whether there is or isn't a written will to determine whether it is binding) as opposed to substance.

In considering how inheritance is disposed of we further question what happens when a person makes a will including many legacies bequeathing individual gifts but no heirs. While the will is valid, the estate will be considered partly testate and partly intestate. In order to decide who the heirs are, since they aren't listed in the will, one turns to the law governing intestate succession.

Article 587 is a transitory provision:

> *The provisions of this Code shall not supersede any other law previously in force with regard. toany testamentary instrument made before the 11th February 1970, even though on such date the disposer 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 disposer, be maintained under the provisions of this Code, provided it satisfies the requirements thereof.*

When the law was changed in 1868, there was a radical overhaul of the law of inheritance through the establishment of the Public Registry. Prior to this, wills and contracts lacked a central unit recording system. This meant that in order to find out whether a contract existed, one would need to ask all the notaries in Malta and Gozo. In relation to succession this was a problem as there was no document to prove which will was the latest will and testament of

the testator. When the law was changed, the legislator wanted to address this problem also in relation to existing wills and noted that all wills needed to be deposited in the vaults of the Court of Voluntary Jurisdiction and they became what today are known as secret wills. After this date, in order to find out the existence of a will, one could carry out a search in the register of the court. Following, the law distinguished between secret and public wills depending on whether it was registered in the Court of Voluntary Jurisdiction or in the Public Registry.

Today, to establish whether a will was made, one gets a certificate from the Public Registry or the court.

Another change which arose was to the formal requirements of a valid will, such as the amount of witnesses, who could be a witness and who could receive through a will. The legislator was faced with a situation where there existed pre 1870 wills which were valid at the time which they were made but which were invalid under under the newer law. Through this transitory provision the legislator solved the issue of discrepancies between the two by stating that all wills which were valid at law as it stood at the time when the will was drafted maintain validity and all wills which were not valid but became validunder the new law would also retain validity. This indicates the law applied retrospectively.

Grognett v Petit (1870).

Of Wills

Our Civil Code, particularly the old law, is a masterpiece of legal writing. Most of the dispute and litigation that arises does so because of changes to the law that were not well thought out.

A will is defined through **Article 588** as follows:

> *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 part of his property.*

Understandings of Wills

A Will as an Instrument

When analysis wills as an instrument we must firstly exclude briefly cross-border inheritance that must be considered independently.

Since a will is an instrument, this presupposes that it must be written. This was confirmed in the judgement **Grima v. Camilleri (1884)**. As we saw in the case of **Balzan v. Degiorgio (1959**) regarding the golden chain, a promise to give something to another person after death

verbally is insufficient for inheritance purposes. In this regard, a will is important as it clearly outlines the wishes of the testator. In fact, the interpretation of the wishes of the deceased are to be derived exclusively from the literal interpretation of the will (save when issues arise in relation to capacity as will be outlined). This means that if something is not clearly outlined, then it cannot be presumed as only the will explains itself. In the previous case, the promise that was made by word of mouth was not included in the will and thus, couldn't be assumed as the wish of the testator. This notion that the interpretation of the wishes of the deceased can solely derive from the will was determined in both **Wismayer v. Wismayer (1936)** and **Axiak v. Axiaq (1945)**.

Considering that public and secret wills must be necessarily in writing, we question who is empowered to draw up the will. This is a task generally entrusted to a notary who is the sole person empowered by law to determine and express the wishes of the testator when drawing up the will. Therefore, in a situation where a testator is drawing up a will with his children present and the children are outlining his wishes, the notary has a responsibility not to listen to what the children are stating but to find the true intentions of the testator. While it could be the case that a child goes to the notary with the pre-written wishes of the testator when such wishes to draw up a will, the notary still has the obligation to meet with the testator to hear their wishes and change any discrepancies that may exist to reflect their true wishes. A case on this point arose in the form of **Vella v. Camilleri (2023)**. Here, the testator had a number of children. In previous iterations of his will, he left his estate to his three children in equal shares. In his final will and testament, he left his three children as heirs in equal shares with the right of accretion and substitution.

Accretion comes from the word accrue and notes that if one refuses their share of the inheritance or is unable to accept it, that share accrues in favour of the others. In the case of an inheritance with two heirs, A and B, should A refuse their share of the inheritance, instead of inheriting 50%, B will inherit 100% as the 'last man standing'. Basically, the shares accumulate in favour of the heirs who remain. This only applies if the will admits accretion.

Substitution applies normally if there are grandchildren, i.e. further descendants. If a testator leaves their estate to their three children, A, B and C, and B dies before the testator does, the children of B step into his shoes through representation and substitute B. This means that the estate will still be divided in the same number of shares.

This issue in this regard was that instead of calling for "*substitution and accretion*" as is generally done in a will, the testator called for "*accretion and substitution*". In the former case, substitution applies first and accretion only kicks in should there be no grandchildren to step into the representation of the original heir. However, since accretion was put before substitution, a dispute arose as to which process ought to have occurred first as potentially, the testator's grandchildren would have been excluded if accretion applied first. The First

Hall Civil Court ruled that as is standard procedure, substitution applies first since the notary made a mistake in the drafting and ordered for the will to be rewritten with a correction. On Appeal, the court came to the same final conclusion but for different reasons. It stated that this wasn't a mistake but an issue of interpretation: looking at the will as a whole and taking in the entire context surrounding it, the court stated it was clear from its wording that the testator never intended to leave the grandchildren out of the will. While agreeing on merit, the Court of Appeal disagreed with the First Hall ordering an amendment to the will noting that the court doesn't have the power to correct a mistake in the will.

The law states expressly what a will is and the formalities of a will, meaning that if one fails to abide by these formalities then the thing in question is not a will. Interestingly, if all the formalities are adhered to and the will is referred to under a different title, then it is nonetheless a will. The case of **Murgo v. Golizzi (1905)** highlighted that for something to be treated as a will, whether or not that was the nomenclature used for the instrument, then it must satisfy the legal formalities outlined at law. In this case, a document calling for donation to take place after death was drawn up instead of a will, with the contract being written as though it were a contract of donation. When the person died, the heirs challenged the contract stating that it was invalid since inheritance can only take place by means of a will. The Court disagreed and noted that the deed of donation was not null and could enable inheritance to take place as it satisfied the legal requirements of a will and thus could be treated as a will. The court looked at the requirements of a public deed including it having been done before a notary, registered in the Public Registry and signed before witnesses and noted that since all the criteria were met, the deed of donation after death was validly treated like a will.

A Will as Revocable by Nature

Caruana Galizia argued that a will is merely a draft that only become final upon death. Therefore, the wishes contained therein only become an obligation upon death, with a testator having the power to amend the will as many time as desired prior to such a moment.

It is important to note that it is illegal for any individual to preclude or stop a person from updating or amending their will. Likewise, it is illegal to enter into a contract with any party that binds another not to change their will. The ability to change their will is an absolute right, save for situations where lack of capacity prevents a person from doing so.

This is enforced through **Article 781** which notes that:

> *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.*

A Will as Being Made by a Person According to the Rules Laid Down by Law

Firstly, we note that only a natural person can make a will. Such must have legal personality and legal capacity.

Legal persons, such as companies, as precluded from making a will.

A Will as Regulating What Happens When a Person Dies

A will in and of itself regulates what happens when a person ceases to live. As mentioned, the key moment when the will comes into effect is upon the death of the testator. This differs from the moment at which one determines whether the individual had the capacity to draw up a will as that is considered at the moment the will was made. Therefore, the effects of the will apply upon death. This is the *punctum temporis.*

It is often the case that beneficiaries and properties may have changed since then. For example, Property X is included in the will and left to Person A, but before the testator dies, he sells it. The clause in the will is no longer valid and the situation is regarded and effect is given to the will at the moment of death and not before. The testator is not precluded from selling Property X because he left it to Person A in his will.

Similarly, if Person A dies before the testator, should nothing further be provided about Property X regulating such a situation, then Property X simply remains part of the estate.

A Will that Disposes of Property in Whole or in Part

A will is an instrument that enables a transfer of patrimony, that may include a select few other things, such as plans for funeral arrangements.

We note that the estate of the testator may be disposed of through the will either in whole or in part. This means that the will can cover all or some of the estate and either way it would be valid.

In Malta, it is not required that the testator makes an inventory of the entire estate and thus, the person would be at liberty to dispose of a generality of assets without individualising them. However, there is also the option to mention individual items to be left as a gift to legacies. Should the testator not leave individual gifts (and therefore, not name any legacies), the will is considered to be by universal title through the appointment of an heir. However, not appointing an heir doesn’t alter the will’s validity.

Universal or Singular Title

Article 589 notes that in the same will, a testator may dispose both by universal and singular title, and also solely by singular title:

> *A will may contain disposition by universal as well as by singular title.*
>
> *It may also contain disposition by singular title without any disposition by universal title.*

A disposition by a universal title refers to the appointment of an heir. An heir receives a share in the universality of the estate or patrimony. This is outlined in **Article 590**:

> *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.*
>
> *Any other disposition is a disposition by singular title.*

On the other hand, a bequest of a singular title is a bequest of something specific, i.e. a legacy. If one in the same person is appointed as an heir and also is bequeathed a legacy, such person is known as a pre-legacy.

Article 591 discusses nomenclature highlighting the follow:

> *The word 'heir' applies to the person in whose favour the testator has disposed by universal title.*
>
> *The word legatee applies to the person in whose favour the testator has disposed by singular title.*

Normally, a notary will call an heir as such and a legatee as such. However, should the title be used incorrectly, it doesn't make a difference should the disposition clearly indicate the intention of the testator. In **Mifusd v. Gauci (1935)** a dispute arose dealing with legacies in relation to usufruct. In the will, the individual was named the usufructuary heir as opposed to the usufructuary legatee. The creditors manipulated the fact that in the will the person was referred to as an heir as opposed to a legatee to go after then for the liabilities of the estate owed to them. However, the court disagreed stating that it is not the wording that counts in this regard, rather the intention of the disposition, which in this case was clearly meant to be that of a legatee. This meant that the usufructuary was not liable for the debts of the testator and confirmed the fact that it is the name or the effect which determines whether a bequest is by universal or singular title and not the nomenclature.

There are major differences between heirs and legacies:

- They receive different items in the inheritance in terms of content. While the heir steps into the shoes of the testator and inherits his assets and liabilities, a legatee only inherits a single item. This means that the testator's patrimony is vested in the heir.
- An heir is liable, unless there is the benefit of inventory where liabilities will be paid only from the inherited amount only. If such doesn't exist, the inherited property is mixed

with the heir's personal property and any liabilities of the testator must be paid from coffers of the heir - *confusio*. A legatee is not liable for any debts of the inheritance.

- An heir is also liable to fulfil the wishes in the will and give effect to the will including paying out any legacies.
- In Malta, an heir has the immediate right to administer the estate. This is an *ex officio* right by the very fact that the individual is an heir. The legatee on the other hand will only get the gift from the heir administering the estate if he claims it within the timeframe. However, in this regard we remember the obligation which the heir has to fulfil the wishes of the will including forwarding the legacies. The only exception in this regard is when the legatee is already in possession of the legacy.

Take the following example, in his will, a testator leaves Legatee A an immovable property. Legatee A wishes to sell such land. Here, an *immissjoni fil-pussess* is entered into through which it is outlined that a transfer has taken place from the heir to the legatee. This is registered in the Public Registry and acts as proof that the heir has fulfilled his duties to pay the legatee.

Unica Charta Wills

The Maltese jurisdiction is one of the few that still allows a husband and wife to make a joint will. This is known as an Unica Charta will, contained in **Article 592**:

> *A will made by the spouses in one and the same instrument or, as it is commonly known, unica charta, is valid.*
>
> *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 others.*
>
> *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.*
>
> *The non-observance of the provisions of sub-article 3 shall not cease the nullity of any provisions 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 to be imposed by the Court of Revision of Notarial Acts.*

This law was amended in 2004, 2007 and again in 2017.

Under Roman law there was a traditional resistance to unica charta wills because it was felt that a joint will, regardless of it being done by a husband and wife, constituted an intrusion into the freedom to make a will without pressure. It was believed that the dominant spouse

would always boss the weaker spouse into submission, infringing upon the weaker spouses' ability to freely make a will independently.

In Malta, this practise goes back hundreds of years and was even recognised and provided for in the Code de Roan , as noted in the case of **Gauci v. Mifsud (2006)**. When Ordinance VII of 1868 was drafted, Sir Adriano Dingli ensured to include this practise, taking into considering Spanish and Germanic laws and models.

🌿 Conditions to draw up an Unica Charta will

1. Only legally married spouses can make an unica charta will. Those couples who are *de facto* married and cohabitants are precluded in this regard, as only *de jure* spouses enjoy this ability. This can be determined from **Article 562(1)**.
2. An unica charta will can only be a public will. Spouses cannot make a secret unica charata will that is deposited in court. This is because if it is a secret will, it can be revoked easily by simply asking for it to be given back. This would mean the existence of such a will would only be recorded on the books of the Court of Voluntary Jurisdiction and no one would know that such a will was made. If the requirement for both spouses to jointly revoke the secret will existed then this would impinge on the spouses' ability to make further wills. There is also the issue as to what happens when one of the spouses dies in relation to the viewing of the will: by publishing the secret will, the wishes of the surviving spouse are also exposed which goes against the purpose of a secret will. This can be seen through **Article 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.*

3. As per **Article 592(3)**, the manner in which the will must be drawn up is split with one part containing the estate of one of the testators and another part containing the estate of the other, keeping them separate. In the past, unica charta will were be drawn up using "*we*" making it difficult to extract the will of the spouse who dies without revealing the will of the survivor since it has been written in the plural. Nowadays this has been amended - it is written in two parts: the will of the first spouse in the singular and the will of the second spouse in the singular in two different sections. Therefore, when one of the spouses dies, the publication of the will only involves the part of the unica charta will

pertaining to the deceased spouse. publish it when a spouse dies, you only publish the part of the unica charata will that contains that spouse's. This has to do with drafting and the practical effects when publishing a will but non-observance doesn't render the will null; the notary, however, is subject to a fine, as per **Article 593**.

🌿 Unica Charta Wills and the Dissolution of Marriage

What happens to the unica charta will if the spouses subsequently divorce?

If there is no provision in the unica charata will regulating the assets of the spouses in the case of divorce, the unica charata will remains binding on the parties and will be given effect upon the death of the separated spouses, unless it has been revoked.

What happens to the unica charata will if the spouses get an annulment?

This arose in the famous judgement **Psaila v. Aquilina (2019)**. Here, the wife, who had been suffering from muscular sclerosis (MS), a degenerative disease, since before her marriage, made a will with her husband one year into their marriage, leaving everything to each other. The husband was aware of the MS at the time of marriage, however, as her condition worsened over the years, he eventually sent her to live with her parents while he continued living in the house she owned and began a relationship with their maid. He initiated separation proceedings but such were not concluded before her death. Concurrently, the wife initiated church annulment proceedings, claiming she was not in a position to give valid consent to the marriage due to her condition. The Church granted her the annulment in 2016, shortly before her passing, but this did not revoke her will. Upon her death, the husband claimed to be her universal heir, but the wife's parents disagreed, arguing that the annulment invalidated the marriage and that he was therefore, no longer her husband.

The law provides for such a situation in the Marriage Act: according to law, the court looked into whether there were children from the marriage and whether the annulment was due to the fault of one party - the husband was not at fault for the annulment and was deemed to be in good faith, which has a bearing on the dissolution of the effects of the marriage according to the Marriage Act. What is particularly interesting about this case is the element of capacity that came into the consideration. The Court claimed that since the wife couldn't give valid consent when marrying, she couldn't have had the capacity to create a will. However, there are many issues with this argument and in fact the case has been appealed with it being very likely the judgement will be overturned.

🌿 Changes to an Unica Charta Will

In the case of unica charta wills, unless the spouses doesn't have a right to change the will outlined in the will itself, they can change the will. This is in line with the principle that one has a right to change their mind and their will. Nevertheless, if there is a clause in the will that states that no spouse is able to make amendments to the will and one does without the permission of the other spouse, then such spouse loses the benefits from the will, mainly the ability to inherit the predeceased spouse.

Here, we regard a major different between unica charta wills under the old law and under the present law. Under the old law, the default situation was that neither spouse had the right to amend the unica charta will unless there was written permission in the will itself. Changing the will without such permission resulted in dire consequences. Today, it is the other way around: a spouse can always change the unica charta will, unless the will itself provides otherwise. Changing it when such actions are precluded by the will results in the consequence of forfeiture as this is a kind of deception against the other spouse and is considered fraudulent: Unica charta wills are understood as a underlying contract between spouses through which they agree on how they want their inheritance to be divided as a joint decision. Therefore, since such is a joint decision, the unica charta will has bilateral scope and it is only right that since the parties agree to the will having binding effect that changing the will behind the other spouse's back results in the penalty of forfeiture.

This is all outlined through **Articles 593** and **594** underlying the bilateral nature of such a will:

> *Where, by a will unica charta, 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.*
>
> *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.*
>
> *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 to be imposed by the Court of Revision of Notarial Acts to explain to the testators in a will unica charata the meaning and effect of this article and of Article 594, and enter in the will a declaration to that effect.*

*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.*

We note, however, that not all changes lead to forfeiture.

- When the effects of the will have been exhausted or extinguished, then changes can be made:

  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.

  If the unica charta will only had the provision where the testators left heirs to each other, that will would have ended its effect upon the death of the first one among the testators; in that case, the survivor will be able to dispose of the inheritance as he wishes.

- The unica charta will can be changed to reflect remuneratory legacies, i.e. leaving a gift to compensate someone for services rendered. The law wishes to provide for situations where circumstances arise and a person feels they must thank another or compensate them for help provided. While on paper this is legitimate, it remains one of the tricks that have been used to get around changing an unica charta will when a preclusion from doing so applies. Therefore, there are a number of conditions that apply, including:
  - The legacy being proportionate to the services rendered. This was outlined in **Aquilina v. Bugeja (1930)**. It noted that the court will look at the nature of the service rendered to ensure that there is a balance between the service and the benefit being derived from the will. If the gift and service balance each other out, then this is considered a just remuneration and a liability that was duly paid for.
  - The legacy must arise from something stated in the will itself, as per **Brincat v. Zammit (1965)**. The testator must outline that the gift exists and is going to a person in compensation for services rendered. Without this specific stipulation, the remuneratory nature of the gift doesn't exist and it cannot be assumed. This ensures that the spouse cannot use this exception as a means to bypass forfeiture.

In terms of the forfeiture, the law notes that the spouse who makes the change without the ability to do so "*shall forfeit all rights which [they] may have had in virtue of [the] will on the estate of the predeceased spouse*". This means that anything coming from the will is lost, even if the spouse appoints the other as the universal heir. In such a situation, the surviving spouse's heirs will need to recalculate the inheritance.

> *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.*

This is because forfeiture only comes to light after the second spouse has died and only operates if there is a court case. If the situation escalates to court, and forfeiture is proved, the court will look at the assets of the first spouse, see what the second received from the first and remove such from their patrimony to represent the forfeiture. This has given rise to ample litigation.

In the case **Gauci v. Mifsud (2006)**, Mary and Joseph Coppola drew up a will. They had no children and left everything to each other save certain legacies. Immediately after the husband died, the wife made a second will. In this case, the court said that she forfeited what she inherited from her husband despite being his universal heir for changing the legacies they decided upon together, disturbing some of her husband's wishes:

> *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.*

> *Survivors have the faculty to be able to dispose differently from this will without incurring the penalties contemplated in the accepted laws, however the said legacies which must remain firm and full and therefore are not included in this right to be varied the present will from the survivors.*

Conversely, in **Albanese v. Grima** the spouses left everything to each other having no children. The surviving spouse changed the will following the death of the other spouse but the court noted that since the surviving spouse was the sole heir and since if they died, their inheritance would be regulated intestate, they had a right to make a new will without suffering forfeiture as no where were the wishes of the predeceased spouse disturbed and nowhere did the will provide for what was to take place following the death of one of the spouses.

> *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.*

> *The forfeiture imposed in article 291 of Ordinance No. VI of 1868 does not take place when the testators were only limited to establishing themselves as universal heirs of mutual ownership, without any provision in favour of third parties.*

In **Caruana v. Aimsworth (2007)** the court distinguished between whether the second will was made during the lifetime of the predeceased spouse or after, highlighting the bilateral nature of such a will. In this case, the spouses through the unica charta will left everything to each other and had no children. However, following the drafting of the will, one of the spouses immediately made a second will leaving his share to another member of his family. Like so, if his wife died first he would inherit her, but if he died first his estate would go to his family. Parallels can be drawn between this case and **Albanese v. Grima**. Since in the latter there was a second will was made after the spouse passed away to ensure his inheritance wouldn't be regulated by intestate succession, that was looked favourably upon by the court and didn't result in forfeiture. However, in the former case, since the second will was drawn up while the spouse was alive, this constituted a deception and therefore, forfeited his inheritance. Had the spouse drawn up the second will following the death of their spouse, forfeiture wouldn't have occurred. The conclusion reached by the court was mathematical:

> If an unica charta will was made with no power to revoke or vary; &
>
> One of the spouses revoked or varied their part of the will;
>
> Such latter spouse automatically loses all benefits from the will.

In **Xuereb v. Aquilina (2010)** we have another situation where the spouses were childless and left everything to each other. In this case it was argued that on the demise of the surviving spouse, half the estate would go to the wife's family and half the estate would go to the husband's family. After the wide died, the husband made another will and decided to leave everything to the wife's family, even donating immovable property. After the husband died, the matter escalated to court with the court stating that once the husband changed the will to go against the wishes of the wife as outlined in the unica charta will there was automatic forfeiture. Thus, the court considered that the wife's family couldn't inherit her based on the wording of the will. Further, the Court of Appeal noted at First Instance they would have dealt with the situation differently based on an incorrect interpretation that occurred but that such 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.*
>
> *This was the interpretation given by this Court to the will of the Refalo spouses in light of the law applicable to the case, and even if this Court had not agreed with this interpretation, it would still not have been it will be the task of this Court to prefer its opinion to that previously expressed when this Court was composed differently.*

When considering when forfeiture applies, we note that certain conditions must be met:

1. There must be an unica charta will and not two wills made contemporaneously. Therefore, there must be one signature from the notary and the signature from both spouses on the same document.
2. The testators shall have bequeathed to each other the ownership of all their property or the greater part of it. Under the old law this was not the case but now, the surviving spouse must receive the greater part of all the property for forfeiture to apply.
3. There must be the express and specific condition in the will itself that there will be forfeiture if the will is changed. One cannot only preclude the other spouse from changing the will but forfeiture must be attached specifically to that.

As noted, the result of forfeiture is that the surviving spouse forfeits all rights which they may have had in virtue of the unica charta will in relation to the estate of the predeceased spouse. If the surviving spouse forfeits the inheritance, no one is left and the will doesn't make further provisions as to what is to happen, then the rules of intestate succession kick in. This means that the surviving spouse could still inherit according to the rules of intestate succession, especially if there are no children where the surviving spouse could inherit everything. This may act as a disincentive considering that spouses may not fear forfeiture since they will nonetheless benefit under intestate succession as forfeiture only applies *"in virtue of such will"* and not in virtue of all inheritance rights.

NB. Forfeiture can still apply if by some act *inter vivos*, the requests outlined in the unica charta will are rendered ineffectual. For example, the spouses decide to leave everything to each other through a unica charta will. However, behind Spouse A's back, Spouse B donates a sizeable part of their inheritance rendering the will ineffectual. Another example would be if Spouse B is a fraud and is sued criminally with consequences to their assets. Since through their actions, the assets are compromised, they have rendered the will ineffectual through their deeds and thus, forfeiture occurs.

Another issue to consider is that of the Reserved Portion. Since the law emphasises that the Reserved Portion is a guaranteed right, case law exists that provide that even in the case of forfeiture, one can retain the right to claim the Reserved Portion. It must be kept in mind that forfeiture is not a ground of disherison or unworthiness: a person who suffers forfeiture still has a right to inherit. In **Gauci v. Mifsud (2006)** even though there was forfeiture, the surviving spouse retained the right to the Reserved Portion, in line with what the law says today.

Additionally, when considering forfeiture, under the law, there is one exception as highlighted by **Article 594**:

The spouse who has forfeited the property as aforesaid shall, however, retain the right of usufruct over such property:

Jekk persuna 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.

If a person in their innocence goes to make a will and it isn't explained to her that she can't and she does it anyway, such a person shouldn't suffer totally and therefore, the right of usufruct is added.

We question whether this makes sense and whether, by virtue of the wording of the law, those who suffer forfeiture could lose the Reserved Portion and only get usufruct or whether usufruct is to be consider part of the Reserved Portion. This also doesn't make much sense considering that forfeiture is examined when the second spouse passes away and therefore, they don't need the usufruct as during their lifetime, such spouse would have enjoyed the full benefit of the unica charta will.

The Capacity Of Disposing By Will

Here, we consider the requirements necessary for a person to be able to make a will which is regulated under **Article 596**:

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

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.

This article evidently outlines that any person who is not subject to incapacity is able to make a will. Thus, the presumption is that any person is able to make a will. Incapacity is the exclusionary exception and in order for it to arise, a person must be found incapable due to a physical or mental incapacity or because they satisfy a ground of incapacity outlined at law.

General Rules of Capacity

When dealing with the capacity to make a will, we note that there exist certain general principles.

There exists a presumption in favour of capacity.

This is a *juris tantum* presumption meaning it is rebuttable, as opposed to a *jure et de jure* presumption. This means that the presumption of capacity can be challenged. The burden of proof in this regard is placed on the person alleging incapacity as noted in **Schembri v. Galea (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.*
>
> ---
>
> *In his normal state, a man is presumed reasonable and of sound mind, until conclusive evidence proves otherwise. The burden of proving otherwise lies with the opponent of the state of health.*

The court will not easily disturb the will of the testator.

As stated, the will must stand on its own as the only document that is able to express the wishes of the testator. Therefore, the court will generally assume the validity of the will and make every effort to safeguard and uphold it, recognising that it represents the intentions of the deceased individual who is no longer able to advocate for themselves.

Children are always capable of receiving.

The capacity to make a will is not as rigorous as the capacity to contract.

In this regard, we note that there is a significant amount of leeway granted to the testator to enable him to outline his wishes through a will. For example, courts have underscored that if a person experiences a clear and lucid moment, and this can be substantiated, any will created during such a period will be upheld and safeguarded.

🌿 The capacity to make a will is tested at the moment the will was made.

This means that the precise moment in which the will was made is important for the determination of capacity. The situation of the testator before or after drafting the will is irrelevant in terms of determining capacity. If a person was capable when the will was drafted, then the will is valid. Conversely, if the person was incapable when the will was drafted but became capable later on, then the will is invalid. This persists despite certain arguments that if capacity is developed later on the testator is able to revoke the will make.

Mental Integrity as opposed to Physical Integrity when dealing with Capacity

We note that when dealing with the capacity to draft a will, the law takes mental integrity into account more than physical integrity. What is required for a person to be capable to draft a will is that such person is aware of his surroundings and is able to communicate his wishes coherently to the notary or person drafting the will.

While undoubtedly physical incapacity can make it difficult for a person to communicate, the law outlines way and means through which this can be addressed, no matter how serious the physical deficiency is.

Borg v. Cini (1884)

The Role of Notary in Drafting Wills and in Determining Capacity

Firstly, we must consider that the role of the notary is dually regulated under the Civil Code as well as under Chapter 55 - The Notarial Profession and Notarial Archives Act.

🌿 A notary performs a public function.

A notary is the person responsible for drawing up a public deed and therefore, since a will is a public deed, the notary is the person empowered to create it.

A notary is unable to refuse to draft a will should there be no inhibiting factor, even if they know they won’t be paid for such a will - **Article 11** of Cap 55.

Hence, if an individual requests a notary to draft a will, the notary is obligated to accept the request as long as the person is capable of doing so, without discretion to refuse. While some notaries may seek to avoid drafting wills in unusual circumstances, particularly when individuals leave it until the last minute to engage in the process, the law mandates acceptance. Even if the person is unable to visit the notary, the notary must visit the individual desiring to draft the will. Refusal exposes the notary to potential damages; if the notary declines to draft the will and, as a result, no will is created, damages may ensue. It's worth noting that proving damages in such cases is challenging, given that the individual who would have created the will is deceased.

However, there are exceptional circumstances wherein a notary might face a dilemma, such as during the Covid-19 pandemic. In such instances, if the notary has valid reasons for refusal, they cannot be held liable.

A notary is the only person who can determine the wishes of the testator - **Article 25(6)** of Cap 55.

This is not only the notary’s right but the notary’s obligation as the only person empowered to receive the wishes and communicate directly or in a proper manner with the person making the will.

We note that there could be exceptional situations where the notary is unable to understand the testator and in such scenarios, an interpreter can be used. This can only occur if the notary is satisfied that the communication is clear.

Moreover, when individuals approach notaries to draft wills on behalf of their parents or ascendents and relay their wishes, the notary cannot draft the will outright. At most, a preliminary draft may be prepared based on the descendant's instructions, but these must be confirmed by the testator. The notary is obligated to amend the will if the wishes are inaccurately represented. While there is no prohibition on drafting a will in the presence of others, the primary focus remains on the testator. The notary must ensure clear communication with the testator, even if this involves mitigating distractions or noise that may interfere with the drafting process or confuse the testator.

Failure by the notary to honour the testator's wishes may lead to legal disputes, emphasising the paramount importance of unequivocally understanding the testator's intentions.

Here, we consider the case of **Cassar v. Naudi (2010)**. In this case, an elderly couple residing in Sliema, with no children and infrequent visits from relatives, were cared for by a carer provided by the state. Initially, the carer's visits were infrequent but gradually increased in frequency as did her involvement with the couple. Eventually, the couple moved to live with the carer, granting her power of attorney, which she exploited to withdraw significant sums from their bank account. Shortly after the husband's passing, unnoticed by many, the carer swiftly transferred the couple's house to her son's name.

A relative, attending a Mass commemorating the husband's life, discovered the couple's house empty the following Sunday. An investigation revealed the wife residing in the carer's house in Luqa, in a severely weakened state. The police intervened, discovering the wife nearly unconscious and strapped to a bed. Despite her weakened state, the wife expressed a desire to make a will when she briefly communicated with her sister.

However, when a notary arrived, the wife was too weak to effectively communicate. Despite being informed of her wishes, the notary refused to draft a will, citing the wife's lack of coherence. Medical professionals attributed her condition to medication effects. After several days, a psychiatrist assessed her capability to make a will, and she was found fit. The notary struggled to hear her due to her weakened state, but her communication was eventually recorded. The wife passed away a few days later.

A legal dispute ensued, with the carer suing the family to nullify the will, and the family suing the carer to challenge the house transfer. In the case where the carer sued the family, the court examined the circumstances of the wife’s will's creation, emphasising the notary's role in ensuring the testator's awareness, proper communication, and clear wishes. Despite the wife's weakened condition, the notary’s certification of the her ability to communicate her wishes validated the will's legality, safeguarding it.

“*Whereas the testator is of sound mind and judgement and is capable at law to make his will, he had come to this will in virtue of which he orders as follows..*”

This is a standard phrase used in practically all public wills. Through this preamble, the notary states that the person in question is capable of drafting a will and that the notary is understanding the testator.

The court treats this clause with slight circumspection. While it holds some weight, it cannot be considered the *prove regina* and when there is doubt, it must be looked beyond. Therefore, if the will is ultimately challenged, the fact that this clause is included in the will isn’t enough to certify capacity, especially if there is evidence proving that the person was incapable when the will was made - such evidence would override the clause despite the general rule of contracts that that which is stated in the contract is proof of its contents.

In this regard, however, the notary and the will have a presumption in their favour: the will is presumed to be valid and the person challenging it must prove otherwise.

Here, we consider the case of **Bonavia v. Bonavia (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.*
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> *Although the notary's attestation, including the "clausole di stile" in the will indicating the testator's soundness of mind, may not be exhaustive, its deposition still holds significant importance. This is particularly true when it can offer details such as the will being drafted in the presence of the testator and under his dictation. Additionally, if the testator's conduct indicates rationality, in accordance with the law, it further reinforces the validity of the will.*

This case gave a lot of importance to the testimony of the notary, reinforcing the power of the adjudicating skills of the notary. In fact, this judgement noted that the notary has the power, right and obligation to override a medical opinion if he thinks that a person is capable or incapable, depending on the circumstances. The notary is thus empowered to carry out an assessment and only if he believes the individual to be capable to make a will should be draft that will. This assessment

is based on whether the notary believes the individual to be aware and to understand and whether he is able to communicate effectively, being clear and consistent in that which he is expressing.

This is supported by the fact that in cases where there is a dispute between the opinions of medical practitioners and notaries in relation to capacity, jurisprudence dictates that for the purposes of wills, the notary is the person empowered to make the assessment. This was recently outlined in **Scicluna v. Dalli (2021)**:

> *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*
>
> ---
>
> *The jurisprudence emphasises the importance of the notary's testimony to the extent that there have been cases where the notary's testimony has outweighed contradictory analyses by medical experts. This occurs because the notary is in the best position to analyse the testator at the moment of drafting the will, which is the defining moment for its validity. There is no need for any special knowledge or capacity to write a valid will; it is enough for the person to have awareness of their actions and what they want to do with them. This awareness is best assessed by the notary who is drafting the will.*

Nevertheless, it is standardly agreed upon that it is always safe for a notary's opinion on capacity to be supported by a medical certificate, especially when the person is elderly and showing signs of infirmity. In most cases, the notary will ask for a medical certificate from a psychiatrist or a family doctor to reinforce their decision to draft a will if the circumstances admit some kind of doubt. This, however, is just a recommendation. If there is no certificate, it is acceptable because ultimately, it is the notary who provides testimony based on the circumstances and nothing can be inferred from its absence. However, it is recommended to obtain one if the circumstances raise any doubts. Here, we take into consideration **Xuereb v. Refalo (2010)**:

> *…ma tista' tingibed 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.

No conclusion can be drawn from the fact that the will in question of the deceased was not accompanied by a medical certificate, as the actress is claiming. It is from her that the existence of a certificate as such can strengthen the evidence in favor of the mental capacity of the testator, but its absence does not necessarily mean that this capacity was lacking.

In **Galea v. Casingena (2006)**, the court took a different view. Here, the court considered the fact that a medical certificate was not attached to the will. In this case, the testator had been suffering from progressive senile dementia for some time. She had a disabled child and in her previous wills, she always ensured adequate protection of the child. However, she then made a will radically changing her previous testament removing the protections for them. 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 psychiatrist with a certificate attached to the request. In the last will, the bond between mother and child which was so prominent in previous wills disappeared which is undeniably strange. Both the Court of First Instance and the Court of Appeal did not look too kindly on the fact that the notary didn't deem it necessary to request a psychiatric certificate and attach the same to the will to corroborate the testator's capacity. In the circumstances, the courts argued it was advisable to have a certificate. This was further emphasised considering that the contents of the will did not indicate reasonableness and was not consistent with reality according to the court - while in previous wills she protected her disabled child, in the last moments of her life she abandoned them.

In kwantu ghar-ragjonevolezza tat-testment in kontestazzjoni, ghalkemm mad-daqqa t'ghajn jista' jirrizulta li l-fatt li t-testatrici halliet it-tfal taghha kollha ndaqs bhala xi haga ragjonevoli, kuntrarjament ghal dak li jinghad mill-appellanti, il-kumpens ghall-kura, assistenzi u servigi li l-attrici qeghda tirrendi favur ohtha Magdalene Sofia sive Gloria Cuschieri (persuna bi bzonnijiet specjali) huwa legat ta' Lm3,000 a saldu. Dan kuntrarjament ghat-testment precedenti taghha tas-17 ta' Awwissu, 1994, li huwa ferm aktar dettaljat, fejn kienet halliet bhala prelegat il-kontenut kollu tad-dar tal-abitazzjoni taghha lill-attrici, bhala kumpens ghall-kuri, l-assistenzi u s-servigi li hija rrendiet lit-testatrici u lill-mejjet zewgha, kif ukoll legat tal-proprjeta' bin-numri 11 u 12, Triq Bognor Beach, Bugibba u dan bl-obbligu li l-istess legatarja ddur b'bint it-testatrici l-ohra Magdalena Sofia sive Gloria

> *Cuschieri u li zzommha toqghod maghha sakemm ikun umanament possibbli. Inoltre t-testatrici kienet iddikjarat li hija kienet taf li dan il-legat ma kienx kollu proprjeta` taghha peress li kien jifforma parti mill-komunjoni tal-akkwisti ma' zewgha u ghalhekk ordnat li minkejja dan, l-artikolu jkollu effett shih.*
>
> *In the testament under dispute, although it may appear at first glance that the fact that the testator left all her children equal shares is reasonable, contrary to what is argued by the appellants, the bequest for the care, assistance, and services that the plaintiffs are providing in favor of the other Magdalene Sofia, also known as Gloria Cuschieri (a person with special needs), is a legacy of €3,000 to be paid. This is contrary to her previous testament of August 17, 1994, which was much more detailed, where she left as a legacy the entire contents of her residence to the plaintiffs, as compensation for the care, assistance, and services rendered to the testatrix and the deceased, as well as a legacy of the property located at numbers 11 and 12, Bognor Beach Street, Bugibba, with the obligation that the same legatee brings along with her the other daughter of the testatrix, Magdalena Sofia also known as Gloria Cuschieri, and that she remains with her until it is reasonably possible. Furthermore, the testatrix had declared that she was aware that this legacy did not constitute her entire property, as it was part of the joint ownership acquired with her spouse, and therefore ordered that despite this, the article would take effect.*

This was deemed to be an indication that the mind was not working properly. To the court, this drastic change in heart without any external justification further attested to the testator's lack of mental soundness and convinced it that the woman was not capable when she made the will, thereby invalidating it.

> *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.*
>
> *It is understood that parents have particular concerns in the case of children with special needs and that someone should take care of them after the parents are no longer able to do so, as the testatrix effectively did in her previous testament.*

Here, we question, whether the court has a right or the role to test the reasonableness or contents of the will. Is the judge empowered to play the role of the referee? In this regard, we note that the judge will only look at the contents of

a will if asked as a test of capacity. The court does not have the right to argue that a will is unreasonable and therefore, it is null. A will can only be nullified in the case where incapacity. Therefore, challenging a will on the basis of unreasonableness is not enough. The contents of the will alone are not enough to challenge the will itself - alternative evidence must be brought forward.

Also in relation to this case, the court quoted a UK case **Kenward v. Adams (1975)** which noted that:

> *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.*

What's strange about this is that it is almost inclined towards a presumption of incapacity which is definitely not the case under Maltese law. Thus, while this case is often quoted, it can be misleading. What it is trying to argue is that under the circumstances outlined, it would be wise for a notary to seek the advice of a medical professional when the situation is unclear as to capacity or lack thereof. In fact, in addition to quoting this judgement, the court in **Galea v. Casingena (2006)** noted that:

> *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.*
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> *Although such evidence can still be contested, the fact remains that similar certificates provide more robust proof and offer peace of mind to the involved parties.*

It notes that while under Maltese law there is still a presumption of capacity and while a medical certificate of incapacity can be refuted, having one provides more solid proof and eases the mind of the notary.

Therefore, when making a will, notaries will come across many different situations of infirmity and it is difficult to draw the line, especially if the person drafting the will comes up with strange ideas. This doesn't *prima facie* make them inconsistent but it could be a situation of incapacity and therefore, the notary needs to be skilled enough to determine such incapacity, whether or not it is

supported by a medical certificate, even though obtaining one is advisable. That is why the courts put such a strong importance on the role of the notary.

If a notary has any doubts about capacity, they should take notes for their own records.

A notary has the responsibility to judge a testator as capable or not at the very moment the will was being made.

Here, we consider **Mifsud v. Giordano et (1953)**, the premise of which was reconfirmed in **Bonavia v. Bonavia (1971).**

> *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.*
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> ---
>
> *The legal principle that those who are incapable of disposing of their own affairs must be protected, and may not be subjected to a will due to incapacity or undue influence, not only obligates proving that influence, but the proof thereof must also cover the very moment or the immediate period when the will was made.*

This is also supported by the work of jurists including Baudry-Lacantinerie that argued that when regarding the actual capacity (soundness of mind), it is sufficient for it to exist in the testator at the time of making the will; it matters little if they later lose it. Once manifested in a legal form, testamentary will is considered persistent until it is revoked by a legally expressed contrary will.

One judgement which contrasts this *forma mentis* is **Psaila v. Aquilina (2019)**. This case was already outlined when discussing unica charta wills. The court questioned how the wife, who couldn't give valid consent to marriage due to her condition in 2001, could have given valid consent to make a will in 2002, especially since MS as a disease worsens with time. Therefore, the court invalidated the will, awarding everything to the wife's parents, even though there was no concrete evidence to deem her incapable. This means the Court of First Instance used circumstances which happened one year earlier and not at the moment the will was made to deem her incapable. This contradicts the established legal principles. under Maltese law. The court seemed influenced by notions of fairness, but this decision is controversial and likely to be reversed on appealed.

Degree of Consciousness and Awareness when Determining Capacity

Capacity for the purposes of making a will is determined by two golden threads.

1. One who knows and is aware of what he doing;
2. The very contents of the will and whether they are reasonable under the circumstances as an indication of *gradi di debolezza di mente*.

As far as determining capacity is concerned, the test is not rigorous. This is because the presumption of capacity is so strong that even someone with very low intelligence can make a will so long as that person understands what's happening around him and can communicate his desires. In fact, in the judgement **Cassar v. Naudi**, a 1871 judgement of the Torino Court of Cassation was quoted that argued:

> *…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.*

> *...it's not necessary to have "a perfectly and rigorously sound mind," but it's sufficient to have that limited use of reason that allows awareness of one's actions; and to evaluate the various degrees of mental weakness of the testators, one must consider the reasonableness or otherwise of the testamentary provisions.*

Therefore, a weak mind doesn't mean that a will is invalid. In the judgement of **Vassallo v. Sammut (1950)** the court outlined a checklist of validity which keeps arising based on sufficient perception, reasoning and memory. In fact, in this regard, it is one of the most quoted judgements:

> *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*

> *Nor does this moderate level of ordinary intellectual faculties suffice to prevent, for the purposes of making a will, occasional mental errors and fleeting appearances of aberration; since in the presence of such defects, when the habitual state exhibits the certainty of a common ordinary intelligence, and it is not known that at the moment of making the will there is a state of aberration, one cannot assume insanity that excludes the capacity to make a will.*

The author Troplong was also quoted in this judgement arguing:

> *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.*
>
> *It is generally accepted as true that the will is presumed to have been made during a period of remission of illness if the infirm person has had lucid intervals and the act bears the characteristics of wisdom.*

Therefore, the conclusions of this case were that one doesn't have to be highly intelligent to make a will, so long as one is conscious and aware enough to know what is happening and can communicate it effectively.

We note that in the case that one suffers from a mental infirmity that not all degrees will lead to legal incapacity to make a will. This was first outlined in **Bartolo v. Psaila (1909)** where the testator was known to be moody and do abnormal, weird and eccentric things. The court said that there is a big jump between this type of character and a person being incapable of making a will due to incapacity.

> *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.*
>
> *That in the examination of the mental capacity of the testator, the facts deposited by witnesses must be precise and refer to the time of the testament or to a nearby time; and therefore, testimonies that refer to different times or generally to public knowledge are of no use.*

Even in **Vassallo v. Sammut (1950)** it was noted that "*minn eċċentriċita għal miġnun hemm differenza immensa*".

We note that proof of incapacity must be conclusive and sufficient to rebut the presumption existing in favour of capacity. As noted in **Gauci v. Mercieca (1922)**, doubts, suppositions or possibilities are not enough to rebuke the presumption and only conclusive evidence would be accepted. The proof needs to be rigorous to show that one didn't have "*knowledge of the act they were performing nor their own will*". For example, in **Imbroll v. Mougliette (1921)**, a young woman got married to a man fifty years her senior. He made a will leaving everything to her and upon his death, the family challenged the will. They accused the young woman of using her youth, beauty, sexuality and wiles for the service of the fanciful pleasures of the testator to beguile him and trick him into leaving her everything. They claimed that he was too old to make a will and that his course of action didn't truly reflect his wishes. The court disagreed arguing that the woman did nothing but fulfil her expected duties in a marriage by

being faithful, loyal and loving to her spouse. This was not deemed a valid ground to challenge the will.

Role of the Psychiatrists in considering Awareness and Consciousness

When situations of doubt arise, the role of the psychiatrist is very important, even though there is conflicting case law on the matter. The courts tend to make their own assessment and in **Danastas v. Danastas (1926)**, the court appointed psychiatrists to assess a person's alleged incapacity after his death regarding the facts.

The seminal case in this regard is **Vassallo v. Sammut (1950)**. Here, the Court of First Instance appointed a psychiatrist and there was disagreement on the validity of the will.

> *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-personalita' ġuridika 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.*
>
> ---
>
> *It is recognised, before anything else, that the same expert witnesses recognised the difficulty of their assigned task, as MV, the subject of this psychological study, is deceased, and in order to reconstruct her legal personality, there is no means other than that of circumstantial and indirect evidence obtainable from the evidence, and their assessment, the most delicate and important task of the expert, can lead to conclusions consistent with truth and justice.*

Following, a group of three psychiatrists were appointed with the court relying on their report to claim the will was invalid and to order its nullity. On appeal, two important points were raised:

1. What is the role of the court in assessing validity? Here, it was questioned whether the psychiatrists, the court or both parties had the right and the obligation to assess the facts and determine capacity and therefore, the validity of a will. The Court of Appeal examined the role of psychiatrists in putting the clock back to determine capacity or lack thereof. It concluded that it was the court's role to ascertain and assess the facts without the possibility of delegating that responsibility to another party. It noted that a psychiatrist can be engaged as an expert to help understand the different mental infirmities and understand the point of view of the person suffering from the condition.

   Therefore, in cases like these, the conclusion of the psychiatrists depends primarily, if not exclusively, on the appreciation of the evidence presented to them. In fact, it was stated by this Court ***Bartolo vs Psaila (1909)*** *that "the judgment on the mental capacity of a*

person already deceased at the time when the expertise is ordered cannot be entrusted to experts, because such examination by psychiatrists would reduce to the appreciation, which belongs to the Court, of the evidence produced.

2. That the will was actually invalid because the person wasn't capable and was being subjected to suggestion (i.e. he was forced to draft the will in such a way that it did not reflect his true wishes). The Court of Appeal argued that since this wasn't a ground mentioned in the original case, it went outside the boundaries set by the *rikors guramentat*. This was therefore, deemed to be outside the scope and wasn't considered.

In this particular case, the Court of Appeal noted that it cannot accept the conclusions of the experts employed by the First Court, as they are based on evidence that is not reliable and concluded on the strength of the evidence produced that it was not proven that the testator "*ma kellhiex il-koxxjenza ta' dak li kienet qieghda tagħmel u volonta propja*." This indicates that while psychiatrists may be engaged, ultimately, the facts will be determined by a judge.

Alleging Incapacity

When alleging incapacity, the following criteria will all have a strong bearing:

1. Evidence of the Notary

   While this is important, especially if a lot of time has passed, there is generally a lack of recollection and therefore, sometimes it may not be counted on.

2. Evidence by the Witnesses to the Will

   Ignoring the conflicting legislation on this point, usually, wills will have two witnesses. If they are present, the testimony of such witnesses to the will may act as evidence. The operative word in this regard is "*may*" as usually what occurs is that the notary will spend time with the testator drafting the will and persons employed in the office will be called in to act as witnesses to the will. Therefore, while in most cases, witnesses will have a proper understanding or be able to give an assessment, in this regard, since the witnesses aren't usually present for the actual drafting of the will, their testimony may not aid in this determination. However, if they are present and aware of the process, their role as witnesses to the will and the weight of their words in court will hold weight.

3. The Contents of the Will Itself

   Here, we question whether the bequests are reasonable under the circumstances and given the situation of the testator.

4. Evidence given by those close to the testator including neighbours, friends and family

5. Evidence by Doctors and Other Professional who may have known the testator and treated him
6. Evidence by Court Appointed Experts
7. The Particular Circumstances of a Case

In this regard, we take into account the case of **Rossignaud v. Pelligrini et (2018)**. Here, the father had left reserved portion to the plaintiff and the plaintiff argued that the will should be nullified due to invalidity. The will was drafted by a very intelligent people who knew many prominent personalities who appeared to provide testimony on his behalf. There was a lot of jurisprudence and study put into the judgement and a significant amount of evidence was brought forward. The judge quoted **Banks v. Goodfellow (1870)** which elaborates on what is meant by understanding when drafting a will, i.e. how to determine whether the testator understands what he is deciding.

> *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.*
>
> *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.*

Therefore, this argues that if there are circumstances which indicate some mental infirmity, it is important to back up the will with some certification as it would be improper not to ensure the mental state of the person making the will.

Those Precluded from Making A Will

Here, we regard **Article 597** which states:

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.

There are also other articles which are taken into account including **Article 611** and **Article 599**.

Wills by Minors - Article 597(1)(a)

We note that under the Civil Code, the age at which a person becomes *sui juris* is 16. This coincides with the age that one can make a will. Any will made before the age of 16 is invalid and any will made between 16 and 18 is highly regulated with only certain aims that can be achieved through it. This is because according to the law, even at 16 a person is not yet mature enough to make a will. In line with **Article 598**:

Those who have not yet completed the eighteenth year of their age cannot make a will other than remunertory dispositions.

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.

This form of will shall be analysed however, it is interesting to note that under Roman law the age where one became *sui juris* was 14. In fact, that was the case under the Civil Code as well until a 2004 amendment. This is because those under 16 are not considered to have sufficient understanding and volition to draft a will. It is strange because in many other areas of law, 14-16 year olds are treated as being capable, for example:

1. Under the Commercial Code, **Articles 9** and **10**, it is possible for a person to be legally emancipated at the age of 16 to become a trader, yet such person can only make a will to compensate and not to appoint a universal heir.
2. Under the Criminal Code we regard **Articles 26, 27** and **35** where it notes that it is possible for a person aged 9-14 to be imprisoned for a term of four years if they act with mischievous discretion and those over 14 are punished as though they are adults save for the reduction of the sentence by one degree. We question why an individual who is shown to be aware cannot make a will.
3. Under the Marriage Act, 16 year olds are able to marry with their parent's consent and yet, they are precluded from entering into a will. The Cohabitation Act provides the same benchmarks.
4. Even under the Constitution, one is able to hold an ID card and passport at 16 and also able to vote at 16, yet not allowed to make a will.

In line with other legal instruments, it seems that we are moving closer to a situation where a person can make a valid will younger - at least at 16 to make a will other than to compensate.

As a result of **Article 598** one can only make a will to compensate for services rendered and when doing so, regard is taken of the service and means of the minor, i.e. how wealthy the minor is, how high the gift being bestowed is and what the service rendered was. There must be a balance here - if an issue is raised because an amount outlined is too high, then the court has the power to reduce it to a reasonable amount. The discretion of the court is there to protect minors from abuse. As mentioned, this would make sense if not for all the aforementioned cases where benchmarks for minors are being lowered. If a minor makes a will in contravention of these benchmarks, the will is deem null and void (not annullable). Therefore, for example, if Person A makes a will when he is 14 and eventually lives to be 100 without changing the will, the will doesn't become valid upon maturity since at the moment when it was done, the minor didn't have the capacity to create it and therefore, it is null and void and his estate is governed by intestate succession.

Those Interdicted - Article 597(1)(c)

Here, we note that the law qualified interdiction that precludes a person from making a will. The interdiction must be based on the ground of:

1. Insanity;
2. A mental disorder.

In order for a person to be interdicted, a psychiatric report must be issued detailed the reasons as to why such a person should be interdicted. This certificate is confirmed under oath and application is completed before the Court of Voluntary Jurisdiction. Normally, during this process, the assets of the person to be interdicted will be outlined and a name of a person to represent the interdicted person (i.e. a curator) will be appointed. The administrative part of the interdiction process may take some time and therefore, the time taken between then and the final decree isn't immediate.

It is very important to keep in mind that until there is a final decree issued by the Court, the person is not interdicted for the purposes of making a will - the mere filing of the application is insufficient. The psychiatric report doesn't confirm interdiction, only the decree of interdiction to be signed by the judge if he is satisfied. It is only from the moment when the decree of interdiction is signed that the person is precluded from making a will as that capacity has ended. There is no possibility for such person to make a will because even the curator is precluded from making a will on the interdicted person's behalf.

Therefore, once the decree is issued, the legal capacity to make a will is terminated. This subsists even if the person recovers or has lucid intervals and even if there is a subsequent psychiatric report attesting to capacity. This was noted in **Mallia v. Mallia (2011)** where the court highlighted that the incapacity to make a will begins the moment the decree is signed by the judge and doesn't even require publication to take effect.

> *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* ***Dingli noe vs Mifsud Bonnici (1953)****: "L-effetti tal-interdizzjoni jibdew mill-gurnata tad-digriet li jordna l-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"*

> *The law is strict in this case of legal incapacity and provides for absolute nullity, not relative. From the day of the injury forward, the acts performed by the interdicted person are null. So it is in this case. The fact that there is a psychiatric report attached to the will does not negate the official status of interdiction and the consequent nullity of acts made by the interdicted person. Furthermore, as the Court stated in the case* ***Dingli vs Mifsud***

> ***Bonnici (1953)****: "The effects of interdiction begin from the day the interdiction is ordered and also bind third parties regardless of their knowledge or ignorance." Official interdiction is only removed by another court order where the reasons for the interdiction are no longer present, and therefore the original interdiction order is revoked."*

Thus, even if later on this interdicted person is certified to be capable of making a will, the decree must be removed for the person to be engage in such a way. The mere filing is insufficient.

This was considered in the case **Vassallo v. Sammut (1950).**

We note that originally, interdiction was limited to situations of insanity, however, by virtue of Act II of 2012 the law was amended to include interdiction on the basis of a "*mental disorder*". This was a change that many consider to have been made with blinkered eyes as there is a lack of clarity. There is no definition as to what constitutes a mental disorder and even trying to source one externally through the Mental Health Act garners limited results. Under this Act, all that is noted is that only consultants can certify a person as having a mental disorder. Logically, this leads to the deduction that only a consultant can certify what a mental disorder is. The law fails to define or condition the type, quality or extent of the disorder for the purposes of incapacity in relation to making a will. All that is required for this sub-article to apply is that a consultant has certified the person is suffering from a mental disorder and the process to issue a decree for incapacity is followed. This creates a lot of legal uncertainty and many grey areas. However, we content that mental disorder has a wider meaning than insanity and that a person can be sane but suffering from a mental disorder.

When talking about wills, we note that what is important is:

1. Awareness and Reasoning
2. Communication

Therefore, it can be deduced that a mental disorder must impinge on a person's ability to reason or be aware of his circumstances. Not just any mental disorder will disallow a person from making a will.

We consider the judgement of **Ellul v. Busuttil (2017)**. Here, a married couple had made a unica charta will. The husband passed away and a few months later the wife was taken to an old persons' home. In September before she died, she was certified as being slightly disoriented in time and her surroundings, having problems with awareness and reasoning as she kept asking for her husband who had passed away slightly earlier. In October she changed her unica charta will. She was eventually interdicted on the basis of dimentia and passed away. An issue arose as to whether she was capable of making a will when she amended it in October as there were already signs she was losing her mind. The court referred to **Vassallo v. Sammit (1950)** which emphasised:

> *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.*
>
> *Therefore, the rebuttable legal presumption is that anyone who makes a will is capable of disposing of their property, unless rebutted by the contrary proof that needs to be provided by those contesting the validity of the will.*

The court in **Ellul v. Busuttil (2017)** highlighted the difference between inabilitation and interdiction:

> *Huwa ritenut li l-fatt li l-ispecjalista in materja, l-psikjatra Dr. Spiteri, ma hassx il-htiega li jaghti parir li l-pazjenta tigi interdetta izda li tigi biss inabilitata, huwa sintomatiku tal-fatt li t-testatrici kellha grad ta' kapacit, tant hu hekk li fic-certifikat mahrug minnu jinghad "She is unable to exert her civili rights in full". Issa kif inghad mill-ewwel Qorti:*
>
> *"Il-ligi f'dan il-kaz tikkuntenta ruhha bil-minimu jew almenu bi grad moderat u mhux bi grad gholi u wisq inqas bis-superlattiv jew grad massimu ta' kapacita" bhal ma hu sottolineat fil-kaz ta **Bonavia v. Bonavia (1971)**.*
>
> *It is considered that the fact that the specialist in the matter, the psychiatrist Dr. Spiteri, did not feel the need to advise that the patient be interdicted but only inabilitated, is symptomatic of the fact that the testator had a degree of capacity, so much so that in the certificate issued by him it is stated "She is unable to exert her civil rights in full". Now, as stated by the First Court:*
>
> *"The law in this case satisfies itself with the minimum or at least with a moderate degree and not with a high degree and even less with the superlative or maximum degree of capacity"* as noted in **Bonavia v. Bonavia (1971)**.

In fact, in the **Bonavia** case, the judge Caruana Curran noted that in cases like this:

> *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.*
>
> *Certainly, all preconceived notions must be ignored by the court, whether that someone who is different is not capable, or that anyone who is ill is not in their senses. If there is ever any prejudice, if this is the correct vocabulary, this is just the presumption of capacity, subject to the contrary proof which, however, must be, as stated, rigorous.*

In the case **Vassallo v. Sammut (1950)** the court outlined the principles that must be following in cases to impute the testament when the testator isn't in his right frame of mind

and highlighted that:

1. Capacity is the rule and is the default and that incapacity must be proved by the person alleging.
2. The incapacity of the testator must be proved at the moment the will was being done, not before and not after.
3. In order to ascertain capacity to make a will, the test is not very rigorous. It is enough that it is shown the person can reason is aware and can communicate. This indicates that the benchmark isn't very high.
4. In order to prove insanity or incapacity, the evidence must be very strong as a result of the strong presumption in favour of capacity. Thus, cogent, clear, consistent evidence is needed to disprove that which the notary has drafted in the will.
5. Courts are hesitant to challenge a will because they aim to safeguard the most vulnerable party involved, who is typically the deceased individual (de cujus) whose wishes are expressed in the testament. Since the de cujus cannot speak for themselves, their will serves as their voice. Therefore, the court endeavors to protect it to the best of its ability. When assessing capacity and mental competence, the court relies heavily on the testimony of the notary and the contents of the will, which serve as crucial evidence in determining whether the will should be upheld or not.

In **Ellul v. Busuttil (2017**) the court tried to rely on the recollections of the notary but he was unable to remember the circumstances of the will. However, he claimed that if he had any doubt as to whether the person was capable or not, he wouldn't have written the will. The court claimed that this word was not enough and ought to have been substantiated by medical proof, but that there remained the presumption of capacity that could only be overturned by the person who wishes to prove the will is not valid. Without such evidence, the will remains valid.

> *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.*

> *Furthermore, the court understands that the notary's deposition may not be very helpful when it is stated that they do not remember the particular case. From the evidence presented, the court believes that the notary should have realized that the testatrix was weakened, and consequently, they should have insisted that the testatrix be examined by a*

doctor and obtain a medical certificate regarding whether she was mentally capable of making a will on the day she did it.

The court also examined the evidence of the psychiatrist who a month before had certified that the testator was beginning to lose her memory. The court ended up discarding the certificate as it was not sufficiently clear on the details:

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.

From Dr. Spiteri's testimony, the court understands that the defect the testatrix had was a limitation in memory. However, this does not mean that she lacked the use of reason that would allow her to be aware of what she was doing. In the court's understanding, Dr. Spiteri's deposition might have been more detailed, shedding more light on the case.

Finally, the court regarded the contents of the will to regard capacity noting that it was satisfied the will embodied the *de cujus'* wishes. The court looked at the dispositions and said that they make sense under the circumstances with nothing unusual about them. The fact that she preferred to favour a person who was taking more care of her as opposed to another wasn't strange because she still remembered the other relatives. The court found it very important to look at the will.

Ezami tad-disposizzjonijiet testamentarji ma jwassalux lill qorti biex tikkonkludi li huma irragonevoli. Fil-fatt it-testatrici ma eskludietx lill-membri familjari min-naha ta' zewgha li kienu jissemmew fit-testment li ghamlet ma' zewgha.

The examination of the testamentary dispositions does not lead the court to conclude that they are unreasonable. In fact, the testatrix does not exclude family members from the side of both spouses who were mentioned in the will she made with her spouse.

One further thing that convinced the court was the fact that she included a pious disposition in the will providing arrangements for her funeral. The court considers that when such a disposition is involved, the person making the will is likely in their right frame of mind as they are aware that they are making provisions for after they die and are aware of their morality and the circumstances they find themselves in. In fact, in **Bonavia v. Bonavia (1971)**, the court noted that

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.

The best evidence in such a question is the very content of the testament itself, which may reveal oddity, inconsistency, or attest to the state of the testator's mental illness...which the court declared shows a sense of affection and recognition of her own needs as well as the super-juridical needs of the testator in the very close time frame of the testament.

Another case to consider is **Bonnici v. Mifsud (2013)**. Here, there existed a depressed and suggestible mother with strong indications that she was losing her mind. There was a psychiatric report stating that she should be inabilitated meaning that she wouldn't be interdicted - the defect in her mind was not sufficient to stop her from making a will and thus, this is not considered to be a ground of incapacity. Later, the daughter called a young notary to say that her mother wanted to make a will and it was obvious that she wasn't aware of the psychiatric certificate. The daughter provided the notary with the previous wills drawn up by the mother and the new will was drafted based on the old will with very few modifications, in fact, certain clauses were even identical. The will ended up being contested and in this case, the notary testified stated she remembered the will being done, remembered the daughter being in the room as it was being drafted but also remembered discussing the wishes with the mother. Ultimately, when the will was read out and signed, the daughter was asked to leave the room. The court said that despite what the psychiatrist said, once the notary was satisfied that the person was lucid, aware and communicating, then the will is valid as there is a presumption of capacity. Here, following the rationale of the **Kenward v. Adams (1975)** judgement, the court emphasised that it would have been wise for the notary to obtain a medical certificate for her comfort but that nonetheless since the person was reasoning, understanding and validly informing the notary of her wishes, then the will was valid and was preserved. Therefore, the court concluded:

1. There was a presumption of capacity;
2. The evidence of the notary carries important weight

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.

The deposition of Dr ... who drafted the will is highly relevant. It emphasises that the testator spoke for herself and that she was fully lucid and aware of what was being said. While it is true that the notary was not a medical person, she was certainly in a position to ascertain whether Carmela Cassar was speaking sensibly or not. She herself stated

that she was certain that Carmela Cassar was with her because if she didn't, she wouldn't accept her to make the will. In light of the doctor's certificate issued five weeks prior, this court considers the version of the notary as a plausible one.

3. Based on the contents of the will, the will was reasonable as it saved most elements of the old will and only changed certain parts. This helped cement the determination that the testator was in the right frame of mind.

Another case judging incapacity due to interdiction is **Psaila v. Aqilina (2021)** which has already been outlined. We note that capacity is meant to be considered at the moment the will was made, not before or after as occurred in this case where the judge considered the woman's incapacity to marry in 2001 and transposed this incapacity to 2002 when she made her will.

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.

The Court acknowledges that it must make reference to such a decision, especially since, once it was determined by the Ecclesiastical Tribunal and confirmed by the Court of Appeal, that Sharon Psaila was incapable of assuming and understanding her marital obligations due to her illness, and this was at the time of her marriage in the year 2001. This also means that on the 24th of May 2002, due to the mental disorder and condition she had, she was not in a capable state to consider her affairs when the will was made as the sole document with the defendant.

It was evident that in this case the court was heavily influenced by the fact that the couple's marriage was annulled and the fact that the husband began separation proceedings after the woman was interdicted. The main issues raised in relation to this judgement are:

1. The time frame considering that a person with MS shouldn't be considered to be crazy as there are definitely moments when the person is in a good state.
2. The consent and capacity needed to validly draft a will is much lower than the consent and capacity needed to marry. All that is required is that at the moment of making a will, the person has sufficient understanding and awareness to be able to reason and that that person can communicate. Sophisticated reasoning isn't needed and therefore, it is difficult to imagine the wife didn't reach this threshold when drafting the will at the beginning stages of MS.

Wills by Persons having some “Defect” or “Injury” - Article 597(1)(b)

Here, we discuss situations where wills are invalid due to the testator not being capable of understanding or volition and communicating their wishes, even with interpreters. This applies even when such persons are not interdicted. Here, the defect or injury in understanding, volition and communication can be of any kind, both physical and/or mental. Mostly, this relates to communication - if a person can understand a wish but cannot communicate it for any physical or mental reason then it is invalid. For example, a person suffering from locked in syndrome cannot make a will. This was introduced primarily as a means to protect persons suffering from such a defect or injury to be protected from abuse to ensure that when such individuals do create a will, they reflect their wishes and are not manipulated by third parties or the notary.

This law was changed in 2004 to make it slightly more flexible. For example, under the old law, a congenital deaf-mute who could not write was prohibited from making a will. This has now been changed and they can make a will under certain conditions so long as there is satisfaction that the person can understand and express their wishes.

The main issues in this regard relate to blindness, dumbness, deafness and illiteracy. If a person is able to read and write on their own, there are no impediments to making a will. A contentious issue emerged in the case of **Ferrito v. Cassar (2010)** regarding the eligibility to create a will. The crux of the matter revolved around the interpretation of the ability to "write" in the context of making a secret will. The case brought into question what exactly constitutes the capacity to write. The dispute arose when it was observed that the person in question could produce their signature, prompting the court to presume their ability to write. Consequently, the will in contention was upheld as valid. This decision was significant due to the discrepancy between the English and Maltese versions of the law governing secret wills. The English version stipulates that a testator must be able to read and write to create a secret will, while the Maltese version only requires the ability to write - **Article 663**. The discrepancy became pivotal in the case, particularly as the individual in question could not read but could write. Ultimately, the court sided with the Maltese interpretation, deeming the secret will to be valid.

In such situations, the institution of interpreters become important. We note that under the Civil Code they are not provided for.

Article 37 of Cap 55 outlines the situation where a person appearing on a public deed is totally deaf:

> *Where any of the appearers is totally deaf, such appearer shall read the act, and a mention of the fact shall be recorded therein.*

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.*

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.

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.

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

Therefore, **Article 37** of Cap 55 makes provisions for wills and public deeds made by people who are deaf and for those who are deaf and illiterate.

When a person is totally deaf but can read, then he must read the will himself and in the will, it must be noted that such an exercise took place.

In the case where the person cannot read, then an interpreter is appointed by the Court of Voluntary Jurisdiction. To be appointed, certain criteria must be satisfied including:

- The interpreter cannot benefit from the will. (It seems however that heirs, legatees or relatives can act as interpreters).
- The notary must be satisfied that the interpreter is actually communicating with the testator well.
- There is an exception in the law that the interpreter can be chosen from amongst the parents or relatives of the deaf person. However, such individuals cannot, at the same time, act as witnesses or attestors to the deed. This was included because the communication between parents and children is strong rooted. The fact that they cannot serve as witnesses is no longer very important considering that under Cap 55, it is no longer a requirement for the will the be witnesses. This is one of the main discrepancies between it and the Civil Code where witnesses are still required on the penalty of the will being void.
- If the person is totally deaf and illiterate, the interpreter cannot be the notary, even if the notary fully understands the person.
- The interpreter cannot have the same qualities as the witness:
    - Must not be blind, deaf or dumb
    - Must not be related to the notary or be the spouse of the notary

- Must be able to sign

Here, we also consider **Article 669** of the Civil Code that applies:

> *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.*
>
> *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.*

Article 38 of Cap 55 deals with the situation where the appearer is dumb, or deaf and dumb:

> *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:*
>
> > *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;*
> >
> > *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 (5)**.*

Here, we also consider **Article 668** of the Civil Code that applies:

> *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.*
>
> *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.*

We note that in general, if an interpreter was used and is not named in the at then such act is voidable as per **Article 39** of Cap 55:

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 (VoluntaryJurisdiction Section), and that he took the oath to perform his duties faithfully.

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.

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.

This applies for all situations, not merely where the person is deaf or deaf and dumb. Herein, there exists another presumption in favour of validity with the legislator's use of the term "*voidable*" and opposed to "*void*".

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Interdicted Prodigals - Article 597(1)(e)

A prodigal refers to a person who has no control over how he spends his money. Such a person is not considered to be insane or to have a mental disorder, but simply is unaware of the value of money.

In cases of prodigality, a decree is required to interdict an individual on this basis. Once interdicted for prodigality, the person retains the right to revoke any previous will they have made. However, they are unable to create a new will without first obtaining permission from the court. This involves filing a request before the Court of Voluntary Jurisdiction. Upon receiving such a request, the judge evaluates the circumstances to determine whether the individual is capable of making a will free from undue influence of prodigality. Without the court's permission, a person interdicted for prodigality cannot draft a new will. The allowance for revocation exists because, in revoking a will, the individual is not relinquishing assets but rather reversing a decision they had made. The concern lies in the act of giving away assets, as values hold no significance in such cases.

We note that considerations of prodigality have existed since Roman law. Under Roman law, Emperor Leo noted that a will was valid unless that which was written within it was the result of the testator's prodigality. The deciding body would analyse the contexts of the will and see whether the bequest was made out of a sense of prodigality before taking a final decision on the validity of the will. This begs the question as to what happens in cases of inheritance by universal title - it is fairly easy to analyse prodigality in situations where the testator leaves a gift and there is inheritance by singular title. In this regard, the deciding body could go into the context and see whether there were services rendered, whether there was a special relationship between the individuals or whether there was some sense of obligation. However,

in the context of universal title, it becomes difficult to distinguish what is being done out of a sense of prodigality and what is being done because one wants to leave a person as their heir.

Today, this is no longer the situation and the determining factor is interdiction on the basis of prodigality. This, as mentioned, entails prohibiting a prodigal from making a will unless there exists the permission of the judge. Such a decision is based on the exercise of the judge's discretion. Yet, it remains evident that distinguishing between prodigality and other circumstances is challenging, particularly unless the situation pertains to a remuneratory disposition. In such cases, there is something tangible to attribute a value to, allowing the judge to assess whether the testator comprehends the value of the gift. The judge can also inquire whether the bequest is motivated by valid reasons, such as a special relationship or the fulfilment of an obligation, or if it stems from the individual's inability to recognise the value.

Court intervention is necessary because the law wants to ensure that what is being done and written in the will is being done in a reasonable way taking into consideration the circumstances of the person's life. If the person who wishes to make a will is interdicted on the basis of prodigality, the court will investigate the behind the scenes circumstances behind the will.

The *punctum temporis* to determine validity remains the moment the will was made: at the moment the will was made, was the person interdicted for being a prodigal. If no, the will is valid even if the person is interdicted as a prodigal later. If the answer is yes, then the will is invalid.

Members of Monastic Orders - Article 611(1)

We note that members of Monastic Orders are precluded from making a will provided they:

1. Are members of order or corporation of regulars. These include priests or nuns who belong to a religious order.
2. Have taken a vow in such order. While the law doesn't outline or specify what vow must be taken, presumably it refers to the vow of poverty. This causes the person who has taken the vow to relinquish all their rights to tangible things and results in them being deemed by law to be incapable of buying and selling. In fact, once the vow has been taken, the person who has taken it is considered to be civilly or legally dead with the potential for revival.

Generally, in relation to the generation of a will, the person who is going to take such a vow will make a will before they are taken. However, once they are bound by the vows, making a will is a legal impossibility and inheritance will occur *ab intestato*.

Here, we consider **Article 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.*
>
> *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.*
>
> *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.*

As shall be regarded, sub-articles 2 under **Article 611** also prohibits a person from receiving inheritance once they have taken such a vow. Later, an analysis as to what constitutes "*small life pensions*" shall be taken into consideration.

Sub-article 3 notes that this is not an irreversible position. Once a person breaks free of the bondage of the vow, they are able to inherit and dispose of their property through a will freely once more. Therefore, upon leaving the order, a person reacquires the right to amend their will.

General Overriding Provision - Article 599

This is the general overriding provision resulting in the nullity of wills:

> *Any will made by a person subject to incapacity is null, even though the incapacity of the testator may have ceased before his death.*

If a will is deemed null, it holds no legal validity from its inception - it is void *ab initio*. While the will may exist and be documented, it holds no legal weight.

Only the court has the authority to declare it null. The court does not label it as voidable; instead, it is null *ab initio*, meaning it never possessed any legal validity. Any actions taken based on a null will are also considered null, regardless of the individual's good faith, such as believing they are the rightful heir.

A court pronouncement is necessary to declare the will void, but once such a declaration is made, the will is null. This assessment of validity is made at the time the will was created, even if the incapacity that led to its nullity is later resolved. This was confirmed in the case of **Mallia v. Mallia (2011)**.

Capacity to Receive Under a Will or Capacity to Inherit

Firstly, we consider that there exists a presumption in favour of one's capacity to receive under a will with the burden of proof resting on the person wanting to prove otherwise. Therefore, if someone challenges a person's right to inherit, such a person benefits from the presumption and has to prove nothing until the other party brings concrete evidence to dispute it. This is contained in **Article 596(1)**:

> *Any person not subject to incapacity under the provisions of this Code, may dispose of, or receive property by will.*

Incapacity can only result from one of the limited grounds established by law. Thus, they are defined by law in a restricted manner and cannot be extended in any way.

Further, we consider that incapacity in this regard may either be absolute in the sense that a person would not be entitled to inherit anything from anyone, or relative in that such person cannot inherit specific persons or properties.

Under this section, we shall consider the capacity for the following to inherit:

1. Children
2. Members of Monastic Orders
3. Those not yet conceived
4. Foundations
5. Persons who are unworthy

Children

Here, we regard **Article 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.*

According to this article, children are always presumed to be capable of inheriting. We also note that the law makes no distinction about the nature of children, i.e. the law doesn't discriminate between legitimate, illegitimate, adopted and children born from successive marriages. It also fails to discriminate between those mentioned and those not mentioned in the will and includes children who are considered so by legal presumption. This wasn't always the case - the distinction was removed in 2004. This is further corroborated by **Article 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.*

What must be considered in this regard is the question of viability. In order to inherit, the child must be born viable. This will also become important when dealing with the Reserved Portion.

When considering children's right to inherit we note that inheritance isn't barred by one generation. If a child predeceases their parent, for example, but has children of their own, then those children will inherit.

Members of Monastic Orders

Here, we consider **Article 611**. Once again, we consider those who:

1. Are members of order or corporation of regulars. These include priests or nuns who belong to a religious order.
2. Have taken a vow in such order. For the purposes of law, it doesn't matter the Order or Congregation to which the religious person is to be a member, nor does it matter the religion. Furthermore, the law doesn't stipulate whether it is a simple vow or a solemn vow of poverty. Yet, to understand it contextually, the section must be read in conjunction with Canon law. Under Canon law there exists a distinction between simple and solemn vows and through the case **Galea v. Farrugia (2003)** it was determined that only solemn vows result in the incapacity 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.*
   >
   > ---
   >
   > *It is also important to note that according to canon law, what emerges from the acts of the vows taken by those who belong to religious orders is not all of the same significance because in fact there are those who take simple vows and those who take solemn vows, and it is the latter that lead to the renunciation of civil rights formally obtained to receive property.*

In this regard, we also consider that as per **Sammut v. Sammut (1937)** this incapacity applies to nuns as well as to priests. Considering the nuns also take a solemn vow, they are also precluded from inheriting.

Those who have taken a monastic vow are, for the purposes of law, civilly dead upon the taking of such vows. In fact, this was argued by Baudry-Laucanterie: "*constituendo la professione religiosa nel morire al mondo.*" This means that there is total exclusion as though such person did not exist and in relation to receiving under a will, a person forming part of a monastic order is generally precluded from doing so except under certain limitations. This wasn't applicable in France by means of a 1715 decree in relation to Jesuits. While the Jesuits did take such a vow, since they travelled overseas and were working as part of the mission in colonies abroad to expand and sustain the French colonial aspirations, the government issued a decree noting that Jesuits were able to inherit to ensure that the property would remain French. This exception pertained both to making a will and to inheriting.

A major question in this regard is the *punctum temporis*, i.e. the moment at which the capacity to receive is considered and whether this relates to the date of the death of testator or some other date. There exists dispute on this matter. Under Roman law, if a person took a vow and whilst being bound by the vow the person inherited, what was inherited went according to the beneficiary's will as if the person inherited and then died at the same time. Thus, according to Roman law, if Person A who has taken a vow inherits from their father, Person A despite being bound by the vow inherits and the property is then disposed of according to their will. If in Person A's will everything was left to the Monastic Order, then the moment Person A inherited from their father, the inheritance went to the Order.

A practical situation where the *punctum temporis* was of particular significance and where Roman law rules still applied was in the case of a French nun whose father and son went to war in the 1600s. Both the father and son died in battle and the question arose as to whether she took the vow before or after they died. If she took the vows before than all her assets would have gone to the Order since that was what was stipulated in the will she made before taking the vow. If not, the assets would belong to her. It was determined that the vow was taken before and since she was considered to be legally dead, she was unable to inherit and the estate went to the Order and not the family.

This is not the case today under Maltese law, however. In **Buhagiar v. Galea (1908)** as well as in **Galea v. Farrugia (2003)**, the Maltese courts noted that if a person took a vow, that person became legally dead. If they were legally dead then they couldn't inherit and thus, never became the owners of the estate. This means that there exists no way for a person having taken the vow to dispose of any estate they could have inherited had they not taken the vow unlike under Roman law. In fact, the court unequivocally disagreed with the party who claimed that the member whose inheritance was being disputed acted as a vehicle transporting the estate from the deceased to the monestry in the former case.

The court stated that if a person is bound by a vow, that person doesn't exist, and no rights of theirs are considered save for the right to a small life annuity. This means the person cannot

pass the inheritance onto who would inherit him according to the will made before taking the vow - once the member could not inherit, he had nothing to transfer: *nemo dat quod non habet.*

We also question whether this incapacity to inherit is absolute? The answer is no. The incapacity lasts for as long as the person remains bound by the vow. The law provides for two exceptions:

1. During that period of incapacity, those who have taken the vow may inherit a small life pension/annuity. Here, we consider testate succession as such a right doesn't arrive from intestate succession. Those bound by a vow may receive a life pension through a will. This creates an issue - if such a person receives a pension through a will but doesn't spend it all through-out their lifetime, there exists a situation where the person owns assets that upon their death will have to be distributed. If the person made a will before taking their vows, the assets will be distributed according to their will. If not, the rules of intestate succession will apply.

   NB. We note that this is distinct from the Reserved Portion considering that as long as one remains bound by solemn vows they are not able to claim the Reserved Portion.

2. When a person is legally released from his vows, such a person is able to inherit as they regain their personality under the law. In such a case, the person retrospectively inherits. This means that it doesn't only apply to inheritances that arise after the release from the vows but even to the inheritances that occurred during the period when the person took the vow.

   For example, if Person A took the vow in 2020 and their father died in 2023 but in 2024 they were released from their vows, they are able to inherit their father because such inheritance operates retrospectively.

   The law was amended to reflect this position as it wasn't always the case. It happened in response to a specific incident whereby a gentleman whose wife predeceased him had two sons: one died in a car accident and one became a priest and took a solemn vow. The man was worried about the inheritance since at law the retrospective effect wasn't provided for and worried if the son was released from his vows he would be destitute. He petitioned the legislators to change the law into what it is today where if a person leaves the bonds of the vow, the person reacquires capacity as though their incapacity never existed.

   The only issue with this is that it creates issues with stuck inheritances. For example, if Person A leaves their property to their son Person B who took a solemn vow, but since that person is a priest it would go to Person C, until Person B is alive because of the

potential that exists for them to be released from their vows, Person C cannot use the property.

Those Not Yet Conceived

Here, we consider **Article 600**:

> *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.*
>
> *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.*

Logically, one would assume that a child who hasn't even been thought of cannot inherit, yet that is not technically the case. It is in fact possible for unborn persons to benefit from a will as heirs of legatees if:

- They are already conceived at the moment of testator's death or the fulfilment of a condition stated in the will.
- They are eventually born from the immediate children of the testator who were conceived at the time of the testator's death.
- They are called to the enjoyment of a foundation.

Article 600 builds upon notions and correlates to the law on entailed property, i.e. the making of provisions as to how an estate will be inherited fown the bloodline from generation to generation in perpetuity. As has been noted, the rule relating to entailed property is established by the original will which will regulate succession and the estate down the line according to the norms and rules of the will. In such a case, the person who inherits the estate is not the owner, he is the holder in trust for future generations. While he is able to enjoy the fruits and the property, he is precluded from disposing of the estate, save from selling parts if destitute. Under Maltese law this is no longer possible with entails having been partially removed in 1952 and totally abolished in 1973 since the law was not in favour of leaving the estate to future generations.

However, an exception was made in relation to grandchildren who have not yet been conceived with the law allowing a testator to make provisions for those grandchildren that have yet to be born. Therefore, the children of the testator must necessarily be conceived when the will is drafted, yet it can include dispositions for the children of that conceived child also.

Take the following examples into account:

Example 1 - A testator may wish to leave his estate not to his children but to his grandchildren who have been or may be born.

- If all the children of the testator pre-deceased him, the grandchildren who have been born by then will be the heirs.
- If all his children pre-deceased him but the wife of one of them is pregnant from her pre-deceased husband, that child who is as yet to be born will inherit together with any other grand children
- 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.

Example 2 - 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 from such child. If there were any it would be these grandchildren and any future 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)

The maximum one can go is if the testator's wife is pregnant, he can leave the estate to the children to be borne of that foetus because the child was conceived at the moment of passing away.

Foundations

The law makes certain provisions for foundations in the sense that a testator is able to leave their estate to a foundation. In this 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. The maximum limit that a foundation can be set up for is 100 years, i.e. three generations. This is, in a sense, an except to the rule abolishing entails as there is no specific beneficiary and the foundation is inherited according to the will down the bloodline yet the bequest is valid.

In Malta, foundations aren't very highly considered, especially foundations set up by inheritance because when one sets up a foundation, they are leaving the control of the assets

to a person they don’t know, either a firm or an accountant to manage the foundation. Generally, individuals are against leaving control of their estates to third parties. Nonetheless, there is a big benefit to this at the same time that bequeathing to a foundation means the estate is consolidated - the property doesn’t need to be split up and can be kept in the family. This option is generally availed of when one has a collection that they don’t want broken up. In such a situation, the foundation is the right vehicle to keep the asset in tact for 100 years. Another major advantage is the tax benefits.

A downside is that very often, heirs are not a fan of property being tied up. Beneficiaries like to inherit and have what they inherited be in their control. Setting up foundations and in the past entails may be beneficial to the testator for pride or honour, but heirs likely prefer to inherit their share that isn’t controlled or interfered with by anyone els.e

From what can be seen, families who have had huge estates which were tied up because of entail or because of various conditions in a will , as soon as the property was released from the headache of being tied up, beneficiaries want to have things in their control without being tied up. Setting up foundations and entails may be beneficial to the testator for pride etc. but heirs will probably not want that - beneficiaries will want their own bit without any control or interference by anyone else.

Unworthiness

The first thing to highlight is that unworthiness is distinct from disherison. Disherison arises when a person makes a will and purposefully disinherits a person by stating it in the will. In situations of unworthiness, there is nothing precluding the person from inheriting in the will rather it relates to facts and situations that are so serious and grave that make the offender unworthy to inherit in spite of and independently of what is written in the will. This applies even if there is no will. This acts as a punishment against the offender because of a wrongful act he committed classifying him as unworthy which renders him incapable of inheriting, taking legacies and claiming Reserved Portion - the person cannot benefit in anyway from the inheritance but their children can, even though for example the unworthy person is unable to enjoy usufruct over the property inherited by the children even if they are minors under his tutelage. This is because unworthiness is a very personal ground.

Unworthiness is a defence that is raised by the heirs after a person as died. If one is declared unworthy, the share doesn’t go down the line but the rules of accretion apply. The share accumulates in favour of the other heirs and the descendants can claim the Reserved Portion.

It i not an issue of capacity to inherit or the volition of the testator. It is conceptually very different from incapacity to inherit with the *raison d’etre* being to avoid situations where an heir has acted egregiously towards the testator and still benefits from inheritance.

A common example would be as follows: Person A dies and in their will leaves their three children, (B, C and D) as heir in equal share. Sibling D performs an act that renders him unworthy as stipulated in **Article 605** and Siblings B and C contest his ability to inherit on the basis of unworthiness because of the grave and serious nature of the act he committed against their parent Person A.

This is contained under **Article 605**:

> *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*
>
> *(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.*
>
> *The provisions of this article shall also apply to any person who has been an accomplice in any of the said acts.*

The grounds of unworthiness are limited to those listed at law and must be interpreted restrictively. Moreover, in the case of doubt, the court is bound to decide in favour of the beneficiary. The court has no discretion to extend the grounds to preclude inheritance on this basis, no matter how dire or serious the situation may be. The specific grounds are the only ones the court is empowered to consider to deem an individual unworthy and those raising unworthiness are the ones charged with proving it and in doing so dismantling the strong presumption that exists in favour of the capacity to inherit.

Interestingly, in the past, the grounds were wider and included:

- A widow remarrying within one year of her first husband's demise or if during the period of morning, she conducted herself immorally as this would be putting down the reputation of the deceased husband.
- If the beneficiary witnessed the murder of the testator or knew who the murder was and failed to come forward.

The claim for unworthiness must be raised by Heir A against Heir B as it is a dispute between heirs. The testator isn't involved in this consideration and may even be unaware of a situation

of unworthiness in relation to one of their heirs. This isn't something that occurs *ex officio* but has to be raised for it to apply.

Wilfully killed or attempted to kill the testator or their spouse - Article 605(1)(a)

As in all crimes, here, there needs to be the *actus reus* and the *mens rea*.

The first thing that we question is whether or not there needs to be a conviction for this ground of unworthiness to materialise or whether one will have to prove the case again in civil proceedings. We note that similar to all proceedings, civil proceedings are separate and independent from each other. The two remedies are independent of each other.

If there is a criminal conviction, because the benchmarks dealing with criminal law are more onerous (beyond reasonable doubt v. balance of probability), then a criminal conviction will constitute sufficient proof for this ground of unworthiness of apply civilly. Yet, if there is no conviction this doesn't mean the court won't go into the matter. However, it is rare that this will arise.

We note that the specific offence requires a specific intent and therefore, unworthiness won't arise if there is grievous bodily harm or grievous bodily harm from which death ensues and the requirement of the *mens rea* that is considered specifically at law is not satisfied. From the civil law aspect, the ground of provocation and other mitigating factors won't carry a lot of weight, unless they totally excuse the person. This also includes what occurs in situations where there is a state pardon where the court isn't bound to ignore this ground of unworthiness and also where a person has served their conviction.

Here, we take into account the **Marie-Madeleine d'Aubray Case (1676)**. This revolved around a noble French woman who was forced into an arranged married who after having borne seven children wanted to leave her husband for the man that she was having an affair with. When she told her father about the separation he was furious as such a faux pas would lower his standings in the royal court. On fake charges he imprisoned her lover for two months at Bastille but once he was released the affair continued. During his time in imprisonment he began learning alchemy and as a result gave his love a poison which she administered to her father and brother in order to be with him with no impediments. An issue arose as to whether she was entitled to inherit her brother and father since it was contested that the part she played in their death made her unworthy. In the case brought against her she raised the defence that both her brother and her father were molested but the court ignored this mitigating factor and was executed. The inheritance passed onto her children.

In a local case **Degiorgo v. Agius (2012)**, the defendant murdered his wife and his children acting as the plaintiffs successfully won the case after the court declared the husband unworthy to inherit her. Through this judgement it was clarified that while this is a ground for

unworthiness that prohibits inheritance found under the section of the law dealing with testate succession, it equally applies to intestate succession pursuant to **Article 796** of the Civil Code.

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.

This second ground can be divided into three distinct section:

1. The person being deemed unworthy must have charged the testator or spouse before a competent authority.

   The first consideration to make is in relation to the word "*charged*". We are aware that in criminal proceedings, it is the Police or the Attorney General that issues a charge - an individual is never entitled to criminally charge or prosecute someone. The most they can do is report, reveal or disclose that a criminal act has or might have taken place. Therefore, charge must be understood in this sense: as a result of a person's actions, i.e. what they reported and testified, proceedings have been initiated against the testator or spouse. Here, the causal link between the reporting and the initiation of proceedings must be established - for unworthiness to arise there must be the direct action of the unworthy person.

   Additionally, we note that this report or statement must be made to a competent authority. This can include the police or the court.

2. The charge must be in relation to a crime punishable by imprisonment.

   Here, it is evident that the law requires it to be a crime as opposed to a contravention as the distinction between the two is clearly outlined in the Criminal Code.

   The report cannot relate to just anything. It must be in respect of a crime which a person can be imprisoned if convicted. The most common cases relate to molestation. Here, there is no requirement that the testator or spouse is accused is actually imprisoned. The person who makes such a report falsely satisfies the criteria to be deemed unworthy even if ultimately, the testator or spouse they accused isn't actually imprisoned.

3. The charge must have been made despite the person making it knowing that the testator or spouse was innocent.

   The criteria of innocent must be understood in two ways -

   - There must be the physical fact that the testator or spouse being accused is innocent.
   - There must be the mental belief that the beneficiary knew of such innocence and despite knowing of such innocence, made a false charge.

This has given rise to some debate.

We take into account the case of **Dr Chetcuti pro et noe v. Busuttil pro et noe (2018)**. This case is now pending appeal. A dispute arose between the children of a man's first and second marriage and since they live abroad, the case is being settled by their lawyers who have been appointed as curators. The man and his first wife used to live in London with their children. It resulted that one of the children asked the police to investigate the man for being violent towards his wife, i.e. their mother. Eventually, the British Police dismissed the report considering they felt there wasn't sufficient information and evidence to base proceedings on and therefore, no action was taken. Therefore, the report was followed up but was deemed to be unsubstantiated. Later, the man and his wife divorced and the man remarried in Malta and had more children. Following his death, a dispute arose as to whether the child who made the charge against her father was worthy of inheriting him or not, i.e. consideration was made as to whether she falsely accused him. The Court of First Instance firstly likened this ground of unworthiness with 'Calumnious Accusation' under **Article 101** of the Criminal Code:

> *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.*

Secondly, they outlined that for unworthiness to arise, the three requirements must be satisfied:

> *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*
>
> ---
>
> *From the definition of **Article 605(1)(b)** of the Civil Code, three element need to be satisfied in order for a person to be deemed unworthy to inherit, namely:*
>
> 1. *An accusation against the testator or spouse must be made before a competent authority;*
> 2. *Of a crime punishable by imprisonment;*
> 3. *When the person knows whom they accused to be innocent.*

Here, the court went into the issue of what a 'charge' is and whether it is necessary for this ground to be satisfied that the offender is actually charged before a criminal court. It was

noted that the mere making of a report through which proceedings could have been taken was what the law was envisaging in this regard. The court quoted from the criminal case **Police v. Giusti** where Professor Mamo was quote to confirm this understanding:

> *Il-Professur Mamo ighid:*
>
> > *Such crime is completed by the mere presentation of the information, report or complaint to the competent authority.*

However, even with such an explanation as the one given by the court, there remains an issue as to what happens when the police don't follow up. In this case, the court didn't go into that consideration because there was no proof that the person making the charge knew the father to be innocent (the child had reasons to believe that the father acted in the manner she accused him of and thus failed the third criteria of believing him to be innocent). On this basis the case was dismissed.

Compelled, or fraudulently induced the testator to make his will, or to make or alter any testamentary disposition - Article 605(1)(c)

The first consideration is the distinction between compelling and fraudulently inducing:

Compelling -

Fraudulent inducement arises when a person tricks or forces another into making a will or making a will in a specific way. An example of this is as follows: A Gozitan family was made up of a widow (W) who had two children: a girl (G) and a boy (B). She especially doted on B and used to live with him while the G got married and went to live on her own. After some time, B began to date and the mother became very jealous and angry resulting in a rift arising between the two of them. She eventually told him that if he didn't stop seeing his girlfriend she would move out and go to live with G. This ended up happening but G became very possessive of W not letting her go out or engage with many other people. When B came around to try and make amends with W, G wouldn't let him see her. At the same time, she convinced W that B was ignoring her as he didn't care about her, which wasn't the case. Eventually, W made a will cutting off B as a result of these false stories and W's true belief that B had abandoned her. The court concluded that there was fraud on the part of G who tricked W into making the will by creating a false version of reality.

When discussing fraudulent inducement, we note that sometimes, this ground is confused with the capacity to make a will, in the sense that it is assumed in such a situation that the person has a weak mind and as a result is unable to be aware of her surroundings, reason things out and communicate their wishes. However, it actually relates to a person who ends up making a will as a result of trickery or force as the person who makes the will in such cases is presumed to be capable. The will in and of itself is still valid and the question relates

to the unworthiness of the beneficiary. This is not to say that the two grounds are mutually exclusive as there can be a situation where a person was incapable and was fraudulently induced into making a will. In such scenarios, the court will be concurrently asked to examine this ground and the mental state and will power of the testator, yet there the primary question would relate to the validity of the will since if one is incapable of making a will, compulsion is not material due to lack of capacity.

In order for this ground to be satisfied it is essential that there be a link between the acts of the offender and the action by the testator. Therefore, a will must have been made or amended because the testator has been compelled to do so. Unworthiness is not present if an outsider compelled the will to be changed in favour of a beneficiary but it is the beneficiary themself who must have caused the compulsion or inducement.

Yet, interestingly, it is not necessary to prove the offender gained a benefit from the will. Say in the above situation the W didn't leave the portion of the inheritance earmarked for B to G but instead left it to her sister. G didn't gain any benefit from the will but as a result of her inducement the will was changed and it deviated from the original wishes of the testator. In such a case, because of the forcefulness and deception, even though her share of the inheritance remains unchanged, she will be deemed unworthy and not inherit anything at all.

In **Camilleri v. Camilleri (2018)** this was considered in relation to a secret will. The question arose as to 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. Firstly, it was acknowledged that people have different levels of resistance and awareness with some people being more fooled that others but that this doesn't render a person incapable of making a will. However, the court noted that woman in question had a weak mind and wasn't strong enough to resist the pressure placed on her by her son - while she wasn't incapable, because she was frail, she easily succumbed to the pressure.

> *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.*
>
> ---
>
> *The physical challenges faced by Antonia Camilleri, along with her age and vulnerability, were such that they created barriers to express her strong and determined will and unwavering desire or resistance to any suggestion, request, or occasional threat made by someone to alter her perception.*

This led to the conclusion that it is important to consider coercion and fraud contextually and subjectively in relation to the circumstances surrounding the testator and from their point of

view. Additionally, the court made it clear that in the case of unworthiness, the compulsion or inducement must be such as to deviate from the person's free will.

It was also noted that the fact the woman made a secret will and not a public will carried some weight when determining that coercion took place.

In **Camilleri v. Camilleri (1947)** judgement, it was noted that this can also work inversely in the sense that a person is unworthy if they compel or fraudulent induce another not to make a new will.

> *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*

> *In order to succeed in this action, it is necessary first and foremost to demonstrate that there was a clear and determined intent to either make a will or to change what had already been done. The actions then must involve coercion, either physical or moral, or deception, and these must be such as to prevent the testator from making the will.*

And in **Cachia v. Cachia (1957)**, the nature of fraud needed to satsify this criteria of unworthiness was qualified as needing to be "*unjust, serious and determinate.*"

> *…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.*

This is because, undoubtedly, there is a fine line between being 'smooth' and being fraudulent. With wills this tends to happen often because the question arises as to whether the person making the will was being tricked or whether they genuinely wanted to leave a person who visits them in their will. Every care, encouragement, attention, suggestion, or insistence that is not accompanied by deceitful manipulative techniques, does not constitute coercion. In cases of doubt, capacity prevails: one is presumed to be entitled to inherit with others having the burden of proof to demonstrate that the beneficiary in some way tricked the testator. Thus:

> *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.*

> *For the coercion to succeed, it must be shown that the testator's will was influenced due to coercion and that the testator did not have the control over it as they would have had if it hadn't been for the coercion exerted upon them.*

Here, we consider violence and note that it does not require fear capable of influencing a strong man; it is enough that the facts are such that it can be deduced that the testator did not dispose of his full will, or that the violence produced a coercion capable of obliging the testator to do what he would not have wanted.

Prevented the testator from making a new will, or from revoking the will already made, or suppressed, falsified, or fraudulently concealed the will - Article 605(1)(d)

Here, there are two distinct scenarios to take into account. Either the beneficiary:

1. Prevents a testator from expressing their wishes; or
2. Does any of the following to a will -
    a. Suppresses
    b. Falsifies
    c. Fraudulently conceals

Here, the EU Regulation 650/2012 regulating successions with a cross-border element is important.

Rehabilitation

As noted, when dealing with unworthiness, this is something that is raised by heirs against other heirs and has nothing to do with the testator who in fact may not even be aware of the circumstances leading to one of their beneficiaries to be deemed unworthy. However, there are situations where the testator is aware that an heir did something that would render them unworthy. Here, there are three options:

1. Either the testator moves to disinherit them and exclude them from the will.
2. Or the testator does nothing about the situation leaving it up the remaining heirs to raise unworthiness.
3. Or the testator could decide to make amends with the person that could be deemed unworthy to inherit upon his death. This is known as the rehabilitation of the offender.

The process of rehabilitation is contained under **Article 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.*

This article deems that if an heir is at law able to be deemed unworthy but the testator wishes to forgive him, he must do so by means of a public deed or a will. Therefore, a private writing or a letter is insufficient in this regard with the law providing significant clarity in this regard. Forgiveness for an act that would render one unworthy for the purposes of inheritance can only be shown through a will or public deed.

The wording of the law specifies that such a person "*may receive by will*". Here we note that the "*may*" is not facultative - there may be other instances besides this - but must be interpreted as giving the power or the entitlement of the unworthy person to receive. This is the only situation through which an unworthy person may benefit if their right to inheritance is challenged by another heir, otherwise they will be precluded from receiving. If their right isn't challenged then even without such a document they will inherit.

Other Consequences of Unworthiness

Article 607 stipulates other consequences to a person being found unworthy:

> *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.*

Since there may be a delay or a time lag between when a person passes away resulting in the succession being opened and a court judgement, it could be that the beneficiary is already in possession of the object. In such a scenario, upon being found unworthy, the person loses entitlement to the object or to the money and must restore any fruits or income that has been received. This was outlined in the case **Abela v. Cassar (2021).**

We also consider what happens if the unworthy person takes possession of estate without objection from other heirs, specifically whether an act of an heir is equivalent to their renunciation of challenging unworthiness. Taking the following example:

> Imagine Person A died and left two heirs in equal share in their will, Heir B and Heir C. Let's say objectively Heir B satisfies grounds of unworthiness. Heir C divides the property 50/50 according to the will, takes their share and leaves the remaining share to Heir B. We question whether in doing so, Heir C (being the innocent heir) renounced the right to challenge unworthiness.

This takes us to the institution of the tacit renunciation of a right. In order to have been deemed to have renounced to a right tacitly, such renunciation must be clear and unequivocal with one's actions following such renunciation needing to be consistent. Therefore, to truly renounce the right to challenge unworthiness, Heir C would have to act and consider themself to be the owner of the 50%. By taking their half and suing the heir for unworthiness, it is clear that the right has not been renounced.

The judgement **Cutajar v. Cutajar (2003)** deals with renunciation. In this case, one of the siblings challenged the validity of the will. To do so, he had to renounce his inheritance. The challenge was successful and the latest will was annulled and the previous will came into force under which all children were equal. A second case was subsequently filed where the sibling in question argued that just because he renounced the inheritance under the will he challenged that was annulled, doesn't mean he renounces to the inheritance under the previous will since the circumstances had changed. The court agreed that the renunciation was based off a set of facts which had changed and that therefore, he was entitled to inherit without any problems.

> *Biex din id-difiza jew att taghhom kellu jitqies [rinunzja] 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.*
>
> ---
>
> *For this defence or act of theirs to be considered [renunciation], there must be implicit acceptance. This must be so clear that it can only necessarily and unambiguously mean that no other consequence could be inferred from it except that the one who did it intended to accept the inheritance.*

A similar situation also arose in **Dr Chetcuti pro et noe v. Dr Mark Busuttil pro et noe (2018)** which is currently in appeal dealing with a similar issue.

Article 608 outlines the harsh consequences of being deemed unworthy:

> *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.*

This demonstrates that a person who is deemed unworthy cannot benefit even slightly from the will and they lose all their entitlement from the estate. However, the children of the unworthy individual have a right to claim the Reserved Portion (if it exists) and if such an individual has no children them it is lost. It further notes that even when the children inherit under the will, the unworthy person cannot exercise administration rights or usufructuary rights over the property even if they are minors.

Tutors and Curators

Tutors and curators are incapable of inheriting at law in accordance with **Article 609**:

> *A tutor or curator cannot benefit under a will made during the tutorship or curatorship by the person under his charge.*

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.

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.

This notes that tutors and curators cannot benefit under a will of someone they're looking after, i.e. a person under their charge. Additionally, if a person is rehabilitated, and the tutorship or curatorship has finished, the inability for them to receive persists until they have rendered their accounts to the Court of Voluntary Jurisdiction as they are bound to do at law. This provides a record of their actions in relation to the assets under their control that the court must approve the administration of.

The only exception to this rule is if a tutor or curator is an ascendant, descendant, sibling, aunt or uncle, nephew or niece, cousin or spouse od the person making the will. This is because at law, there is a presumption that these are the people bound to help when in need that have an obligation because of blood and family relationships. They are the obvious people who would inherit another and thus remain entitled to do so.

Therefore, it can be concluded that this is a temporary form of incapacity, as per **Article 609** until the person is no longer serving as a tutor or curator. The key moment to judge this incapacity is the moment when the will was made - a tutor or curator is eligible to receive if the will was drawn up following their disengagement from the position. If, conversely, it was drawn up while the testator was still a ward, there is the risk of abuse and desperation since the ward could have no ability to control their own money and is under pressure by the tutor or curator to leave them as beneficiaries. To avoid undue influence being a factor then wills made while the ward was still under tutorship or curatorship will see the tutor or curator excluded from receiving.

This continues to apply if one makes a will when under tutelage or curatorship making them beneficiaries and doesn't alter it after that situation has changed. If an individual is under someone's tutelage, they are not necessarily interdicted but may be incapacitated to a certain extent, although not to the degree that prohibits them from making a will. If they create a will during this period and allocate significant benefits to their tutor, who is unrelated to them, later regaining full capacity doesn't alter the significance of the will if ample opportunities were available to amend it but were not taken. The initial impediment at the time of making the will persists despite any subsequent change in circumstances.

Furthermore, we take into account the fact that not all types of curators are prohibited to inherit. One to manage his affairs and not merely a curator ad litem.

Persons Assisting in Drawing Up The Will

This applies to both public and secret wills and notes that there exists incapacity in relation to those people who assist in making the will, namely the notary in public wills and the person who has written out the will in terms of secret wills. The exclusion also extends to the spouses of such persons and those related by consanguinity or affinity up to the third degree.

This is contained in **Article 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 also exists an issue in relation to witnesses. If a person is going to benefit from a will either as an heir or legatee, then they cannot act as witnesses and nor can their relatives. Doing so would render the will null. In fact, in **Trapani v. Hili (2000)**, an issue arose because the husband of a legatee named in the will acted as a witness. The court nullified the will and this decision was then confirmed on appeal.

As outlined in **Article 610**, the law only makes an exception in terms of trusts. If the will sets up a trust, the notary who has drawn up the will is not precluded from being a trustee, i.e. the person with the management and control of the assets and who has powers as an owner as regulated by the trust deed itself. Aside from this

- The notary, their spouse and relatives;
- The person who drafted a secret will, their spouse and relatives;
- Witnesses and their spouse and relatives;

are excluded from benefitting.

Exclusions in Relation to Privileged Wills

As noted there are special extraordinary circumstances that enable a person to draft a will without the requirements that are generally necessary *ad validitatem*. These are known as privileged wills. However, there are some exceptions that the law caters for in this regard also:

In case there is a will made at sea, no member of the crew including the captain is allowed to benefit for such a will. This is extended also to encapsulate crew members' parents, children, descendants or spouse. This is because the possibility of getting away from the ship and the people on it is remote and incidents can occur with one's freedom being restricted including situations where one feels dependent on the crew. This could result in the testator feeling

pressured in creating a will benefitting a crew member. Therefore, irrespective of any evidence brought to the contrary, since the will is made at sea it cannot benefit a crew member.

This is outlined via **Article 681**:

> *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.*
>
> *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.*

NB. There is nothing precluding a person from returning to land and making a public or a secret will benefiting the crew member but this must be done on land.

Persons Rendered Incapable as a result of a Condition in the Will

Some people can be rendered incapable as a result of a condition in the will itself. For example, a testator can specify that only certain types of people can inherit him as a condition in the will. This serves to limit those capable of inheriting. Only these types of people will inherit me as a condition in the will. A condition can be put in the will to limit who is capable of inheriting. This was noted in **Abela v. Cassar (2021)**.

Intermediaries

In this regard, we turn to **Article 612** and **Article 613** which note that:

> *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.*
>
> *Where the incapacity is partial any such disposition shall be void only in part.*
>
> ---
>
> *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.*

Here, the law looks at a situation where the court is empowered to go beyond appearances in the sense that if someone is considered to be an intermediary (i.e. a front for someone else), this intermediary cannot inherit the testator unless, as noted in **Article 613** they are related to the degree prescribed by that article. Spouses are presumed to be intermediaries.

We take into account the *contra scriptum testimonium non scriptum non fertur* principle which argues that unwritten testimony is not admissible against written testimony but note

that this is not an absolute principle and the court is empowered to look behind appearances. This was discussed in **Morana v. Dr Spiteri et**.

Realistically, these situations are far-fetched and don't arise in judgements - they are unusual and rare occurrences.

This is more of a control on the Testator trying to go round the impediments of **Article 609** and **610** (Curators, Tutors and Notary Public).

Reserved Portion

When considering which areas of the law of succession create the most issue and lead to the most instances of litigation, we consider unica charta wills and the Reserved Portion. The Reserved Portion is delicate in its nature because in and of itself touches people who are in a very vulnerable moment and where personal sentiments between themselves, the deceased and often their siblings are brought prominently to the fore.

We question why the law so ardently protects the Reserved Portion when it causes so much uncertainty and so many issues. Caruana Galizia argues that the underlying reason behind the Reserved Portion, and in turn why it is protected, is because the person who is making the will owes a duty of maintenance, care and support to the members of their family and must minimally provide for them.

> *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.*

The members of the family owed this duty are:

1. Descendants
2. Spouse

In the past, there also existed an obligation towards ascendants but this changed in 2004 and is now limited to children and spouses.

Because the aforementioned duty of maintenance, care and support is so strong, the law reserves a minimum portion of the *de cujus'* estate for such members of the family. This reservation at law overrides and trumps anything stated in any will and any donation made during the *de cujus'* lifetime. This indicates the extent to which it is protected as it infringes upon the freedom to dispose *jus abutendi jus fruendi*, i.e. the absoluteness of the right of ownership to do what one likes with their property guaranteed under **Article 320** is restricted vis-a-vis inheritance because of the notion of the Reserved Portion. AS we shall see, the protection is so great that the Reserved Portion is paid ahead of anything else.

While in other jurisdictions the Reserved Portion may be even more prominent with even greater protections, such as under Sharia law, there are others where this is a very limited or practically non-existent right, such as in the UK.

Understanding the Reserved Portion

The key article establishing the idea of the Reserved Portion is **Article 614**:

> *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.*
>
> *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 descendant or spouse under any of the provisions of **Articles 615** to **653**.*

Sub-article 1 firstly notes that if a person has no spouse or descendants (i.e. people in whose favour the law protects the Reserved Portion as a minimum right), then such a person is free to dispose of their estate any way they wish to any person capable of receiving. Therefore, there is no restriction either on the quantum or on the beneficiary. This indicates that parents, other ascendants and siblings are not entitled at law to receive anything from the estate. This is to be examined at the moment of death and recognises the absoluteness of the right to ownership.

However, by virtue of sub-article 2, once it is ascertained whether the person had a spouse or children then the issue of the Reserved Portion comes into play. This consideration is made upon the moment of death and not when any will may have been drafted:

> At the moment of the person's passing, did they have a spouse who is alive? If yes, then such spouse is entitled to claim the Reserved Portion.
>
> At the moment of the person's passing, did they have children who are alive? If yes, then such children are entitled to claim the Reserved Portion.
>
> At the moment of the person's passing, if they had children who predeceased them, did they have grandchildren who are alive? If yes, then such grandchildren are entitled to claim the Reserved Portion.

Sub-article 2 also makes a distinction between:

1. The disposable portion of the estate, which is the portion free from restrictions; and
2. The non-disposable portion of the estate, which is the portion reserved by law to the spouse/descendants.

The two portions are fictitiously calculated and we shall examine what property is taken into consideration and how it is calculated.

From this preliminary understanding, we note that the Reserved Portion consists in two limitations:

- Limitation as to the person, i.e. the beneficiary of the inheritance. If there is a spouse and if there are children, then there is the Reserved Portion they are entitled to claim.
- Limitation as to the percentage, i.e. the quantum. Understandably, the entire inheritance isn't reserved with there being special calculations to determine the percentage of the estate one is able to claim as the Reserved Portion, depending on the entitled's relationship with the deceased.

In this regard, we turn to the judgement **Wismayer v. Wismayer (1950)**:

> *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.*

> *That the absolute right of the disposition of the property is limited by the faculty of any disposition with a gratuitous title, when the disposer has left certain relatives surviving. In this sense, the human capacity to dispose by will is not unlimited, because the de cujus cannot dispose of all the goods, but only part of them. In other words, apart from the limitation regarding certain persons, the capacity and faculty of the dispositions by means of acts of last will is also limited to the quantity of the goods.*

Therefore, as noted in **Vella v. Barbara (2007)**, no matter how the testator makes out his will, the spouse and children will always be entitled to the Reserved Portion:

> *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".*

> *This means that, regardless of the way the testator disposes of his wealth after his death, the descendant is always entitled to that share so called "legitima portio".*

Article 615 provides further explanation as to the technicalities of the Reserved Portion:

> *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.*
>
> *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****.*

Therefore, the Reserved Portion is a limitation imposed by law applying to both testate and intestate succession that can override the wishes of the testator that spouses and children are entitled to claim.

We question how the right to a reserved portion applies if there is no will and the law outlined how much one ought to receive through inheritance *ab intestato*. The reason for this is that there may be a will with many legacies and no appointment of an heir to inherit the remainder of the universality. In such a case the law of intestate succession applies to select an heir by operation of law but since most of the estate has been given away through gifts, the heir may want to renounce the inheritance and simply claim Reserved Portion. For example, a testator leaves Child A lovely gifts by naming them a legatee in their will. Child B is not left any gifts and received very little compared to the Sibling A. Even though Child B by virtue of the law of intestate succession will be named an heir, nonetheless, they may prefer to renounce to the inheritance and claim the Reserved Portion. This similarly can apply if throughout the lifetime of the testator, many donations were made and very little is left in the patrimony.

However, we also take into consideration that a person entitled to claim Reserved Portion doesn't need to necessarily be regarded unfavourably, either in the will or through operation of law surrounding the inheritance. An entitled person can even claim the Reserved Portion if there is a benefit in their favour in the will but, after doing the calculations, it is more worth it to accept the Reserved Portion. In this regard, spouses and children must look at the total assets they would inherit normally (by virtue of the will or intestate succession) and see whether one would be getting more or less by claiming the Reserved Portion. This is important because to claim the Reserved Portion one must necessarily renounce to the inheritance left by the *de cujus*. One is either an heir that accepts everything as is, or else they renounce to the inheritance and reserve the right to the Reserved Portion.

Thus, being an heir and claiming the Reserved Portion don't sit together. By claiming the Reserved Portion, one is renouncing to being an heir automatically. It is important to note that together with the Deed of Renunciation, one must reserve the right to the Reserved Portion, otherwise it cannot be claimed and the right will be lost. Note that such a right isn't inherited going down the line to one's children if the person forgot to reserve their right to it and therefore, it will be lost.

Here we, take into account the judgement of **Debono v. Licari (1954)** and also consider **Article 861** and **Article 862** that respectively speak about renunciation to an inheritance and reserving such a right.

Reserved Portion pre-2004: Legitim

Prior to 2004, the Reserved Portion was known as the legitim and it consisted of a single share of every item forming part of the inheritance. Therefore, if Person A's legitim was 1/9th of the entire estate, that meant that Person A was entitled to 1/9th of everything in the inheritance calculated as a portion of every single item therein. This is known as *pars bonorum* which means part of many goods or things forming part of the inheritance.

In **Wismayer v. Wismayer (1950)**, the following was stated with regards to the legitim where it was noted that it didn't entitle the person claiming the legitim to claim any specific item only a quota of the entire estate:

> *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.*

> *The letigim according to our laws is only a quota of the property left by the decedent; and therefore this person can dispose as he wants of his goods, without distinction of their species, but only with the limitation of the quantity. That is to say that as long as the decedent does not exceed the available quota he is not obliged to leave to the legitimate a certain type of property.*

Thus, when someone claimed the legitim it was a problem because the division of the inheritance got stuck as the person claiming the legitim had a right to be paid in kind and one wouldn't know which part or parts such a person claiming would get until a judgement is pronounced outlining such or until an agreement has been reached amongst all the concerned parties. Until then, the situation is open and any object could be granted to the person claiming the legitim.

This one one of the major problems created.

In 2004, the situation was changed and the legitim became the Reserved Portion. With this change in name came a change in meaning. As opposed to the right to claim a part of every single item of the inheritance depending on the share, the individual claiming the Reserved Portion has the right to be paid in money as a credit. Because of this change into a credit, the concept of the Reserved Portion has changed entirely.

Reserved Portion post-2004: Reserved Portion as a Credit

As noted, following the 2004 amendments, the Reserved Portion became a credit to be paid in money unless the parties agree otherwise. This can happen as in the following case:

In **Ellul v. Axiaq (2012)**, the plaintiff sued for the Reserved Portion. An issue arose as 90% of the assets were immovable property of substantial value with there being very little liquidity. The property was valued and an amount was established as a credit to be paid to the plaintiff. Another problem that arose is the right to interest. By law, the person claiming the Reserved Portion may be awarded interests. While this is not a guarantee with the court having discretion in this regard, in this case, it was found that the plaintiff was entitled to such interests. However, the defendant heir stated that he was not in a financial position to pay the Reserved Portion in money or pay any owelty of substance and thus, an issue arose as to how the credit was to be paid. Normally in such a scenario, the court would order the heirs to pay and if they are unable to do so, the assets in the estate inherited would be liquidated in order to settle such payment as payment generally must be effected in money. However, in this case, the plaintiff and defendant agreed to settle the amount owed through a transfer of property, i.e. immovable property would be given in settlement of the Reserved Portion. Since it happened that the value of the property was greater than what the plaintiff was entitled to under the Reserved Portion then he had to pay the difference back. This shows that the Reserved Portion need not only be settled in money but can be settled through other means should there be the agreement of the heirs and the person claiming the Reserved Portion. If no agreement is reached, the court doesn't have the power to award property in kind since the default situation is credit.

This notion of payment as a credit in money as opposed to in kind can also be emphasised by a recent claim for Reserved Portion dealt with by Judge Mangion. In this case, the court calculated the amount due and ordered the defendant heir to pay it within a stipulated period of time. However, it also ordered that should the amount not be paid, the property forming part of the estate would need to be sold in order to satisfy the claims. Thus, the heirs were given the option either to pay in money from their coffers but if such wasn't possible in the time period stipulated that the inherited property would be sold to make good for this claim.

Since the property is being paid as a credit, it is important to establish the moment at which the estate is valued for such purposes, i.e. the *punctum temporis*. The main contenders are

1. The moment of the opening of succession - the time of death of the *de cujus*;
2. The moment of liquidation and payment of the Reserved Portion - the time when the judgement is decided.

The impact of the change between being paid in kind or in credit is significant when taking into consideration this question.

If one is paid in kind, the value isn't of too much importance as whether it is measured twenty years ago or today, what is being received remains a share of the entire thing with everything being value the same way as a fraction of a whole.

However, if one is being paid as a credit in money and there is a time lag between the date of death and the date the object is received, then one is not being compensated for any increase in value that may have taken place in the interim. When one is paid in kind the value goes to the beneficiary but this is likely not the case when one is paid as a credit in money and it can create an imbalance. Judgements in this regard are conflicting.

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.

Valuation of the Estate for the Purposes of Calculating the Reserved Portion - Stage 1

To value the estate for the purposes of the Reserved Portion, firstly the Reserved Portion itself must be established. The date considered here is the date of the opening of succession, i.e. when the *de cujus* has died. That is the moment when one takes stock to see if the minimum provisions of the Reserved Portion have or haven't been satisfied by the inheritance, either testate or intestate, or whether they have been exceeded - whether the person has left sufficient assets as required by law for the spouse and the descendants. As shall be regarded, the spouse is entitled to 1/4th of the estate and children are entitled to 1/3rd of the estate, unless there are five or more children, in which case they are entitled to 1/2 of the estate. This is done by considering whether the *de cujus* has given out too many gifts or legacies and has exceeded the disposable portion in relation to the total value of the estate. As we shall regard, the law anticipates the various ruses that can be employed by testators to reduce the Reserved Portion, both *inter vivos* and *causa mortis*.

What is taken into consideration for the purposes of valuing the estate?

Here, we regard, *inter alia* **Article 620**:

1. Assets of the *de cujus*

   This includes the entire property whatever its nature – movable or immovable, corporeal or incorporeal. Here, we keep in mind, as shall be seen, that donations made must be fictitiously added up.

2. Donations and Legacies

These are to be included, no matter their nature. When dealing with remuneratory legacies, however, the “service” however is considered as a liability as shall be seen:

We question whether this includes remuneratory legacies which refer to gifts for compensation of services rendered in the will. This is a pertinent question as this mechanism is one of the most common means through which testators have tried to circumvent the right to the Reserved Portion by granting heavily remunerated gifts for services rendered. Generally speaking, if there is a liability, it is deducted from the estate. Therefore, if there is a debt acknowledged, it is deducted with the heirs needing to pay it as a recognised liability. In the case of a gift for services rendered, the heirs have to pay it but the question is raised: what if the person is getting more than the service is worth to impact and circumvent the Reserved Portion. Here, the court will give validity to or acknowledge the liability in principle but will also examine the nature and extent of the service determining how long the service was provided for, what type of service was provided for and what the service entailed. Once such is valued, the court will give a bit of leeway and determine the final value of the service which would then be considered a liability on the estate. The difference is considered to be a gift and will be valued in relation to the Reserved Portion. This was determined in **Cortis v. Dottrin (1880)**; **Falzon v. Falzon (2009)**; **Bonello v. Bonello (2013)**. In the 2009 case, the parents had donated a house to one of the daughters who was unmarried and looked after her parents all their life as a thank you for the service. The house was worth Lm80,000 and services was worth Lm20,000. There was a liability to the estate of Lm20,000 to account for the services rendered but the remaining Lm60,000 were put in the bulk of the estate to be accounted for.

3. Simulated sale or agreement

   When dealing with a simulation, we note we are dealing with something that looks like one thing but is in fact another. We note that this doesn’t necessarily render the agreement null. Especially in Malta, this often happens when a contract of sale simulates a donation. Some donations may be disguised such as when property is sole for an irrisory consideration or where one has remitted a debt. If the value doesn’t reflect the object, up to the cost of the sale it is a sale, but beyond that it is considered to be a donation. People have resorted to simulated agreements to hide the actual extent of the assets, but the court will look behind appearances and take head of the extent to which the contract is a donation. The part which is considered to be a donation will be calculated into the estate.

   Another simulation would be to sell for an amount but the actual amount never goes into one’s patrimony. When looking at this situation one has to examine all the circumstances.

These are taken into account if they can be proved as noted in the following judgements: **Farrugia v. Farrugia (1936)**; **Dr Chris Said noe v. Mary Abela (2008)**.

4. Income from Leases

   Here, there is no *carte blanche* indicating that they are valid. The individual circumstances of the case would have to be taken into consideration. However, leases generating income have a value and would be taken into consideration.

5. Life Insurance Policies

   There are various life insurance policies to take into consideration. There exist pure life insurance policy which will only be paid upon a person's death, where if a person doesn't pay their premium for a year, the policy is stopped and nothing is received. There also exist life insurance policies with profits where every year, the value of the policy is worth so much and if one stops paying then it will only be worth that amount. We note that the profits must be considered as part of the estate. However, a pure life policy, as long as one is alive, is worthless and has no value, especially since it cannot be sold or traded.

   Since the payout of a pure life insurance policy takes place after death and during a person's lifetime there is no way to force the insurance company to pay, then strictly speaking, the policy is not part of the patrimony of the person who has died. Yet, case law has established that life insurance policies are also valued. When the payout occurs, such a payout is taken into consideration.

6. Liabilities.

   We question whether all liabilities are taken into consideration for such purposes? Generally, all debts owed to or by the heirs or legatees are taken into account, but we keep in mind some exceptions:

   > Bad debts are those debts a person gives up trying to enforce that are ultimately written off. Situations where this arises are delicate. If the debt is acknowledged after the person passes away, the acknowledgement removes any prescriptive period because through acknowledgement one waives the defence of prescription. If the debt is not acknowledged then it won't be paid as it is time barred. When valuing the estate and examining whether bad debts are taken into consideration, we have to look at the circumstances and be realistic. Are they due and will they be paid? If the debt listed is just a paper amount meant to reduce a person's claim to the Reserved Portion it should not be considered and in this regard, the court will take a realistic approach.
   >
   > Funeral expenses are always counted even though they arise after death. With reference to bequests made for the repose of the soul, according to Caruana Galizia, as long as these bequests are not excessive they are deducted from the estate they are

valid. The courts say this is a belief that a person held (justified) and right that he thinks of these things making it a justified liability.

Maintenance expenses are not counted. If the testator has a minor child to support and the will has made provisions for this minor child, since the obligation is one arising from law then the expense is not deducted. While such is an obligation that follows the estate, it is not an amount that will be deducted for the purposes of calculating the Reserved Portion.

7. Usufruct and Life Annuities

Usufruct is the right to use and enjoy the fruits that terminate upon a person's death, or if given to a legal person is valid for up to thirty years. If in the will, one has a legacy of a usufruct or a life annuity, the person has a choice, as opposed to the general rule that will be outlined that a person is bound to accept the legacy. One can choose whether or not to accept the usufruct or life annuity and if one takes it, the object is not valued for the purpose of collecting the Reserved Portion as it is making good for the part of the inheritance. The reason being is because it is difficult to value a usufruct or a life annuity because they are alleatory agreements dependent on an uncertain event - one that will happen but one is not sure when.

In terms of valuation for the purpose of succession tax, the law provides a chart with the older one is, the lower the value for taxation. In real life one can't be sure on the valuation so to avoid this difficulty, the law says that if one opts to take the annuity or usufruct, that object is not valued for the purposes of calculating the Reserved Portion and one will only get the usufruct or the life annuity.

If one chooses not to take it, then it will be valued. legat

Sometimes, this choice can be difficult and it is something only the person presented with the choice can make. Imagine, for example, one is left a mansion they are entitled to enjoy to the fullest extent, but they live alone and have no use for all the space. The heirs cannot tell the person claiming the Reserved Portion that they don't need it or alternatively that they do need it and the choice can only be made by the person who has been left the usufruct depending on the value of the estate, the nature of the property, the age of the person, their lifestyle and their expectations as an exclusive choice.

Take the following example into account: The choice is between accepting the usufruct of a small one-bedroom apartment worth €200,000 when the rest of the estate is worth €800,000. This may be seen as acceptable. If the situation were reversed and the apartment was worth €800,000, the person might question whether they would be better off with the money after calculating the credit that would be owed if they refuse the usufruct.

Here, we consider **Article 621**:

> *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.*
>
> *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.*

In the case **Calleja v. Ciantar (1949)**, the person chose the usufruct and the court said this was the person's "*arbitrary choice*". The word arbitrary choice is interesting. Arbitrary means one can be as unreasonable as one likes. The courts don't have the power to examine why one decided to take or not take the usufruct.

Once the estate is established, there is the need to calculate the disposable and non-disposable portions of the estate at the date of death. To do so, the court will fictitiously recompose the value of the estate: if there were any donations made in the testator's lifetime, those are fictitiously entered into the estate and are valued. While there is contention as to how these donations are valued, whether the date taken is the value of the date when the exercise is happening or the date when the donation is actually made, the correct interpretation is the date when the donation is made.

Once the estate is valued, (whatever is left at the date of death plus any donations made during the *de cujus'* lifetime fictitiously brought back into the estate) one sees who is claiming the Reserved Portion, be it the spouse, the children or even one of the children. Following, one must check whether the testator has left sufficient funds in the non-disposable portion to satisfy the claims or whether they have given more gifts then they are entitled to. If there aren't sufficient assets, it means the person has given more than he could have given, thereby compromising the non-disposable portion.

Take the following example:

> Spouse A dies leaving an estate valued at €100,000. Considering the minimum standards set by the Reserved Portion, the spouse, Spouse B, has a right to claim a guaranteed €25,000 as 1/4th of the estate. This couple had three children, Persons X, Y and Z. Each are entitled by virtue of the minimum amount set by the Reserved Portion to receive 1/3rd of €33,000, i.e. €11,000 each.

This allows us to distinguish between the disposable and non-disposable portion's of Spouse A's estate. The non-disposable portion amounts to €58,000, and includes the €25,000 due to Spouse B and the €33,000 due to their three children. This means that if gifts and donations have been given by Spouse A in excess of €42,000 (i.e. the disposable portion of the estate), the non-disposable portion has been exceeded which is not allowed. Note that this doesn't refer to the appointment of an heir. On the other hand, if there are no gifts or donations given, then there is no breach such that the estate is in tact.

As noted, the issue arises when so many gifts are given in the will or during a person's lifetime that that what is left to give to the heirs eats into the non-disposable portion. As established, the moment that this is valued is the moment the *de cujus* dies when the estate and the legacies are valued. At this junction, one determines whether there is sufficient estate left to pay the minimum portion reserved by law.

Building upon the previous example, it was noted that €58,000 is the non-disposable portion, i.e. the amount that has been reserved, and €42,000 is the amount that can be disposed of through legacies etc. Let's say that in their will, Spouse A left nothing to Spouse B, left €50,000 to their favour child Person X and appointed all three children as heirs in equal shares. This would result in each child receiving around €16,600 as heirs of the estate (1/3rd of €50,000). Therefore, the children would be receiving more than the minimum amount set out through the Reserved Portion which makes this will favourable to them. However, Spouse B can contest being left nothing as it is clear that they are entitled to more. Since Spouse A could only dispose of €42,000 but left Person X a gift of €50,000, then the non-disposable portion has been eaten into with there not being enough to pay. The result of this is that the €50,000 given as a gift must make good in part the claim of Spouse B on the basis of the minimum amounts set forth in the Reserved Portion.

As was the case in this example, the assets left were insufficient to cover the minimum claims of those entitled to the Reserved Portion, thus, Spouse A compromised the non-disposable portion. To remedy this, a mechanism will kick in relation to the value of the donations made and legacies gifted in order to ensure that the Reserved Portion is guaranteed:

The valuation for the purposes of this exercise vis-a-vis what is left in the estate (the *relictus*) is dependent on the value of the estate at the opening of succession.

The valuation for the purposes of this exercise vis-a-vis donations is dependent on the value of the donations at the opening of succession, as highlighted by case law, including **Mifsud v. Mizzi (1973)** and **Calleja v. Grima**. While there were some who argued that donations ought to be valued as at the date of donation, this is not the standard practise.

Ultimately everything is brought back into the estate and a value is determined to see whether the non-disposable portion has been compromised.

Therefore, the rule when it comes to the valuation of one's credit/the Reserved Portion in Stage 1 is that the estate of the deceased is valued as at the date of opening of succession. The conclusion of this Stage enables one to conclusively determine whether or not the disposable portion has been exceeded.

Liquidation of the Estate - Stage 2

Through this stage, it is determined how much one will get paid when they claim the Reserved Portion, i.e. how the estate is valued.

As touched upon, since the payment of the Reserved Portion is as a credit in kind, the fact that the valuation is done at the date of opening of succession can cause a problem. Especially with property prices increasing sharply, the value date can make a substantial difference in estimating the Reserved Portion. Take the following example into account:

> In his will, the testator left a house worth €250,000 to Child A and appointed all 5 of this children as heirs. If the value of the estate at death is taken, in 2012, it amounts to €300,000 - €250,000 the house plus €50,000 movable assets. Considering there were 5 children, the non-disposable portion ought to have been €150,000 (1/2 of the estate), which the testator definitely compromised. If one of the children claimed the Reserved Portion, this is what the difference in valuation would have amounted to comparing calculating the amount in 2012 v. 2024 when the case is taking place when the house is worth €1,000,000:
>
> Possibility A: ½ x 1/5 of €300,000 = **€30,000**
>
> Possibility B: ½ x 1/5 of €1,000,000 + €50,000 = **€105,000**

This issue was examined in the case of **Mifsud v. Mizzi (1973)** and more recently in **Vella v. Vella et (2016)**.

The former judgement was decided by Judge Caruana Curran and became the recognised jurisprudence questioning how valuing a letigim is to be carried out. It was claimed that the court must carry out two valuation exercises:

1. It firstly outlined the aforementioned Stage 1 and noted that one must establish whether the disposable portion has been eaten into or not, i.e. whether it has been compromised or not following a valuation of the estate as a whole. It was further noted that the date used to consider this is the date of opening of succession.

   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.

That for the valuation of the property in connection with the determination of the legitimate portion, and for the reconstruction of the whole estate of the decedent, one must refer himself to the values at the time of the opening of the succession.

2. Secondly, it moved to discuss the valuation of the estate as Stage 2 to determine how much the person claiming the Reserved Portion is entitled to. It was highlighted that when it actually comes to paying the legitim, the value date must be as close as possible to the court judgement - the date of liquidation of the estate. The reason behind given was because the legitim is payable in kind and once a person is entitled to be paid in kind as a portion of the objects forming part of the entire inheritance, what will be received ought to be revalued at the moment the distribution has taken place. Therefore, if ten years have passed and values have changed, one must carry out a valuation as at ten years later so that if the person's share is worth 1/9th of the whole, they will receive 1/9th of the whole as it stands today.

   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.

   That when a legitim is not satisfied and dealing with goods in kind the right of the legitimate has as object "un bene reale" and the "aestimatoria rei" must be referred to the time of the conversion, and that in the time of - as close as possible to the judicial pronunciation.

   In relation to donations, there is a debate and there is conflicting case law. There is case law arguing that donations should be valued as at the date of opening of succession and case law arguing that it should be valued at date of liquidation of the estate. This will depend whether one is arguing on behalf of the plaintiff or defendant and what is more favourable for their situation as well as the merits brought forward considering the elasticity of the law.

This two-way valuation system has created headaches, confusion and misinterpretation - even judgements that quote it present difficulty in understanding it. In fact, Dr Borg Costanzi considers it to be incorrect on the basis of the the profound conceptual differences that exist between a legitim and the Reserved Portion. As noted, a legitim is a *pars bonorum*, i.e. a part of the estate calculated as defined objects as the payment is effected in kind. Thus, it makes sense and is logical to value all the kinds with one ruler at the date that they will be distributed. For example, if Person A is entitled to receive a plot of land for the satisfaction of their legitim, it is logical to value the plot in conjunction with what the entirely of the inheritance is worth at the time when it is being distributed. On the other hand, the Reserved

Portion is not a *pars bonorum* since it is considered as a credit/a sum of money. He stated that when the law was changed from legitim to the Reserved Portion (a credit to be paid in money), the value date should have changed as the date of opening of succession. This is because this sum of money isn't a part of the inheritance but something liquid that can also include interests, presumably to make up for delays in the receipt of the credit in line with the Civil Code on tort which argues that if a person has been deprived of the use of their money, damages are equivalent to 8%.

However, the courts have not agreed with the line of thinking that valuation should be done as at date of opening of succession, tending to adopt the same old principles as before with the value date being the date of liquidation of the estate. In fact, recent case law in the form of **Vella v. Vella et (2016)** and **Calleja v. Grima**, have continued to carry out two valuations after establishing entitlement to claim the Reserved Portion and the quota such a person is entitled to receive:

1. Stage 1, where the estate is valued at the moment succession is opened; and
2. Stage 2 where the distribution value is calculated as close as possible to the actual distribution itself.

This continues to be done on the strength of the **Mifsud v. Mizzi (1973)** case.

The conclusion of this Stage enables one to determine the amount the person claiming the Reserved Portion is entitled to receive.

Abatement - Stage 3

There is also a third step to consider, that of abatement. This is very important with reference to the manner in which the Reserved Portion is paid out and is only applicable in circumstances when the Reserved Portion has been claimed. If the Reserved Portion has not been claimed, then abatement cannot feature.

Understandably, it is useless to have minimum rights guaranteed at law without there being a mechanism existing to guarantee the fulfilment of such minimum rights. Therefore, abatement exists as one of the mechanisms through which the law reacts to ensure the Reserved Portion is paid to the fullest extent. When dealing with scenarios where the Reserved Portion is claimed, it is usually the case that the *de cujus* has done their utmost to leave the spouse or child/children as little as possible, either *inter vivos* or *causa mortis*. Generally, attempts will be made to hide gifts and donations and minimise them in order that if such person claims the Reserved Portion, what is left to pay them out in the estate is insufficient, usually when the person doesn't have sufficient grounds for disherison or doesn't want to escalate the situation to that extent.

Thus, in such situations where the non-disposable portion has been exceeded and there are insufficient assets in the estate to make good what is owed, the guarantee to the minimum amount by virtue of the Reserved Portion is facilitated through abatement.

Abatement refers to the reduction of the value of a donation or legacy to guarantee the payment of the Reserved Portion. If the donations or legacies are very high (exceed the disposable portion), leaving little left in the estate to satisfy the Reserved Portion, the rules of abatement provide a mechanism to reduce such in value - If there are so many legacies in the will or there have been so many donations throughout the person's lifetime that there are insufficient assets to pay the Reserved Portion, then the rules of abatement will apply to reduce such legacies and donations.

It kicks in firstly by considering whether or not in Stage 1 it was determined that the disposable portion has been exceeded.

- If it has not been exceeded and all donations and gifts given were in the parameters of what is allowed considering the minimum guaranteed rights, there is no abatement. In order to be paid, the person claiming the Reserved Portion receives money as a credit from the heirs from the inheritance, i.e. from the *relictus*, what is left at the moment of death.
- If it has been exceeded with donations and legacies amounting to more than is allowed, abatement comes into play and Stage 3 becomes underway.

Here, we take into account **Article 647** which notes that testamentary dispositions exceeding the disposable portion are liable to abatement:

> *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****.*

This means there are several considerations to make:

  - The law is dealing with what happens with provisions made in the will since it specifies "*testamentary dispositions*".
  - As noted, the disposable portion must necessarily be exceeded in relation to the value of the total non-disposable portion and not the value of the individual Reserved Portion.
  - There is a time bar of ten-years established, or in the case of minors until they reach the age of majority.

🌿 Abatement, in a nutshell

The person claiming the Reserved Portion is a creditor entitled to a cheque to cover what is owed to him by virtue of this minimum guaranteed right. Abatement applies when there are insufficient assets in the estate to cover the Reserved Portion and therefore, the values of the legacies and donations are reduced to cover the sum owed. What the heirs get is not affected by the process of abatement.

Firstly, the legacies are looked at as property that still exists in the estate when the testator has died but which must be given out as a gift. Such will be reduced on a *pro rata* basis.

If after seeing and reducing the legacies, that which was reduced in addition to the estate is still not sufficient to cover the Reserved Portion being claimed then donations are looked at. The first donation to be considered is the one that was given last. There is a slight conflicting interpretation as to how this applies. In **Article 648(b)**, the law states that the value of the donation is taken at the date of donation, therefore, if the donation was worth €5,000 at the date of donation, then according to the letter of the law, the donee is only bound to pay €5,000 even if it increased in value subsequently. However, in the part of the law dealing with donation, the object forming part of the donation is fictitiously presumed to go back to the estate which gives one reason to believe that the entire donation can be eaten up not only the value as it was at date of donation. Till now, there hasn't been a judgement which resolves this conflict.

The major issue in this regard is in relation to the determination of abatement and the fact that the courts have adopted yet another different principle and measuring tape in relation to valuing it. This causes confusion and trouble: When dealing with abatement, donations are valued as at date of donation. Prior to 2004, we distinguished between movable and immovable property as the object of donation with the former being valued as at date of donation and the latter being valued as at date of opening of donation. However, post-2004 everything is valued as at date of donation with no consideration as to change of circumstances effecting value, as per **Article 648**:

> *For the purposes 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**.*

As commented by Dr Borg Costanzi, the courts often fail to take into consideration the operative part of **Article 648** - "*For the purposes of determining abatement*". Therefore, these rules only apply in Stage 3 when discussing abatement and therefore, should the person having passed away exceeded the non-disposable portion. This should not apply to the other Stages if the non-disposable portion is not exceeded. Nevertheless, despite the clarity of the law, at times, our courts have mistakenly used these rules for the purposes of calculating the valuations in Stages 1 and 2. This argument is reinforced by the fact that the Reserved Portion should not vary in value depending on whether or not the abatement procedure must be applied. The amount the person claiming the Reserved Portion is set to receive ought to remain constant regardless of whether there is grounds for abatement or not. In fact, it is inconsistent and contradictory to state that whether or not abatement applies, the amount the person claiming the Reserved Portion will receive will differ and be either greater or lesser. This is what happens when the amount is valued with donations being valued at the date of donation.

It is unfortunate that often judges confuse the mechanisms and the valuation exercises interchangeably rendering the procedures more confusing. For example, Dr Borg Costanzi argues that both **Psaila v. Psaila (2023)** and **Vella v. Vella (2024)**, which are conflicting judgements, are a little right and a little wrong simultaneously. In the former, the judge mistakenly used the valuation system of Stage 3 to determine the valuation in Stage 2, while in the latter, despite the latter, the judgement in and of itself being correct, the judge passed a comment on an aspect which was not appealed from dealing with the valuation of donations and doubts arise as to the correctness of the Court of Appeal in this regard.

Going back to the technicalities of how abatement is determined, as noted the calculation of the Reserved Portion is based on what is left at the end of the inheritance (the *relictum*) and donations and legatees. The Reserved Portion needs to come out of this bulk. If there is enough in the inheritance and the disposable portion hasn't been exceeded, it will be paid by the heirs from the estate in its entirety. If it has been exceeded then ones goes to the legacies. If by abating the legacies there is enough, then one stops there. If not withstanding the abatement of the legacies, there are insufficient assets to pay the RP, then one moves to consider the donations.

Take the following example of a division of estate into account:

Donations made in the testator's lifetime is equivalent to '5'.

The legacies left in the will by the testator equal '5'.

All that is left, including bank accounts and residual property, equals '2'.

This means the entire estate is worth '12' as at the date of opening of succession.

Say one of two children makes a claim for the Reserved Portion. This would amount to 1/3rd of the estate which is '4'.

1. For the purposes of Stage 1, we must see whether the disposable portion has been exceeded. We note that together, donations and legacies make up '10'. This leaves '2' left. Considering that the Reserved Portion requires '4' to be satisfied, there is not enough left and the disposable portion has been exceeded. Thus, abatement must apply.
2. For the purposes of Stage 2, we must calculate the actual amount of the Reserved Portion due to the person claiming it. In this case, it is argued that the donation is valued at date of opening of succession which means it remains '5', the legacies and what's left is valued at date of liquidation, meaning the former are worth '6' and the latter became '4' to account for increase in value. The total estate is now worth '15'. The total amount of the Reserved Portion claimable by the children is 1/3rd but since only one sibling is claiming it then the amount owed is 1/6th making it '2.5'.
3. For the purposes of Stage 3, we consider how the '2.5' will be paid. There are certain judgements that will argue that since the valuation of the remainder of the estate increased from '2' to '4' once calculated in Stage 2 at the date of liquidation that the entire '2.5' must come from there. However, this is incorrect: from Stage 1 it has already been made clear that abatement must apply.

   VALUATE

When dealing with abatement, there is a section which is quite confusing - **Article 650**.

> *Where the value of the donations exceeds, or is equal to, the disposable portion, all testamentary dispositions shall be ineffectual.*

Therefore, it argues that if a person has given too many donations in his lifetime and what is left is either equal to the disposable portion or less, then any disposition in the will has no effect, as though it has not been written. This includes both the appointment of heirs and the designation of legacies.

This seems to contradict the rules of abatement but, however, must be read in line with the aforementioned contentious comment made by the Court of Appeal in the **Vella v. Vella (2024)**. The issue discussed was the abatement of a donation. In the case, a person claimed the Reserved Portion and the other person who had received substantial donations during the

testator's lifetime renounced to the inheritance because there wasn't enough left in the estate. The latter person thought that by renouncing to the inheritance he would have no obligation since he wouldn't be an heir and not need to pay. The court stated he was nonetheless a donee that needed to abate the donation. The Court of First Instance calculated how much was to be paid by the donee out of the donation, i.e. the abatement, and said that he either needed to pay or else the property donation will be sold by court auction. Till here, the reasoning is sound. However, it went on to say that when the property is sold by court auction, any balance remaining will be paid to the donee. Thus, if the donation was worth €500,000 and sold for that amount, with the person needing to pay €200,000 to the Reserved Portion, the Court of First Instance said that the remaining €300,000 would go to the donee. This is what the Court of Appeal picked up on. It ultimately disagreed with the thinking in the judgement, despite no appeal being lodged against this from the First Hall, but likely commented nonetheless so as not to rubber stamp the *forma mentis* tacitly. This seems to almost tally with **Article 650** in terms of the line of thinking with the Court of Appeal arguing that if the donation eats into the non-disposable portion then that donation loses its effect: since in this case the object cannot be divided as it is property, it is lost. If it can be divided then only part of it will need to be given as abatement.

In a similar line of thinking, we must look at the testamentary dispositions (legacies). Here, the law penalises a person who gives out too many donations in his lifetime and continues this streak in the will by giving out too many legacies. In such a case, the legacies will be without effect and cannot be paid out.

The question arises as to how is this compatible with abatement? When carrying out the abatement exercise, in this scenario, one only values the donations on one hand and on the other hand everything left in the inheritance. The legacies are totally ignored. The distribution will be made *pro rata* between the donees and the heirs and the legacy is not paid.

Going back to the previous example:

> Donations made in the testator's lifetime is equivalent to '5'.
>
> The legacies left in the will by the testator equal '5'.
>
> All that is left, including bank accounts and residual property, equals '2'.
>
> This means the entire estate is worth '12' as at the date of opening of succession.

As noted, the value of the donations are greater than what is allowed in terms of the disposable portion. In this example, when **Article 650** kicks in saying that the donation is fine (even though it is yet to be seen whether there will be the need for the payment of any abatement or not, and the legacies no longer have any effect. The persons who would have gotten the legacies will not get them any more with their value being added to the remainder of the estate, valued at '2'.

When it comes to abatement, one looks at the value of the donation as at the date of donation, which we said was ‘2’, and the value of the rest of the estate worth ‘7’. The distribution of the ‘2.5’ credit will be proportionately divided on this basis with the legatees getting nothing and paying nothing.

However, there is a huge question mark on this and whether or not it actually applies, not least of which as it seems to violate a golden rule of testate succession law in that the wishes of the testator have to be respected as much as possible. The Reserved Portion is an exception to the rule, despite being a guaranteed right and will only apply if claimed. Once it is an exception, the wishes of the testator cannot be ignored. Both rights and obligations must make sense together and it seems contradictory to render ineffectual what is written in the will just because the testator have given out too many donations. In fact, **Article 650** almost makes giving too many donations equatable to a ground for incapacity since it renders provisions of the will ineffectual.

Dr Borg Costanzi argues that this clause ought to be interpreted in a looser fashion saying that those legacies will be reduced rather than rendered without effect. As we know, ultimately it is the heirs who have to pay out the legacies as part of the obligations they are bound to honour by accepting the will. Such cannot be considered a liability on the estate but on the heirs and therefore, in such a scenario they ought not to exclude the legacies entirely, but not pay them to the fullest extent. It is also questioned whether the heirs themselves are empowered not to give out legacies because the testator gave too many donations in his lifetime, as **Article 650** seems to imply.

Likely the correct interpretation is that when the testator has given out too many donations, the result of abatement must be seen to see how it effects the calculation of the Reserved Portion and the value of the estate and if the legacy is worth a significant amount, then it can be reduced in order to pay the Reserved Portion..

However, an issue will arise if the object of the legacy cannot be divided and abatement must be carried out. If the legacy is sold to pay the Reserved Portion it has left the estate and then nothing can be given to the legatee. Therefore, there is a strong argument to be made that once the legacy is gone, then it has no effect. If the legacy is a quantity of money or a liquid amount that can be divided, then part of it can be taken. When it is indivisible there will be an issue as to whether the legacy has any effect.

We also take into account **Article 651** dealing with proportionate abatement that ties in with the *forma mentis* proposed in **Article 650**:

> *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 legacies.*

It argues that when carrying out abatement, the interested parties shall abate proportionately. As mentioned, under the mechanism of **Article 650**, during this stage, the legacies are ignored and are put into the basket with the rest of the estate and the abatement is calculated. Following, should anything remain in the estate, it will be deemed whether the legacies can be paid out and to what extent they can be paid out since the Reserved Portion is paid before legacies are. It is not exactly clear how this works in practise, however.

To make things more confusing, we take into account **Article 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.*

This seems to contradict **Article 650** which said that "*all testamentary disposition shall be ineffectual*". However, **Article 652** seems to argue that the testator can order that if there is going to be abatement, such abatement will be done preferentially as outlined in the will. This begs the question as to whether the dispositions are ineffectual or not as this article seems as though they are not.

Dr Borg Costanzi believes the correct interpretation of the scenario, reinforcing what was stated earlier, is that this article proves that legacies are valid but that the Reserved Portion must be paid before them. The testator can say that if there is going to be abatement, the order can be made to list the legacies in order of who ought to pay should the disposable portion be exceeded and only if such is not sufficient will further legacies be burdened, i.e. an order of preference as to who pays first and suffers the consequences of payment.

This is not a situation where the law is saying don't pay the Reserved Portion. It is a case where the law is enabling the testator to say that they might have exceeded the disposable portion, if one has, then X still has to pay it. If there isn't enough in what was left to X, then one can move on to Y and Z to settle the claim.

To further reinforce Dr Borg Costanzi's argument that **Article 650** must be interpreted loosely, there exists **Article 653**:

> *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.*
>
> *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.*

This deals with what happens when the legacy can or cannot be split. When the object can be divided, it can contradict the notion of the Reserved Portion being considered as a credit. The law notes that if the legacy can be divided, the excess can go towards the Reserved Portion. It is a payment in kind and not a credit. It is one of the residual sections of the law that wasn't amended when the legitim was transformed into the Reserved Portion. What is interesting and what reinforced the argument that the legacies are safe is sub-article 2. Case law has also applied this to a doaccretionnee when they have an obligation to abate and the thing received cannot be divided: to keep the thing in question, the recipient needs to pay. The law doesn't state what happens to the object if the legatee refuses to pay.

The law seems to imply that if the request to pay in cash is not made then the object will have to be sold and he won't receive it with the effect of the legacy disappearing. The person who has the legacy has a choice: it is valid to the extent of the disposable portion. If it can be divided it will divided. It if cannot be divided, the legatee has a choice - they can pay and take it or not pay, rendering it without effect.

Collation

Collation is a legal mechanism that may correct favouritism that occurred unintentionally by the parent between siblings. Through collation, the child who received more than the other siblings will have that received from the parent added when calculating the share of the inheritance. Therefore, this is a mechanisms to adjust the estate and not to adjust donations and legacies and ensures that everyone is getting equal counting also the gifts left.

Imagine a scenario where there are three siblings and during their parents' lifetime, one sibling received many advantages such as a house and financial support for marriage, while the other siblings did not receive similar benefits. Upon the parents' passing, they leave their assets to their children in equal shares. The estate is worth €120,000 and therefore, each sibling ought to receive €40,000. However, considering that one sibling received a house and financial support for marriage and the others didn't receive anything, the other two will protest to receiving an equal share of the estate and demand that collation. Therefore, instead of each getting €40,000, the sibling who received more benefits in life will receive less to account for the donations received. In this case, the donation is not lost and is still enjoyed by the sibling as a guarantee, but when calculating how much such sibling is owed by the estate the donation is taken into account to ensure all children are treated fairly in relation to the inheritance and receive the same.

Article 913 introduces us to the notion of collation, which is the final stage in the process. It highlights how children or descendants are bound to collate in favour of other children or descendants:

Children and descendants only, on succeeding to the inheritance of an ascendant, whether under a will or ab intestato, shall impute, in the interests only of the other children or descendants, being co-heirs, the value of everything they may have received from the deceased by donation, directly or indirectly, unless the donor shall have otherwise directed.

The provisions of this article shall apply even though the children or descendants enter upon inventory.

Therefore, in order for collation to apply, the following criteria must be satisfied:

1. There must be a situation of inheritance between ascendant and descendant, one or more of whom have received property by donation from the ascendant (directly or indirectly);
2. There must be a situation of at least one another descendant, who is also a co-heir; and
3. There must not be an exemption by the ascendant.

This mechanism applies by valuing all properties donating as at date of opening of succession, together with the remainder of the inheritance divided by how many children there are and then everyone's share is calculated. Taking into account the various donations each one has received, in the name of equity, everyone gets the same: X amount as a donation and Y amount as a balance. Ultimately, this mechanism operates by leaving the donation amount the same and adjusting the balance receivable from the estate per sibling depending on the value of the donation they received.

Article 914 provides that exemption from collation may be granted either by the same deed containing the donation, or by a subsequent deed having the formalities requisite for the validity of donations or wills. In most cases, children are exempted from collation - this is almost a standard clause and therefore, this process won't need to occur. In so doing, the testator tells their children that what was given in their lifetime was done of their own free will and through the exemption, this free will cannot be interfered with and what is left must be divided.

However, collation will always apply should someone claim the Reserved Portion. In fact, **Article 915** makes it clear that the exemption given by the testator/ascendant will only be valid as long as the donations do not exceed the disposable portion calculated as at date of opening of succession. If they do, then the excess of the donation will be subject to collation:

It shall not be lawful for the children 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.

Therefore, collation applies when the person claiming the Reserved Portion has already received a donation. Any donation made, must be calculated when determining the Reserved Portion and such will be reduced from the overall credit the individual is entitled to, i.e., the donation is taken as payment on account of the Reserved Portion. If there are insufficient assets to divide because the person gave out too many donations in their lifetime and the remaining amount is not enough to pay everyone out their share, the person who received the gift has to collate. The law provides what is to happen at the moment of collation and gives the possibility of the person who has to collate the option of keeping the donation and paying in money, or splitting the donation if it can be split. If the gift cannot be split and the donee doesn't have the funds or doesn't want to pay from his own pocket, then the gift is sold by court auction following litigation.

Firstly, we note a number of preliminaries in relation to this article:

1. It applies only to children and descendants who have not renounced to the succession and not spouses.
2. It applies notwithstanding an express exemption from collation when there is excess.
3. It means that the child or descendant cannot keep the donation in excess of the disposable portion. Therefore, if the donation goes beyond the disposable portion then that difference has to be returned, always in order to safeguard the payment of the Reserved Portion.
4. It notes that the excess is subject to collation.

Therefore in terms of procedure, it operates as follows:

> Firstly, when someone claims the Reserved Portion, any donation given is fictitiously revalued to calculate the extent of the Reserved Portion. At this point, it could be that a donation is exempt from collation but nonetheless the donation is valued to calculate the Reserved Portion. In the case that the person claiming the Reserved Portion also received a donation, regardless of whether the donation was exempted from collation either through the deed of donation or through the will, it is collated regardless. Thus, if the person claiming the Reserved Portion is entitled to a cheque of €50,000 and when his donation is valued it is valued at €40,000, then what is actually owed to him by virtue of the Reserved Portion is €10,000. We must keep in mind that when valuing property for the purposes of collation, the property is valued as at date of opening of succession.

What is interesting here compared to the previous situation outlined with legacies, where there existed confusion as to whether or not they could be considered valid, in this regard we note that a donation made in excess is valid but that such excess is subject to collation. This implies that the thing donated is kept but that its value will be imputed to collation as

otherwise there would be no excess. It is important that there exists excess because this correlates with abatement which as we have established only comes into play when following State 1 it is determined that the testator has exceeded the disposable portion, rendering abatement necessary.

Therefore, taking the previous example once again where the Reserved Portion owed is ‘2.5’, the donation received is valued at the date of opening of succession, not the date of donation. The value, therefore, is ‘5’ which must be reduced from the ‘2.5’. ‘5’ is clearly greater than ‘2.5’ and thus, he gets nothing since his donation is greater than the Reserved Portion. After going through all the stages, it was all for naught because the gifts the person received were greater than the Reserved Portion.

Article 916 also poses certain difficulties in terms of understanding and argues:

> *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)***.

This section reinforces the opinion stated earlier in the spirit of **Article 650**. The important point in this article is that a person who had received a property by donation may still renounce to the inheritance and retain the donation (as long as it does not exceed the disposable portion). Therefore, this doesn’t necessarily mean the total abolition of that written in the will. The legacy can be claimed only to the extent of the disposable portion, however, always within the limits of the obligation to pay the Reserved Portion.

Considering the relationship that exists between collation and the Reserved Portion, we turn to consider **Article 620**.

> *It shall not be lawful for the testator to encumber the reserved portion with any burden or condition.*
>
> *The reserved portion is calculated on the whole estate, after deducting the debts due by the estate, and the funeral expenses.*
>
> *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.*
>
> *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.*

> *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.*

Specifically, sub-article 4 notes that even though there is an obligation on the part of the testator not to burden the Reserved Portion, it nonetheless is subject to collation.

NB. Both abatement and collation are adjustment mechanisms but they are separate and distinct applying in different circumstances, despite them being incorrectly used interchangeably.

Valuation of Donations - Summary

Stage 1 - For the purposes of checking if the non disposable portion has been exceeded, **Article 622** dictates that it should be calculated as at opening of succession.

Stage 2 - For the purposes of calculating the ‘credit’, i.e. the Reserved Portion, there is debate as to whether it should be calculated as at the date of opening of succession or as at the date of liquidation of the estate.

Stage 3 - For the purposes of abatement, it should be calculated as at the date of donation.

Stage 4 - For the purposes of collation, it should be calculated as at the date of opening of succession.

Taking into consideration all the dates of valuations, not only donations, we note that keeping these stages separate is of the utmost importance when trying to engage in the entire exercise. Ideally, the law should be changed so that one valuation date applies to all four stages so the confusion can be eliminated and the fictitious exercises that must be engaged in will be rendered null. Presumably this mechanism applies because of the court’s desire to give justice to the injured party.

Therefore, when calculating the Reserved Portion, the first exercise is to see whether the non-disposable portion is safe, i.e., to ensure that enough is left to satisfy claims of the Reserved Portion which are the amount protected by law. To value the non-disposable portion, one has to take into account all the assets as they stand the moment of opening of succession. In this regard, donations are valued in the same way.

Following, the prevalent law argues that the value fate of the estate and of the donation in order to calculate whether the testator has breeched the non-disposable portion is valued as at date of liquidation. At this stage it is checked to see if there is enough pay out the Reserved Portion. If there is enough, no abatement takes place. If there isn’t enough, the rules of abatement apply.

When dealing with abatement, firstly the rules of legacy apply, if one has eaten into all the legacies, the donations are looked at. According to **Article 648(b)** these are valued at date of donation when one is going to reduce the donation, they are reduced by the value of the donation.

Subsequently, we speak of collation. Here, donation is collated as at date of opening of succession.

Therefore, there are different valuation exercises depending on the exercise being carried out.

Descendants under the Reserved Portion

We firstly note that in the case of descendants the right to claim the Reserved Portion goes down the line indefinitely to grand children and great-grandchildren to the last surviving person. As mentioned, this doesn't apply if the first in line entitled to claim the Reserved Portion doesn't do so, i.e. if a child doesn't claim the Reserved Portion, the grandchild isn't entitled to claim it themselves. When the *de cujus* passes away, the situation is observed to see who is alive at the time: if the children are alive, they are entitled to claim the Reserved Portion, if the children are predeceased, then the grandchildren can claim, so on and so forth. Interestingly, this right is also granted to the children of a person who has either been disinherited or been deemed unworthy of inheriting. This is because such are person effects that only influence the person effected.

Here, we keep in mind that if there are four children, meaning the entitlement is to 1/3rd of the estate, if one child claims the Reserved Portion, then such child is owed 1/4th of 1/3rd which is equal to 1/12th of the estate. The claimant gets the portion of the entitlement.

Determining the Number of Children

In terms of the amount received, we note that if there are up to four children, they are entitled to claim 1/3 of the estate as Reserved Portion. If there are more than five children then they are entitled to claim 1/2 of the estate as Reserved Portion. Such amounts must be left as part of the non-disposable portion. This is contained in **Article 616**:

> *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.*
>
> *The reserved portion is divided in equal shares among the children who participate in it.*
>
> *Where there is only one child, he shall receive the whole of the aforesaid third part.*

In order to engage in this discussion, it is important to classify who is able to claim the reserved portion as a descendant. Here, we turn to **Article 617**:

> *For the purposes of the last preceding article, the word "children" shall include the descendants of the children in whatsoever degree they may stand. Nevertheless, such descendants shall only be reckoned for the child from whom they descend.*

Therefore, there are rules to calculate the number of children and who is entitled to claim the Reserved Portion. The point at which this decision is taken is the date at opening of succession. If there are predeceased children that have no children of their own, these are not counted. If there are predeceased children that have children of their own, i.e. grandchildren of the testator, then the predeceased child is counted and such grandchildren step into the shoes of their parent and between them are able to collect one share of the Reserved Portion. Therefore, collectively the grandchildren stepping into the shoes of the parent, take such parent's right and the amount that would have been owed to the parent had they been alive is split between the number of grandchildren, depending on who claims the Reserved Portion. Thus, simply because there are more grandchildren, doesn't mean there are more shares.

The question as to whether the child actually claiming the Reserved Portion is counted was the subject of debate and the subject of a court judgement in the name of **Buhajar v. Hampton (2015)**. Here, the Court of First Instance interpreted the law to mean that the child claiming the Reserved Portion isn't counted when determining the number of children, however, this was reversed on appeal with the Court of Appeal arguing that the first Court incorrectly interpreted the law and for the purposes of determining the share and counting the children, such child is counted.

Further, we consider whether or not those incapable of inheriting are counted, such as those who have been disinherited or those who have renounced to the inheritance without reserving the right to the Reserved Portion. According to law, for the purposes of calculating how many children there are, such must be counted. This is outlined in **Article 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.*
>
> *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.*
>
> *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.*

Descendants Claiming the Reserved Portion

We note that while the person claiming the Reserved Portion may be named an heir or a legatee in a will, it is incompatible for a person to dually be an heir and claim the Reserved Portion as becoming an heir necessarily means one accepts the rights and obligations that go with the appointment including the paying out of the legacies and the payment of any liabilities. An heir is also charged with paying the Reserved Portion and thus, the incompatibility arises.

To claim the Reserved Portion, any child who has been named an heir must renounce to the inheritance, be it testate or intestate succession. As noted previously, at the same time, through the act of renunciation, the person must claim the Reserved Portion.

However, the situation differs with respect to legacies. We note that legacies consist in individual gifts and are dispositions by singular title. This differs from heirs that receive by universal title. In this regard, the law argues that if a legatee claims the Reserved Portion, they must collect the legacy, however with such being considered payment on account, i.e the gift is taken out of his claim. Take the following example into account:

> In his will, Testator A left €10,000 to Legatee A. Legatee A wishes to claim the Reserved Portion. When the calculations are concluded, the amount he is entitled to by virtue of the Reserved Portion is €15,000 in cash since, as we noted, the Reserved Portion is a credit to be paid in money. However, since the person is a legatee who has been left a gift worth €10,000, such individual will not get €15,000 in cash. They will receive the item worth €10,000 and a further €5,000 in cash in satisfaction of their claim. The legacy has no choice in this regard to refuse the gift in favour of an entirely cash sum. Even the heirs don’t have the faculty to choose the entirely cash option. They must give the object.

The only way around this is through an agreement between the parties which the law allows for.

An issue arises when the value of the legacy is greater than the amount the legatee is entitled to by virtue of the Reserved Portion. Take the following revised example into account.

> In his will, Testator A left €15,000 to Legatee A. Legatee A wishes to claim the Reserved Portion. When the calculations are concluded, the amount he is entitled to by virtue of the Reserved Portion is €10,000 in cash since, as we noted, the Reserved Portion is a credit to be paid in money. As can be noted, the gift is greater than the amount of the Reserved Portion. Here, two different scenarios are considered:
>
> 1. If the object can be conveniently partitioned without any deterioration or detriment, then the legatee will only get part, up to what they are entitled to through the Reserved Portion.
> 2. If the object cannot be conveniently divided, the law is silent on what happens in respect of the Reserved Portion. Yet, when dealing with the law regulating abatement

and collation, there may be an answer.

As highlighted, collation is an institute that applies to both testate and intestate succession in the form of a mechanism that attempt to equalise all the heirs. As outlined, the law gives the possibility of the person who has to abate or collate the option of keeping the gift and paying in money, if the gift cannot be split. If the gift cannot be split and the donee doesn't have the funds or doesn't want to pay from his own pocket, then logically it is assumed that the gift is sold by court auction following litigation and the effect of the legacy disappears.

Other arguments include if the gift has a higher value than the Reserved Portion, then the gift is taken and nothing is paid back and if it has a lower value then the gift is taken and the total amount is topped up until the minimum amount of the Reserved Portion is satisfied. Dr Borg Costanzi disagrees with the first proposition stating that when the law speak about the Reserved Portion, it speaks about a minimum guaranteed right. If one chooses to not go by the will, they are only entitled to such minimum right and no more. Therefore the legacy is taken on account of the Reserved Portion and not in satisfaction of it. Thus, since it is taken on account of the Reserved Portion, it could be a plus or a minus. Just because this legacy exists, doesn't mean one is able to squeeze more out of the value of the Reserved Portion.

Another argument is often floated that if the value of the legacy is greater than the amount due by virtue of the Reserved Portion, then the person should be able to get their Reserved Portion in cash, but as we have seen, it is incompatible to claim the Reserved Portion and refuse the legacy. Nevertheless, one also cannot force someone to take a gift and then force them to pay for it. This relates to the idea that the Reserved Portion, as a minimum guaranteed right, cannot be burdened with anything to encumber it - there can be no liabilities attached. This is especially so considering, as we have seen, often the testators try to find ways around the issue of the Reserved Portion to reduce the value when they wish to exclude a person from receiving under the will. Therefore, if one eventually gets paid in kind, they cannot be forced to pay liabilities attached to the property - it is free and unencumbered, as outlined in **Article 620**.

In the above outline scenario, a legatee being forced to pay to receive a gift they have been left is an encumbering factor and they cannot be forced to pay such sum. If the legacy comes with the obligation to pay a refund, it is a form of encumber on the amount and it can be refused and monies can be demanded instead. This can arise in various different scenarios, such as placing the burden that the Reserved Portion cannot be paid out before two years. Furthermore, we note that the right to the Reserved Portion is a right at law that cannot be contracted out of.

Another example is legal fees: In this regard we question who will pay the legal fees and costs if there is a court case to claim the Reserved Portion when the law states that such must be paid without any encumbers. In normal circumstances, such are paid by the heir as noted in **Fenech v. Cutajar (2023)**. However, this is not always the case and depends whether the person claiming the Reserved Portion does so out of spite and ignores all attempts to settle the situation amicably with the heirs. If this is the case, then the court will penalise such a person since the heirs would have been willing to pay a decent offer that amounts to the Reserved Portion or more, even more so if such offer was deposited in court and made free to be taken. Here, such an individual will be made to pay the legal fees for essentially wasting the court's time. If during the court case there is payment on account, i.e. the amount is settled by the heirs between them, then the court will take this into consideration when deciding on costs.

We further consider whether succession taxes count as something that encumbers the Reserved Portion. Taxes are a reality of life and cannot be ignored, but for the purposes of this consideration, do they count as an encumber on the Reserved Portion. Here, we take into account the fact that the original law of succession was enacted in 1868, prior to inheritance tax being a requirement, which is why the Civil Code doesn't provide for it. However, the succession law regulating the situation today has been updated several times since then. In fact, while case law states that tax law isn't taken into consideration, it is difficult to reconcile this with the reality that taxes must be paid, which in this regard constitute a percentage of the value of the property that must be accounted for, save for certain exceptions such as on the matrimonial home under certain conditions. In Malta, this amounts to roughly 5-10% of the value of the property but in other jurisdictions such as the England, this can go up to around 40%. Case law argues that the amount calculated for the Reserved Portion is done so in relation to the full amount of the estate before tax. This is because taxes are not payable by the deceased but payable by the heirs. Thus, taxes are not a liability on the estate, but a liability of the person who has inherited.

There are two arguments that can be raised against this:

1. When the Civil Code was enacted, or rather the 1868 Ordinance, the notion of inheritance tax didn't exist and therefore, the law's failure to mention it is justified.
2. The nature of a claim for the Reserved Portion is to guarantee a minimum right. When the law talks about it being paid free from burdens and conditions, it anticipates burdens and conditions being put on the estate by the testator to try and avoid the Reserved Portion being calculated properly. However, the

deceased/testator cannot impose the payment of taxes but are payable by operation of the law and are compulsory. Since they are part and parcel of the liquidation of the estate, they ought to be taken into consideration as otherwise, a situation may arise whereby if taxes are not taken into account, the claimant of the Reserved Portion may be more than what the heirs obtain. According to Dr Borg Costanzi, it is time for case law to be reversed and for tax law to be taken into consideration.

Disherison

Over and above unworthiness, the law provides several limited grounds of disherison which enable a testator to justifiably disinherit either their child or their spouse, as per **Article 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.*

There are several things to take into account:

1. The law limits the testator's ability to disinherit to those persons who have the right to claim the Reserved Portion, either spouses or children. Thus, what the law does is give a reason as to why such persons are not entitled to receive such a guaranteed minimum right should they commit one of the offences of disherison listed in the law. Because of the close proximity to the persons, it is not common that a testator chooses to disinherit someone. Generally, they are very reluctant to do so. However, if the ground is so serious or if the testator feels so strongly about it, it can be done.

2. For a person to be disinherited, the testator must include an express provision in the will to that effect, otherwise, the ground is not considered and only the rules of unworthiness can apply if raised by the heirs. This means that the idea of disherison is only compatible with testate succession as it must be listed in the will, unlike unworthiness which is not necessarily outlined *ad validitatem*. In the case of intestate succession, only the grounds of unworthiness can apply. Not only must it be expressly outlined that the testator is disinherited a person, the fact giving rise to the disherison must also be mentioned in the will, including the how and why and how it relates to the ground upon which the testator wishes to disinherit. Therefore, the will must bring proof of itself in relation to the charge listed. If a testator leaves a beneficiary out without saying anything about it, this is not tantamount to disherison. As per **Bartolo v. Bartolo (1936)**, the ground of disherison must be proved and the cause must be one that is enumerated at law for it to be valid.

   The following example can be made to indicate that when the ground of disherison isn't expressly noted, it doesn't apply: In **Cini vs Asciak (2021)** the testator has disinherited

plaintiffs, his grandchildren (children of his predeceased daughter) because they were "*ħatja ta offizi gravi.*" He didn't elaborate further. Eventually, it was noted that because he had objected to the spouse of his predeceased daughter, he took it out on the grandchildren. Since the testator himself didn't include a good explanation as to how the grandchildren were "*ħatji ta offizi gravi*" the disherison was invalid, despite the heirs arguing that the grandchildren had abandoned the testator. The court noted that the testator 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'. … 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.*
>
> ---
>
> *He did not clearly define the facts that should have given rise to disinheritance as required by **Article 622** of the Civil Code. In fact, this **Article 622** requires not only that disinheritance be declared as one of the reasons mentioned in **Article 623** of the Civil Code, but it also requires that this reason be '...defined in the will'….This Court considers that **Article 622** of the Civil Code provides that the reason should have been properly defined by the testator in the will and not by the heirs who in the terms of **Article 625(1)** are only obliged to try.*

3. Because this is an exception, the grounds of disherison, as we already noted with the grounds of unworthiness, must be interpreted strictly, and in case of doubt they don't apply. No additional grounds may be outlined.
4. As shall be seen, when dealing with the Reserved Portion owed to spouses, **Article 638** provides for scenarios where a spouse cannot claim the Reserved Portion, including when they are separated by a judgement and the spouse is guilty of adultery, desertion or under such circumstances where the court determines the forfeiture of succession rights, through **Articles 48**, **51** and **52**; and where the predeceased spouse, has by his will, provided for disherison on any of the grounds mentioned in **Article 623(a)**, **(b), (c)** or **(d)**.
5. The law isn't punishing the children or spouse, it is the testator themself. In the case of **Shires v. Bonello (2006)**, Caruana Galizia's comment on this institute to this effect was quoted. Therefore, disherison is a sanction imposed by the testator.

Grounds of Disherison

Article 623 outlines the limited grounds of disherison:

> *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;*
>
> *(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.*

Article 630 provides one extra ground of disherison on the basis of prodigality:

> *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.*

Ground 1: If the descendant has without reason refused maintenance to the testator

Under the Civil Code, children have a legal obligation, as outlined in Article 8, to provide maintenance to their parents when there is a demonstrated need. It notes that children are "*bound to maintain ascendants in the event of indigence*". This responsibility is not contingent on their status as minors or adults but arises from familial ties. Similarly, spouses are also bound by this obligation, as per Article 2, which extends beyond situations of indigence. The law specifies "material support," meaning that the level of support is determined based on the means and economic status of the parties involved.

In cases where children or spouses fail to fulfil this obligation without a valid reason, it can be considered grounds for disinheritance. The requirement for a valid reason allows the court

some flexibility in interpreting and applying this provision.

> 🌿 Ground 2: If, where the testator has become insane, the descendant has abandoned him without in any manner providing for his care

This ground raises a fundamental question: how can the ground of insanity ever be applicable in the context of disinheritance? If a testator is deemed insane, they are legally incapable of making a will. Therefore, the idea of an insane testator disinheriting a descendant seems contradictory. Dr. Borg Costanzi's perspective, which argues against considering abandonment in moments of insanity as a ground for disherison and making it a ground of unworthiness, makes sense in this light, unless it is a temporary condition where, hypothetically it could then stand.

On a related note, regarding spouses, desertion is also recognised as a ground for disinheritance, adding another layer to the legal considerations surrounding inheritance and family obligations.

> 🌿 Ground 3: If, where the descendant could release the testator from prison, he has without reasonable ground failed to do so

In modern legal contexts, this ground fails to find application or only finds application on a very limited basis. This is mainly because the ability to release someone from prison is generally limited to specific procedures. If a court has issued a jail sentence, only the court can modify or suspend that sentence, or the individual may be eligible for parole based on certain conditions.

However, there are situations where a person may end up in jail for reasons not typically associated with criminal acts. For instance, someone could be incarcerated for failing to meet maintenance obligations like child support payments. In such cases, if the person seeks assistance from their children but doesn't receive it, they may still face imprisonment and thus, can be a reason for disherison. Similarly, unpaid fines or *multi* can also lead to incarceration.

This can also apply where the testator has a "*conditional discharge*".

The qualification of "*reasonable*" in these cases often rely on the discretion of the legal system. In **Grech v. Fenech De Fremeaux (2006)** in his will, her father disinherited his daughter for the reason that she failed to release him from prison, without good reason, and when she could have done so. He claimed that she, at ten-years-old, testified against him in

court and that, because of that testimony, he was sent to prison, and this when she could have testified in another way that would have saved him from that punishment. The case in question related to sexual abuse that the daughter had undergone at the hands of her father. He was eventually found guilty and was imprisoned. He claimed that the child was provoked by his wife (the child's mother) to say that. The court considered 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 of a child's evidence;
d. There was nothing the child could have done to release him from jail;
e. The father expecting his daughter to lie to protect him was unreasonable and unfair.

🌿 Ground 4: If the descendant has struck the testator, or has otherwise been guilty of cruelty towards him

This ground encompasses both physical cruelty, explicitly defined as striking, as well as a broader form of cruelty that extends beyond physical harm to include emotional distress. This ground is comprehensive, acknowledging that cruelty can manifest not only through physical violence but also through psychological and emotional abuse. While there may be instances in case law where this ground is narrowly interpreted to cover only physical violence, it's important to recognise that cruelty encompasses a spectrum of behaviors, including non-physical forms such as emotional abuse.

🌿 Ground 5: If the descendant has been guilty of grievous injury against the testator

Here, grievous injury means "*inġurja gravi*". If one were to compare clause (d) and (e), one is saying "*struck*" and another one is saying "*grievous injury*" and a question arises as to whether one is encompassed within the other. Over here, the law is providing for an additional ground where the testator has been hurt and so hurt as to constitute a ground to disinherit the spouse or child.

What constitutes "*grievous*"? What is contained under the word "*injury*"? Does it extend beyond the idea of an offence in the realm of criminal law? What the law means to convey through this ground is the idea of "*weggajtni*": through something very serious, the child or

the spouse has really hurt the person making the will and therefore, is disinherited. It relates intimately to the idea of guilt beyond criminal law.

This is a discretionary ground that can be subjected to interpretation. This is exemplified in the case of **Debono v. Falzon (2003)**. Here, 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.

Ground 6: If the descendant is a prostitute without the connivance of the testator

It's worth noting that this aspect of the law stems from older legal frameworks. The language used can be interpreted in a way that suggests if a testator were to encourage their spouse or child to engage in prostitution and openly support such actions, it wouldn't be grounds for disinheritance. This scenario raises a curious point: if the knowledge and support of such activities are explicit, the law seems to indicate that disinheritance cannot occur, whereas if the actions are conducted clandestinely, disinheritance may be considered.

The term "*connivance*" carries connotations of acceptance, permission, creating facilitating circumstances, consent, allowance, and even encouragement. This nuanced understanding adds layers to the legal complexities surrounding disinheritance based on certain behaviours or actions. If the testator is prostituting their spouse or child, it is not a ground for disherison. If the testator learns about it but doesn't support it even asking the spouse or child to stop, it can be regarded as a way to bring shame upon the family and therefore, the disherison is founded.

In a notable legal case concerning prostitution and marital rights, a woman in her late teens found herself in a distressing situation. Having fled an unhappy home environment, she encountered two men who were pimps and befriended them. She eventually married one of them. Over time, the husband coerced her into prostitution, using emotional manipulation and pressure. Despite the legality of their marriage, he effectively made her work as a prostitute for his benefit, even though she strived to excel in this role among others under his control. As they aged, the husband sought a younger spouse and initiated separation proceedings against his wife, accusing her of adultery. This accusation carried serious implications, potentially leading to her forfeiture of rights in their shared assets and denying her maintenance, despite her substantial contributions as the primary earner in their household.

However, the court's ruling shed light on the true nature of the situation: the grounds for separation were not the wife's adultery but rather the husband's role in pushing her into such actions. He was found to be at fault, and as a result, the wife retained her share of their joint assets and was granted ongoing maintenance support. Subsequently, their marriage was annulled, yet she rightfully maintained her entitlement to receive maintenance, acknowledging her contributions and the injustices she endured during their union.

> 🌿 Ground 7: 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

If there is a separation case and one has been freed from the obligation to pay maintenance, that is also a ground for disherison. A parent may be released from such obligation by means of

Article 27: If the descendant marries a person of shady character despite opposition;

Article 29: If the descendant engages in a secret marriage – total or partial dispensation of banns

However, in this regard, there must be a court judgement.

Caruana Case?

> 🌿 Ground 8: Prodigality

Being a prodigal or heavily burdened by debt is not in itself an offence against the testator but it gives the testator who worked hard to conserve his patrimony a means to ensure that it will not be squandered or gobbled up by the creditor of his indebted spouse or child. It is a means to ensure his patrimony is safely passed onto his heirs. While the creditors of the spouse or heir may feel cheated by this, technically speaking, the testator cheated them out of nothing as he owes them no obligation. It would be a different story if a beneficiary had been named in the will and then renounced the inheritance to prejudice his creditors. In such a scenario, in terms of **Article 886**, the creditors of the person who renounces to the prejudice of their rights, may apply to the court for authorisation to accept such inheritance in the place of their debtor.

Here, we must remember that being interdicted does not debar a person from inheriting. It is a ground barring a person from making a will but not from receiving.

In such a case the testator is able to bequeath the amount that would be the disinherited person's Reserved Portion to the remaining children and spouse, or to the remaining children, or to the other descendants such as grandchildren.

Important Points

1. In case there is a lawsuit on the disherision, the lawsuit itself isn't filed to revoke the will but to defeat the ground of disherison mentioned.
2. In such a case, the court will examine whether the ground is one of those listed in the law. Here, we bear in mind that not every offence against the testator constitutes a ground for disherison.
3. 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.
4. There is a presumption against disherison and in favour of the child or spouse.
5. When a person has been disinherited on one of the grounds stated in the law, that person will not be entitled to the Reserved Portion. In fact, one of the main interpretations against disherison is the idea that the law provides for the Reserved Portion, even against the wishes of the testator in most cases.

Spouses under the Reserved Portion

Spouses are entitled to the Reserved Portion so long as they are officially spouses. The moment that such must be ascertained is when the deceased passes away. If at that moment the person was still married, then such surviving spouse is entitled to receive the Reserved Portion.

This law was amended in 2004 so when looking at case law, one has to keep in mind this amendment. The shares and proportions which the wife enjoyed were different, as were the parameters. Today, the only parameters consider whether there are any children involved. In the past, considerations were had vis-a-vis the nature of the children as legitimate or illegitimate (even adopted) and reference was also made to ascendants. Today, all children are treated equally and ascendants no longer have the right to the Reserved Portion. In Malta, the wife's portion is irrelevant to the children.

Today, there is an emphasis on the term "*value*", whereas prior the emphasis was on "*share*". This is because one now speaks of payment in cash and not in kind. When the value is paid, the surviving spouse is not liable for the debts of the inheritance. If there is a Community of Acquests with a house loan split equally, and one passes away, if the surviving spouse claims the Reserved Portion, such spouse would only need to pay the value of the loan apportioned

to them. The surviving spouse will not become response for the other half. This liability, however, is still taken into consideration when evaluating the estate. Thus, while not paying the debts, assets and liabilities are considered to evaluate the balance - deduction as part of the calcuation of the net value of the estate.

A question arises as to what happens if at the time of death, the couple were undergoing separation proceedings. If they are undergoing such proceedings, they don't stop at death. The court is precluded from pronouncing a legal separation but may still go into the patrimonial aspects, one of which is the right to inherit. Therefore, when there is a pending separation case during which one of the spouses passes away, the court can concluded that the surviving spouse was at fault for the separation and order that they are not to inherit the predeceased spouse. This is in line with **Article 48(1)(a)** where the spouse may forfeit their inheritance rights in a situation of fault as highlighted in the case **Caruana v. Caruana (2016)**.

The Rights of the Surviving Spouse

Firstly, we take into consideration **Article 631** which notes that:

> *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.*

This outlines the amount of Reserved Portion spouses are entitled to. Therefore, these are the rights that the surviving spouses are entitled to if there is a will which does not give them the minimum amounts they are entitled to. While in the past, a distinction was made depending on whether the spouse needed the extra money through a means test, this is no longer the case.

The right of the surviving spouse to have a share of the inheritance is not something new. It owes its origin to one of the new laws codified by 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. Prior to that there were no rights attached to the surviving spouse. With its institution, the raison d'etre was to provide a deserving surviving spouse who was indigent to 1/4 of the estate. This also came to be known as the *quarta uxoria*. This originally was based on an initial basis deserving plus the wife being indigent and later evolved to being a right that was earned as a result of the reciprocal rights and obligations of spouses: considering the two built a life and family together, it is only right that on the demise of one of the spouses, that the surviving spouse gets a benefit from the estate.

This cannot be equated to the right which the spouse would inherit in intestate succession. This refers to the minimum rights which are reserved for the surviving spouse no matter what has been written in the will. While originally the means and financial standing of the surviving spouse were taking into consideration when imputing their share, this is no longer the case.

As noted in the case **Debono v. Licari (1954)**, in this regard, the spouse is a *hereditas portio* and is not a simple creditor.

In the case that the couple has no children, **Article 632** applies:

> *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.*

Therefore, say the estate is worth €120,000, in terms of the Reserved Portion the spouse would be entitled to €40,000 if there are no descendants (1/3rd of €120,000) and to €30,000 if there are descendants (1/4th of €120,000). Under Italian law, this is increased to 50%.

🌿 The Right of Habitation

This is outlined in **Article 633**:

> *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.*
>
> *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.*
>
> *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.*
>
> *The provisions of **article 395** shall not apply to the right of habitation granted under this article.*
>
> *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.*
>
> *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.

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.

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.

There a number of things to take into consideration in relation to this article. The essence of it is that if the matrimonial home is held in ownership or under emphyteusis by the surviving predeceased spouse, the surviving spouse has a right to live there. Therefore, we acknowledge the right to live and the right to the Reserved Portion. This refers to the tenement as the principal residence that is held in full ownership or emphyteusis and applies even if the surviving spouse has a share in the tenement. This amendment was pushed by a female lobby group. One of the biggest problems that occurred prior to the amendments was that when the house was paraphernal to the surviving spouse, it would be sold leaving the surviving spouse stranded. Now, in the case where the home was owned, in part or in whole, by the predeceased spouse, the surviving spouse is protected. The choice as to what is done with the home is at the discretion of the surviving spouse, meaning no heir could impede upon this right, with the right of habitation linked to the principal residence remaining.

Sub-article 1: Firstly, we note that the right is granted to the surviving spouse is that of habitation and not usufruct. With the latter, there is no obligation to stay in the house but this is not the case vis-a-vis the former. The former is a personal right to occupy and live in the property - there would be no right to sell and it ceases upon death. So the question is whether the right of habitation is beneficial. It is definitely more convenient to remain in the property rather than move from one place to another.

Does it apply to property held in usufruct or lease? Here, we note that the law doesn't mention lease. Under the law of lease, when one spouse dies, the other spouse still has a right to continue the lease in his or her own name.

Sub-article 2: Secondly, we note that is applies to the whole property and the argument that since the spouse has died, they require less space is not an acceptable argument.

If the house is too large, can the spouse entertain lodgers and make some extra money? 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?

Sub-article 3: If the spouse claims the right of habitation, the particular property is not included in the calculations of the value of the Reserved Portion due to the spouse nor is its

value deducted from the Reserved Portion payable. The choice is up to the spouse and not the heirs. In making the choice, a lot of it comes down to questions of value, age and life expectancy. Contrast the following:

> The tenement is worth €4,000,000 with 1/2 belonging to the deceased. If there are children, the spouse's share is 1/4th of the 1/2 left by the deceased which is €500,000. With this sum, plus the €2,000,000 which the spouse owns, they would be able to find decent accommodation.
>
> The tenement is worth €100,000 with 1/2 belonging to the deceased. If there are children, the spouse's share is 1/4th of the 1/2 left by the deceased which is €12,500. With this sum, plus the €50,000 which the spouse owns, they would be hard pressed to find decent accommodation.

Sub-article 4: The surviving spouse need not draw up an inventory or give security. This is important when considering **Article 395**:

> *The grantee of a right of use or habitation shall make up an inventory and give security as provided in the case of usufruct.*

Sub-article 5: This right trumps claims by children and descendants for their Reserved Portion. For example, the deceased assets all formed part of the community of acquests and the estate was valued at €2,019,000 (€2,000,000 for half the share in the villa and the balance representing the 1/2 share of moveables and savings). The couple had three children and the deceased left everything to one child, ignoring the wife and other two children. The Reserved Portion claimed by one of the two children, being 1/9th of the estate (1/3rd of 1/3rd), amounted to €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. Here, we keep in mind that the right of habitation is protected by law, even if there are competing claims, the right of habitation is guaranteed even if there insufficient funds to pay the Reserved Portion. This right cannot be abated. Normally, if there are legacies in the will and the disposable portion is exceeded, such gifts and legacies are reduced to guarantee the payment of the Reserved Portion, but this is inapplicable vis-a-vis the right of habitation.

It is interesting to note that the right granted to a co-owner under **Article 495(3)** does not apply if the property is subject to the right of habitation. Case law has also extended this obstacle to **Article 495A**, for example through the case of **Muscat v. Mangion (2020)**.

Sub-article 6: This notes that a creditor's rights are not prejudiced and claims still can be made. The fact that a spouse passes away and the surviving spouse enjoys the right of habitation, doesn't mean that the creditor's right to be paid vanishes. The law looks at the matrimonial home and the rest of the estate. If there are sufficient assets to make good for the

credit, the assets have to be sold. However, if the heirs do not do this, and act in bad faith, the surviving spouse can sue for damages. The notion of bad faith has bearing in this regard.

The law engages in a balancing act to try, on one hand, protect the right of habitation the spouse is entitled to and on the other hand, protect the right of creditors to be paid. To do this, it tries to make possible that the right of habitation remains in tact and the claim is satisfied using money from bank accounts. However, if this isn't done and there is no justification resulting in action being taken in relation to the matrimonial home, the surviving spouse can sue for damages. If there is no other choice and the bank accounts cannot satisfy the debts of the creditor, the property has to be sold and no right to damages subsist.

Therefore, we consider that in a situation where the value of the estate in in the negative, with there being more liabilities, upon death, the surviving spouse has a right to habitation. Because the estate is in the negative, if the estate were to be calculated to determine the Reserved Portion, nothing would be obtained. Regardless, in such a situation, the right to habituation remains. Additionally, in a situation where one would exercise the right to habitation is when the net value of the estate is low when compared to the value of the property. It would be more advantageous for a person to keep the right of habitation. Yet, if creditors were to enforce their claim on the house, as per sub-article 6, the surviving spouse would still need to vacate, meaning the protection of this right is only to the extent of the just protection and satisfaction of the creditor.

Sub-article 7: By agreement, the spouses may exclude or limit the right of habitation, either through a pre or post-nuptial agreement. In such a case, the tenement will be computed when calculating the Reserved Portion.

Sub-article 8: There are grounds for the termination of the right of habitation. These involve the remarriage of the spouse or the entering into a public deed of cohabitation.

If the surviving spouse is young and the property has an appreciable value, it would not pay to keep the right of habitation is one is exploring alternate relationships. This is because, upon remarriage or cohabitation, there is the termination of this right. We note, however, that if the surviving spouse cohabits without signing a deed, there is no forfeiture of the right to habitation.

Partition between Heirs and the Surviving Spouse

Here, we regard **Article 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.

Therefore, this is an option granted both to the surviving spouse and to the heirs. It applies to inheritance in general, irrespective of whether the Reserved Portion is claimed or not.

In the event of partition, the surviving spouse has a right of preference over the property. Such spouse has a right to consolidate the property in their favour. In valuing the property, the value when this consolidation takes place is not the full value, with it being reduced depending on the age and health of the surviving spouse. There are not expressly mentioned by law and are subjective parameters. One normally pays a reduced value in this regard. Therefore, if there is a right to habituation, there cannot be the sale of a share. If this is done, in the eventual deed of partition, the property would not be assigned to the co-owner but to the surviving spouse.

If this 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 usufructuary 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%.

Here, we also take into account **Article 495(3)**:

Where the heirs in an inheritance continue to hold in common property deriving from the succession for more than three years and no action has been instituted before a court or other tribunal for the partition of the property within three years from the opening of the succession and the portions of the heirs in the said inheritance are the same in respect of all the assets of the inheritance, each co-owner shall be deemed to be co-owner of each and every item of property so held in common:

Provided that this sub-article shall not apply:

When property held in common is subject to any right of habitation, use or of usufruct, for such time during which such right is in force; or

When the property held in common consists of property which is kept indivisible; or

When persons who are holding the property deriving from the succession in common agree otherwise:

*Provided further that the period of there years referring to in this sub-article shall commence to run together with, and shall be deemed as one with the period of three years referred to in **Article 495A(1)**.*

🌿 Use of the Contents of the Matrimonial Home

Here, we turn to **Article 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.*

This article provides that the right of habitation extends to the right of use of furniture of the matrimonial home. This is a right which also terminates upon the death of the surviving spouse.

The definition of furniture is then provided in the subsequent article:

> *The word 'furniture' comprises all furnishing moveables, including the pictures and statues forming part of the furnitures of an apartment.*
>
> *It shall not include, however, collections of books, pictures or statues.*
>
> *Nor would 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.*

Article 637 extends the idea that items included in the right of use are not computed in calculating the value of the Reserved Portion for the surviving spouse and notes the fact that the rights of creditors are not to be prejudiced. The law also give 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:

> *The provisions of **article 633(3), (6), (7)** and **(8)** shall apply mutatis mutandis to the right of use granted by **article 635**.*

The right to use the furniture should not be read as a stand-alone clause, even if the law does not expressly state so. The right of habitation goes with this right of use. The only exception would be if the surviving spouse is not the owner of the matrimonial home, such as in the case where such is rented. In such a case, the right of habitation would not arise but the right to use the contents of the house subsists.

If the matrimonial home belonged to the spouse, in whole or in part, to claim the right of use, the surviving spouse must also claim the right of habitation.

Imagine the following scenario: Person A dies, leaving their matrimonial home worth €4,000,000 and the contents inside worth €500,000. The surviving spouse claims the Reserved Portion, but doesn't reserve the right to habitation. Nonetheless, the spouse claims use over the furniture inside the matrimonial home. While the law doesn't explicitly disallow

it, it is not the intention of the legislator either that saw the two as a package deal when the matrimonial home as owned by the couple.

Where the Surviving Spouse Cannot Claim Rights

Article 638 outlines the cases where the surviving spouse cannot claim rights:

> *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.*

Therefore, should there have been a separation judgement officially separating the spouse and the deceased spouse or if the surviving spouse is unworthy or incapable, then they will not be able to claim these rights of habitation and use. Furthermore, irrespective of whether there was a legal separation or not, the predeceased spouse could disinherit the spouse not only on the grounds mention in **Article 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, as seen in **Vella v. Vella (2018)**.

This is very important because the surviving spouse also forfeits the Reserved Portion if they are guilty of any ground on which such spouse could be declared as unworthy. It is important to note that, the forfeiture clause (**Article 48**) is not always automatic and can be discretionary. In **Caruana v. Verbystka (2016)**, the court confirmed that in the cases of abandonment and adultery, the forfeiture was automatic. It went on to add that a spouse could also forfeit such rights in terms of **Article 48**, **51** and **52** of the Civil Code for serious and grave reasons, but in the latter instance the court has 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.*
>
> *The Court then, except in the case of abandonment or adultery, has the discretion whether to apply the provisions of **Article 48** or not. In the circumstances of the case where the appellant was guilty of very serious negligence, the first Court considered that it should also apply this article and declare that the appellant waived the right to alimony.*

This means that hypothetically, one can be legally separated or divorced and the right of habitation subsists.

Additionally, if there is a right of habituation which has been granted through a contract of legal separation, or if, following the divorce, the right was still granted, the right subsists. This right is not automatically lost upon the death of the spouse or ex-spouse. However, it is important to note that this is only possible in the case of consensual agreements, or in the case it is contained in a court pronouncement without forfeiture.

🌿 Application of **Articles 633** and **635** in cases of Personal Separation Or Divorce

In certain scenarios, **Article 639** notes that the aforementioned rights pertain also to cases where spouses are separated:

> *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 can be linked to **Article 2095A(6)** which states that "*when the matrimonial home is the subject of trusts for the benefit of the spouses or any one of them, nothing in the trust instrument or in the law shall imply that a spouse enjoys lesser rights to the home and its enjoyment than under **article 3A**, and the terms of the trust may not be revoked or varied, nor may the trustee dispose of the said property, without the consent in writing of both spouses or, in the absence of consent without the authorisation of the court.*"

Therefore, this article provides for the continuation of a pre-existing right of the surviving spouse to live in the matrimonial home and reinforces such rights.

Formalities of Wills

Here, we analyse the details of wills, exploring the different types that can be created and the formal requirements for their validity under Maltese law.

1. **Public Wills**: These are crafted in the presence of a notary, signed by them, and then enrolled in the Public Registry. This registration makes it publicly known that a will was made on a specific date. While the fact that someone made the will is public knowledge, its contents remain confidential. This form of will is the most commonly used.
2. **Secret Wills**: Unlike public wills, secret ones are not recorded in the Public Registry but are instead stored in the vaults of the Court of Voluntary Jurisdiction. Unless a death certificate is produced, it's impossible to ascertain whether a person has made such a will. Consequently, access to a secret will is only granted after the testator's death. Once again, the contents are kept secret and are not revealed.

The distinction between public and secret wills doesn't hinge on whether the contents are made public; they remain private in both cases. Instead, it lies in the accessibility of the information regarding the existence of the will and the manner of its registration.

3. **Privileged Wills**: These are crafted under exceptional circumstances, such as during a break of communication, for example during times of calamity or war, or else when at sea. They’re termed ‘privileged’ because they’re exempt from certain requirements due to the extraordinary circumstances under which they're made. Consequently, they have a limited period of validity.

Cross-Border Succession and the Introduction of New Forms of Wills

Under Maltese law, the aforementioned three types of wills are recognised as valid. However, a significant issue arises concerning cross-border inheritances, which is also regulated in the Civil Code due to the EU Succession Regulation, Regulation 650/2012. Through this instrument, the EU aimed to harmonise succession laws across its Member States regarding the applicable law and the formal validity of wills. This harmonisation pertains to both the formal validity of the will itself and the laws governing the estate.

Prior to the EU regulation, the matter fell under Private International Law. Until the enactment of the Regulation, Malta lacked specific legislation on succession matters, thus defaulting to general PIL principles. According to these principles, Maltese public law turns to English public law in cases of deficiency and adopts/emulates such rules. Under English PIL rules, a distinction was made between the formal validity and the essential validity of a

will, i.e. a distinction made between the form of how the will was drawn up including technicalities and the contents of the will. Another distinction was made regarding the nature of the property, whether movable or immovable.

Formal validity was determined by the laws of the country where the will was made. For instance, if a will was made in Malta, Maltese law governed its formalities.

Regarding substantive validity in relation to the contents of the will and how this is going to apply, immovable property was subject to the *lex situs* (law of the location), while movables were governed by the *lex domicilii* (law of domicile). Maltese law mirrored these principles. This meant, for example, that if a British man had immovable property in Malta, his heirs could technically claimed the Reserved Portion, despite a similar institution not existing under English law since we look to the laws of the place where the immovable is located.

With the Regulation, this framework changed. The EU Succession Regulation now determines both formal and substantive validity, as well as the applicable law for the estate. This can be the *lex situs*, or can depend on other factors such as the testator's nationality, or their habitual residence. Therefore, the applicable law is determined either by the testator's choice outlined in the will or by the Regulation's provisions. Eventually, an EU Certificate of Inheritance is issued, after an application is filed before the Court of Voluntary Jurisdiction, determining which will and law apply.

Due to this Regulation, it's theoretically possible for other types of wills, not conforming to the requirements of public, secret, or privileged wills, to be valid in Malta if they adhere to the laws of other countries. For instance, under cross-border inheritance, a holographic will—written by hand with clear wishes kept someone in the home of the testator—may be considered valid, even if it doesn't meet Maltese standards but aligns with the applicable law of the jurisdiction from whence it hails.

This highlights the awareness that different types of wills, valid in various jurisdictions under cross-border regulations, will also be recognised in Malta.

Ordinary Wills

Article 654 stipulates that a will may be either "*public or secret*". As mentioned the manner in which the will is registered will determine the nature and the requirement.

Public Wills

The initial considerations as to the formalities of public wills are contained under **Article 655**:

> *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.

The signature of the witnesses is in no case dispensed with whatever may be the value of the thing disposed of by the will.

1. **Received and Published by a Notary**

   A notary is the individual responsible for drafting the will. They must also sign it. In fact, for validity, certain parts of the will, including the date and time, must be handwritten by the notary. This requirement stems from The Notarial Profession and Notarial Archives Act, Cap 55 of the Laws of Malta, rather than the Civil Code.

   Regarding the certain particulars, it's noted that the date and time of the will must always be handwritten. It's crucial that the time is included as well. Additionally, the name of the notary drafting the will and the name of the person making the will are important details. If any particulars are missing, the notary may be subject to a fine, but it won't affect the validity of the will if the person is identified or identifiable. However, if there are so many missing particulars that the person making the will cannot be identified, then it becomes impossible to prove who made it. There must be sufficient details to establish identity, which typically include: Name and surname, marital status (name and surname of spouse), names and surnames of parents (if alive), place and date of birth, place of residence, and reference to a document of identity.

2. **Presence of Two Witnesses and the Requirement of their Signature**

   According to the Civil Code, there need to be two witnesses to the will that must duly give their signature. The requirement for witnesses' signatures is essential, regardless of the value of the estate, as stated in sub-article (2). This is included as previously, up until 20-30 years ago, any public deed necessitated witnesses. Over time, this rule was relaxed for transactions of lower value, but the Civil Code emphasises that regardless of the estate's worth, witnesses' signatures cannot be waived when dealing with wills.

   This becomes slightly contentious when seeing the situation of witnesses contained under Cap 55 which differs, despite the Civil Code and Cap 55 operating within the same framework. This will be discussed when considering the requirement of the will being "*in accordance with the provisions of [Cap 55].*"

   In relation to the signature of the testator, we note it must be done in a certain way depending on whether or not the testators know how to and can write or not. This is specified from the outset.

Who can be a witness?

Both the Civil Code and Cap 55 provide detailed guidelines on who can act as a witness to a will. The primary role of a witness is to ensure the integrity of the will-making process—ensuring that the testator is fully aware of their actions, communicating effectively with the notary, and making decisions knowingly. Witnesses act as observers, not authorities, during the process. They do not have the authority to interfere with the notary's actions or decisions. If they are satisfied with the proceedings, they sign; if not, they have the option to abstain.

To maintain impartiality and prevent interference, the law imposes certain requirements on witnesses. Drawing a parallel to elections, while the act of voting is public, the actual voting process remains private. Similarly, witnesses to a will are present to ensure everything proceeds smoothly, but their role is not to influence the testator’s decisions. For instance, if a father is making a will and a witness is sent by his child's spouse to ensure verbal promises are upheld, the presence of a familiar witness could potentially exert pressure on the father. Therefore, the law aims to eliminate any external pressure on the testator.

Accordingly, witnesses must meet specific criteria: they cannot be beneficiaries of the will, related to the notary, or have any vested interest in the will. They must be literate, over eighteen years old, ordinarily resident in Malta, and not be blind, deaf, or mute or related to the notary (nor their spouse) 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. These requirements are designed to uphold the integrity and impartiality of the will-making process.

A case to consider is **Trapani v. Hili (2010)** where the witness was the husband of the daughter of the heir and the will was declared null.

As we shall see, Cap 55 doesn’t mandate there being witnesses to the will, yet it is interesting to see how to correlate the fact that while simultaneously stipulating that witnesses aren’t needed, it provides rigorous restrictions as to who can be a witness.

3. **In Accordance with the Provisions of Cap 55**

   There are several requirements outlined in Cap 55.

   The identification of Cap 55 in this article of the Civil Code indicates that when interpreting this aspect of the law, both the Civil Code and Cap 55 must be considered together. Generally, when the Civil Code provides a basic rule, it directs those seeking further details to consult Cap 55. However, there are exceptions to this, as shall be seen in relation to witnesses.

   Importantly, we note that this Chapter highlights the fact that the notary is the only competent person who is able to identify the wishes of the person making the will and

translate them into law. Therefore, this is the sole prerogative of the notary and his sole obligation that no one may interfere with.

Process of Filing and Particulars

As outlined, for a public will to be valid it must be done by a notary and duly signed.

Within fifteen days, the notary must register a note in the Public Registry indicating that a person has made a will, and this information is recorded on the note of enrolment. By providing the individual's particulars, one can conduct a search, and this note will be retrieved.

The original will remains with the notary, who also creates a copy, resulting in two separate versions. At year-end, they are bound into volumes, with originals in one and copies in another. Subsequently, a retired judge, notary, or lawyer is appointed as a '*revizur'* by the Court for the Revision of Notarial Acts. The revizur reviews the formalities of the will, focusing on details like the date and whether the enrolment occurred within fifteen days as stipulated by law. In engaging in this exercise, they do not delve into the contents or substantive elements of the will. If it arises that the notary failed to register within the stipulated timeframe, they may face a small fine. Once the revizur confirms compliance with the law, or otherwise, they issue a report to the presiding judge of the Court for Revision of Notarial Acts, who may enforce penalties if necessary. Procedures exist for contesting these fines.

Upon completion, the original wills are sent to the Notary to Government in Valletta, where they are stored along with other archives. These wills are confidential, and copies cannot be obtained unless a death certificate is provided. Therefore, the notary retains only a copy, either clean and typed. In fact, distinguishing between the original and the copy is possible because the former includes handwritten sections, while the registry copy is entirely typed. Copies can be obtained either from the notary or from the Notary to Government.

The Notary Receiving a Benefit in the Will

It's crucial to recognise that a notary, their spouse, or any relatives up to the third degree by blood or marriage are prohibited from benefiting from the will. Therefore, if any of these individuals stand to gain under the will, the notary cannot draft it. If such a beneficiary is included in the will despite this restriction, the will is rendered void. It

ceases to exist - null *ab inizio* due to the failure to abide by the restriction. Consequently, not only is any benefit intended for the notary or family member nullified, but the entire will becomes void. This underscores the law's commitment to safeguarding the individual making the will from undue influence. When creating a will, the individual is sharing their thoughts with the notary, making it easy for the notary to exploit this vulnerability, especially if the person is uncertain about whom to designate as beneficiaries of their estate.

The Situation of Witnesses

As noted when considering **Article 655(2)** of the Civil Code, the law provided that the requirement for signatures by witnesses cannot be dispensed with. In this regard, it is outlined that two witnesses are needed. This is importance because under **Article 672**, non compliance with the law renders the will null *ab inizio*. Therefore, not annullable but as though it never existed in the first place.

Yet, as mentioned, there exists a discrepancy between the situation under the Civil Code and under Cap 55. The latter was amended two years ago and through this amendment it was established that a will will not lose its validity by not having witnesses: the requirement for witnesses shall only be required if the testator wants it or if the person is unable to sign. Thus, we are left with a situation where under the Civil Code we have an express provision voiding the will if there are no witnesses with the will never having had any validity at all, whilst simultaneously Cap 55 states that witnesses are only required in the situations outlined by **Article 25(3)**:

> *The presence of two (2) witnesses shall be required only in the following cases:*
>
> *(a) whenever any of the appearers so requests;*
>
> *(b) whenever any of the appearers does not know how or is unable to sign his name.*

In relation to **Article 25(3)(b)**, we note that we are not referring to a person who cannot read and write (therefore, not referring to anyone illiterate as there are many people who can actually sign but have no idea how to read and write), but referring to a a person who doesn't know how to sign his name or is unable to sign his name, i.e., through "*unable*" we consider that either he can't or he doesn't know how to sign it. In such a case, the requirement of witnesses cannot be dispensed of.

We question how to reconcile the two different laws if the person making the will doesn't want witnesses:

In relation to public wills, firstly, the notary must explain the right to have witnesses to the testator and that explanation must be recorded. If the testator still doesn't want witnesses this fact must be recorded in the public will itself when being drawn up by stating something to the effect of: "*this will is being done in the absence of witnesses at the specific request of the person making the will after explaining the right to have witnesses if they want them.*"

In relation to secret wills, the document is enclosed in a sealed envelope. When the notary submits the secret will to the Court of Voluntary Jurisdiction, they are required to declare that the will was prepared without witnesses, and this is documented in the note of delivery. The secret will is solely signed by the testator, without even co-signature by the notary, yet it remains valid.

These requirements are contained in the provisos to **Article 25(3)**.

The ambiguity regarding the need or not of the presence of witnesses can pose significant risks. Notaries often favour the absence of witnesses due to logistical challenges in arranging for two witnesses during will drafting. They may even take precautionary measures by bringing witnesses themselves or advising the testator to have witnesses present, especially when called to make wills at strange hours in strange locations. However, from a legal perspective, the absence of reliable witnesses could be problematic if disputes arise regarding the will's validity. Allegations of incapacity or coercion may be difficult to substantiate without witness testimony, leaving the notary solely responsible for defending the will after the testator's death. This is especially true when the will contains something slightly 'abnormal' such as a provision for disherison or unbalanced dispositions between children. In such a situation, regardless of Cap 55, it would be advisable to have witnesses so they can carry some of the burden for certifying validity.

Furthermore, this discrepancy between laws creates uncertainty. The Civil Code declares wills without witnesses as null *ab initio* (null from the beginning as opposed to annullable), with such a consideration applying *ipso jure*, i.e. without the need for a court pronouncement. On the other hand, Cap 55 regards them as valid. This contradiction raises questions about the risk associated with relying on a will's validity in such circumstances. If a dispute arises, is it worth defending a will that may be deemed invalid due to conflicting laws? Is it worth risking possible consequences for the notary who may be deemed to be negligent for the lack of awareness of the provisions of the Civil Code.

While according to the President of the Notarial Council the applicable law is that contained in Cap 55 owing to the principle that *lex specialis derogat lex generalis*, yet there is no guarantee that the court will take this into account and the issue arises once more whether a notary is willing to risk an estate, especially a valuable one, on this point.

Additionally, the proposed amendment to align the Civil Code with Cap 55 raises concerns about retroactive validation of previously void wills: It is contradictory for the law to say that something that was void has suddenly become valid. If something were void and had no legal value but suddenly through the retroactive application of the law it once again takes on life, complications will arise. This is especially so considering case law tells us that a void contract cannot be renewed - a new contract can be entered into but the previous one cannot be extended since it is void and is considered to never have existed *ab inizio*. The typical example in this regard is a promise of sale agreement: within such a contract there would be a term of validity in the agreement itself (if a longer one isn't stipulated it is three months) and after the lapse of such a time without entering into a final deed, the promise of sale is no longer valid and cannot be renewed as a matter of legal impossibility as one cannot renew something that never existed. A new contract would have to be entered into between the parties. In a similar vein, if there is a will that is void, the only way to give it effect again is to redraft it. In fact in **Azzopardi v. Camilleri (2009)**, the following was outlined:

> *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).*

> *The action of nullity is imprescriptible, unlike that of annullability subject to a period of five years as per **Article 1442**; The nullity can be challenged by anyone who has an interest and also by the court ex officio, as per **Article 1421**; It is not possible for a void contract to be rectified if the law does not provide otherwise, while a voidable contract is rectifiable as per **Article 1444**.*

Therefore, such retroactive changes could lead to legal complications and further litigation.

A potential solution lies in transitory provisions similar to that enacted under the 1868 Ordinance where the law was amended vis-a-vis the formalities of wills. Prior to this, there was no distinction between public and secret wills, nor was there a Public Registry - all wills were kept with the respective notaries. In 1868, a number of changes were introduced with one being that all the notaries in Malta and Gozo needed to deliver the wills they had to the Court of Voluntary Jurisdiction, thereby making then secret wills and further, the requirements for public wills were made more rigorous. However, the transitory provision protected the validity of wills created under the old regime, regardless of whether they conformed to the new requirements. Additionally, it was noted that if a will had not been valid under the old law but became valid following the

implementation of the new rules, then it would be considered valid. In so doing, the legislator granted the widest possible benefits. Similarly, if changes to the requirement for witnesses are implemented, giving validity to wills being made after the changes to Cap 55 where wills have been made without witnesses, transitory provisions should be enacted to address wills created during the transitional period. Without such provisions, the risk of litigation and legal uncertainty may increase.

We note that the witnesses are important for the protection of the notary as well as for the protection of the testator, making the legislation mandating their presence both regulatory but also protective:

Notary: If a will is executed with the testator explicitly stating they do not want witnesses to sign, but witnesses are present nonetheless, it raises concerns about potential undue influence on the testator. The law aims to prevent individuals who may exert influence from being present during the will-making process. The responsibility for ensuring the integrity of the process lies solely with the notary. Under normal circumstances without litigation, this may not pose a problem. However, succession matters are often contentious, leading to bitter and acrimonious litigation. People may go to great lengths to prevent others from inheriting, even foregoing their own inheritance if it means depriving someone else.

Consider a scenario where an elderly person, living alone after the passing of their spouse, is pressured by a family member to change their will, threatening to abandon them if they refuse. This conversation may occur privately between the two parties, unbeknownst to others. Subsequently, when the notary arrives to draft the will, everything may appear normal on the surface, leaving the notary unaware of any coercion or manipulation. The intimidating family member may oversee the situation, while the elderly person may feel compelled to comply out of fear. The notary, navigating this delicate situation alone, may sense that something is amiss but may refrain from intervening out of politeness or fear of losing their client. However, if there were two witnesses present, such a scenario would be more challenging to orchestrate, as it would require the involvement of outsiders who would observe the will-making process. This additional layer of oversight could potentially deter coercion and abuse.

Therefore, there is a strong argument for the reintroduction of witnesses to ensure the integrity and fairness of the will-making process.

Here, we consider the case of **Vassallo v. Scibberas (2013)**, which involved a deed of sale. The seller, an elderly woman residing in a nursing home, purportedly left the facility to meet with a notary in Qormi to sell her property, with the payment spread over fifteen years, even though she was very frail and likely wouldn’t live to collect all the money.

The contract was signed in the presence of two witnesses and the notary. However, since the nuns at the nursing home had no record of the woman leaving, court investigations revealed the likelihood that the woman never left the nursing home, casting doubt on the authenticity of the contract, despite being signed in the presence of two witnesses. The notary, the witnesses and the defendant testified in court, explaining the process of the contract, but it was ultimately deemed fraudulent.

This example highlights the vulnerability of transactions even with witnesses present. We consider that if such deceit can occur in a contract of sale, imagine the ease with which it could happen in a will lacking witnesses, placing the entire responsibility on the notary. The risk outweighs the benefit—should a will without witnesses be contested in court and deemed null, the notary bears the burden. While the court may uphold Cap 55's provision eliminating the need for witnesses, allegations of coercion or threats against the testator could easily implicate the notary as the primary target of blame risking the notary's reputation and with it their livelihood.

In **Abela v. Sinagra (2013)**, it was alleged that there were no witnesses present in the signing of the will. Here, the court noted that:

> *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.*
>
> ---
>
> *The presence of witnesses seems to be used to guarantee that no one exerts pressure or influence on the testator and therefore that the will reflects his will.*

In this case, the will was saved by the skin of its teeth, highlighting the importance of witnesses both in terms of preventing undue influence and in terms of protecting the notaries and sharing the burden.

Testator: Witnesses are also important to ensure that the notary properly records the testator's wishes. We note that the law places a heavy weight on the notary to properly record the testator's wishes, however, as people, we tend to be trusting and therefore, the testator may not read back the will before signing it to ensure that it is reflective of their wishes, relying on the integrity of the notary. Thus, if no one is 'watching', how is what the notary has written controlled? Without witnesses it is difficult to stop notaries from taking advantage of the situation and diverting the wishes of the testator in the will. Thus, the protection is also for the testator.

The elimination of witnesses from the will-making process was primarily motivated by the desire to alleviate the inconvenience of finding witnesses. On one hand, you have the hassle of securing witnesses, and on the other hand, you have the validity of the will. When considering the importance of these factors, there is simply no comparison.

🌿 Information about Particulars

When drafting a public will, ensuring the accurate identification of the testator is crucial. We consider the scenario in **Riolo v. Cassar (2001)** where an ID card number didn't match on the will , even though all other particulars were correct. This led to a family member challenging the will based on this discrepancy, leading to complications. Firstly, the court noted that the ID number discrepancy arose due to changes in the law regarding ID issuance. Initially, ID numbers were randomly assigned and unrelated to the individual's birth details. Subsequently, the law changed to reflect the birth certificate number followed by the birth year and additional identifiers for Maltese citizens. Despite this discrepancy, the court ruled that as long as the testator's identity was ascertainable and there was no doubt about their identity, two important conclusions could be drawn:

1. The notary successfully verified the identity of the testator: *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."*
2. The will was executed by the identified individual.

Ultimately, as long as the testator's identity can be established, minor discrepancies such as these do not invalidate the will.

This also aligns with the presumption in favour of validity of a will: The courts will try to protect the validity of a will and if someone who is alleging that a will is invalid, it is that person's responsibility to prove it. Any doubt must be serious and be proved on a balance of probability. If there is a positive fact that is being alleged, the person alleging that positive fact must prove it. This was established in the case of **Pace noe v. Chircop (1964)**:

> *… 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.*

Here, we take into account a case of cross border inheritance: **Galea v. Micallef Stafrace (First Hall Civil Court - 2018, Court of Appeal - 2023)**. In this case, the brother of the plaintiff passed away in Canada in 2013 leaving a holograph will in which he disposed a share of property which he owned in Rabat to the plaintiff. This was not a public will but was written by the person himself and left in his house, with there being no doubt that the will was drawn up by the person who passed away. However, when it came to apply this will, the other

heirs claimed the holograph will was not valid in Malta since under Maltese ordinary law, holograph wills aren't recognised.

> The Court of First Instance turned to PIL and specifically the English rules of PIL since Maltese law did not have ordinary law dealing with the situation. Under this regime, the formal validity is recognised by the law of Canada, i.e., the *lex situs*, and therefore, it applied Canadian law.
>
> On Appeal, the judgement was reversed. It was claimed that there was a law in Malta regulating the situation confirming that the English rules of PIL don't apply. Following, to consider whether the will was valid, the court stated that the general rule and point of departure is that Maltese law applies. For Maltese law not to apply, either the person making the will has to choose a different law or there are circumstances which dictate the application of another law. If another law is applied and one needs to check the validity of the holograph will, such law must be proved as a foreign law. The court considered that no one brought proof of Canadian law and therefore, without proof, the will is invalid as by default Maltese law will apply. Since there is no proof of Canadian law, we cannot acknowledge this as a valid will since under Maltese law we don't acknowledge holograph wills.

The *dunque* in this regard was elucidated by Judge Caruana Curran in the previous case of **Pace v. Chirop (1964)** who stated that whoever is challenging a will because of lack of form must prove and therefore, the presumption is that the will is valid. Interestingly, the Court of Appeal precluded the parties from presenting evidence of Canadian law stating that such ought to have been done at First Instance.

This shows the reluctance of our court to accept foreign jurisdictions. Aside from all of this , there were other issues in relation to the validity of the will including the date being included and the wishes being clear - the court had its doubt as to whether they were considering there was no date on the document itself.

Date and Time: As mentioned, the will must state the date and time it was made and these must be in the notary's own handwriting. Therefore, the notary will type up the will and after reading it, the notary will write the date and the time in ink.

Signatures: Both the notary and the testator have to sign on all pages in a will. When there are witnesses, the witnesses sign on the last page only, unless the testator cannot sign, which must be mentioned in the will. In such a case, the witnesses would have to sign each page.

🌿 Deafness

While the margin note in this regard says "*secret*" this is highly misleading as here, we still speak of public wills. For the purposes of **Article 669**, we consider persons who are totally deaf:

> *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.*
>
> *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.*

If the person can read, then they can read the will themself in the presence of the notary and witnesses. At the end of the will, a note is written to such end.

If the person cannot read but can communicate and sign, the will is read out to him in the presence of witnesses who then communicate with the deaf person through a means that they understand to ensure there is proper understanding and then they sign. The ability of the witnesses to actually communicate and the ability of the deaf person to sign is key in this regard. This is contained in **Article 38** of Cap 55. In the case that the person cannot communicate at all issues will arise.

If a deaf person wants to do a secret will, if they can read and write it is not a problem and it will be done in the same way as any other person, same if they can only write. However, if the deaf person is illiterate, then if he wants to do a secret will he can do so but only with the assistance of a judge or magistrate and likely interpreters as well. Therefore, it is even possible to make a secret will in such circumstances.

🌿 Dumbness

The Civil Code doesn't make any special provision in respect of a dumb person who cannot read and write. If such cannot sign his name, they must follow the same process as any other illiterate person. However, **Article 38** of Cap 55, imposes the extra requirement that one of the witnesses or interpreters must communicate with the testator in sign language.

If a dumb person can write, no problems arise.

Secret Wills

In relation to the form of a secret will, we look to **Article 656**:

A secret will may be printed, type-written or written in ink either by the testator himself or by a third person.

Where the testator knows how to, and can write, the will shall, in all cases, be signed by him at the end thereof.

*Where the testator does not know how to, or cannot write, the provision of **article 663** shall apply.*

The important thing is that the person making the secret will signs it. The will is then placed in a sealed envelope. The fact that it must be sealed emerged from **Article 657**. Such a document is then given to a notary or lawyer to deposit it in the vaults of the Court of Voluntary Jurisdiction within four days as per **Article 660**. This is a big issue for the notary because it isn't simply taken to the registry of the court but must be delivered to the judge by appointment within the time frame and the date of delivery is the date on which the will is deemed to have been made, as per **Article 658**. Usually, notaries encourage persons making secret wills in court in the presence of the deputy and the judge themselves but this is difficult to organise. **Article 659** delineates the duties of the notary receiving the secret will which include drawing up the act of delivery which must be signed by the testator, the witnesses and the notary using the seal as the paper. Additionally, on the outside of the sealed envelope received by the court, the particulars of the person who made the secret will must be written out as such will be used to record the existence of the secret will by the employees of the Court of Voluntary Jurisdiction's registers. It must also be written that the document represents his will and testament. Then, on the envelope itself, the Registrar must note 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. Furthermore, 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. Following, within 24 hours the registrar must record the will on a special register which is kept for such purpose.

When considering the role of the judges in this regard, we consider that they are to have a copy of the special register of secret wills and every quarter double check that the books match up as a form of kind of stock take. Additionally, 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.

Once deposited, the will isn't opened until it is opened by the judge when the person passes away or if the person wants to take it back.

Requirement of Reading and Writing / Reading or Writing

As highlighted the signature is of paramount importance and for validity, the first thing to question is whether the person making the will can do so correctly, i.e., whether the person can actually sign their name. Additionally, in the case of **Spiteri v. Rev Don Mamo et (1923)**, the court questioned whether a secret will must be compltely written b the testator or whether a third party could write it out and the testator only needed to sign it. These two considerations raise questions as to whether a person who doesn't know how to read or write can make a secret will. In this regard, there is a conflict between the English and the Maltese versions of the law that have subsisted for quite sometime through **Article 663**:

> Maltese Version -
>
> *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.*
>
> English Version -
>
> *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.*

Therefore, the conflict arises because the Maltese version seems to require both reading and writing to make a secret will whilst the English version seems to only require writing.

In the case of **Ferrito v. Cassar (2010)**, a dispute arose regarding the validity of a will due to the testator's signature being described as a "scribble." The will was written by the notary and signed by the testator and while it was not contested that the testator made the signature, the challenge focused on the testator's literacy. The opponents of the secret will argued that the testator could neither read nor write, suggesting that his ability to merely scribble did not equate to writing.

The conflict extended to the question of whether the testator's reading ability was also required, therefore, questioning whether the Maltese law or English version ought to be adhered to. Previously, the prevailing argument was based on the law of prevalence: English law prevailed for laws enacted before 1942, while Maltese law took precedence for laws enacted after 1942, when the laws were codified into chapters after the revision. The law in question was enacted before 1942, leading to the argument that the English text should prevail. The English text used the term "*or*," implying that either reading or writing sufficed.

However, on appeal, the court referenced the Statute Revision Law of 1980, which stated that in cases of conflict, the Maltese text takes precedence regardless of the enactment date of the law.

> ***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.*

> ***Article 8(3)*** *of the Act of 1980, Concerning the Revision of Statutory Laws, now provides that "if there is any conflict between the Maltese text and the English text of any revised edition, the Maltese text shall prevail.*

Therefore, in conflicts between Maltese and English texts, the Maltese text prevails. In this case, such a decision established the requirement of both reading and writing, otherwise, the testator must resort to the assistance of a judge or magistrate. Upon examination of the evidence, the court determined that the signature indicated the testator's ability to write, even if minimally literate. Moreover, the court reasoned that if the testator could write, he must have been able to read as well, basing itself on Caruana Galizia:

> *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.*

Consequently, the court upheld the validity of the will.

Contrastingly, in **Micallef v. Farrugia (2011)**, the court very curtly 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:

> *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.*

🌿 Secret Wills made by Illiterate Persons

Here, we note the procedure to crate a secret will isn't exactly the same and requires assistance form a judge or magistrate. In this regard, we consider **Article 664** which outlines the duties of the judge or magistrate assisting the illiterate person and **Article 665** which considers the formalities to be observed by the judge or magistrate assisting the illiterate person:

> *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.*
>
> *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.*
>
> *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****.*

As per **Article 666** we note that any judge or magistrate may help with such an endeavour and that they are bound by confidentiality as to the contents of the will, as per **Article 667**.

Through such a process, an illiterate person is ensured that the document drafted truly 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 the notary.

🌿 Withdrawal of a Secret Will

To take back a secret will, all one needs to do is go to the court and ask for it back. Once it is handed back to the testator, it loses its validity. The secret will is only valid so long as it is in the vaults of the court. This is considered in **Article 532** of the Code of Organisation and Civil Procedure:

> *A secret will may not be withdrawn before the time comes for its opening, except by the testator himself or by an attorney specially authorised for the purpose.*

> *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.*

This is also reflected in the Civil Code through **Article 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.*

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.

🌿 Publishing of a Secret Will

When a person passes away, searches are conducted at the Court of Voluntary Jurisdiction to find any secret wills. To initiate a search, one must present a death certificate and request information regarding any potential secret will made by the deceased individual. If a secret will is found, a formal request must be filed to have it published, as outlined in **Article 533** of the Code of Organisation and Civil Procedure:

> *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.*
>
> *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.*

On the appointed date, time, and place, the doors to the designated location are opened to the public. The Judge, assisted by the court registrar, retrieves the sealed will from the safe. Each step of the process, including verifying the integrity of the seals, is meticulously recorded in a register, as per **Article 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.*

The document is then handed to a notary, typically the one who submitted the secret will, although exceptions may occur at the judge's discretion, in line with sub-article 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.

The notary keeps the will along with their public deeds, not their public wills in the Public Registry. Within 21 days, the notary files a note of enrolment at the public registry, indicating that they have received a secret will from Person A. This publication occurs after the individual's passing, and subsequently, a search in the public registry will reveal the existence of the secret will.

🌿 Nullity of a Secret Will

As per **Article 672**, we note that if any of the statutory formal requirements are not observed, the will is rendered null. While the courts lean towards validity as per the presumption and try to conserve the wishes of the testator formalities must be observed.

Privileged Wills

Privileged wills are made under unusual circumstances in scenarios where it is difficult to find a lawyer, notary or magistrate and are temporary in nature. Because of their extraordinary nature, they is a relaxation of the requirements. However, because of this, they also have a short validity: up to two months from when the extraordinary problem stops.

There are two such scenarios which the law envisages:

1. A break in communication caused by a war or calamity. Once the problem stops, there is a time limit of two months, following which the will won't be valid. In this regard, it may be difficult to determine the two month period since it could be dependent on something not fixed on a specific date: when did the war or hostilities stop and conversely, when did the effects of the calamity cease.

   There have been no such cases in Malta but in the right circumstances this issue of the two month period and when it stops running will have to be addressed.

2. A will made at sea. Here, the two month period is easier to calculate seeing as the time limit starts to run when the passengers return to land making it a finite and definite period. A will written in such circumstances could resemble the following: a migrant on a refugee boat writes a will and gives it to the captain for safekeeping. That will is valid, even though it is not done before a notary and without witnesses. However, once the migrant reaches land, he only has two months within which the will is valid. Following a lapse of such period, the will will lose effect.

The two months are considered sufficient to grant the person who wrote the will enough time to reflect in a sense of normality, i.e. enabling the person to recognise the circumstances they are in and take stock keeping in mind the bigger picture. If the contents are truly the person's desires, they are able to go and get them certified at the notary. However, doing nothing is as though the will was never written as it lapses if the testator survives beyond the expiry of this period as stated at law.

Of the Institution of Heirs, of Legacies and Of the Right of Accretion of the Institution of Heirs and of Legacies

We first take note of **Article 683** which states that:

> *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 the Code.*

Here, we note that there exists a presumption in favour of the validity of a will, even if an heir isn't instituted as an heir *per se.* Therefore, this article provides that whatever someone is called in a will, one has to look at the actual meaning and implication behind the nomenclature. 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 is not the title which counts but the substance.

In this regard, we firstly must regard what the disposition looks like, i.e. whether the disposition in the will is by universal or singular title. In the case where a person is given an indeterminate bunch of objects or a share of the estate, the person, no mater what they are called in the will, is considered to be an heir. This means that they have the obligation to make good the liabilities of the testator and XXX. If one is given a single item, no matter

what they are referred to as in the will, the person is a legatee and they are only entitled to the specific gift as outlined with no obligations beyond that.

The courts have been faced with situations where they were called to interpret a will. Take the following example, in a will Person X was named the usufructuary heir of a house. A dispute arose as to whether the person was bound to pay the liabilities of the estate as an heir or whether in reality the person was a legatee and therefore, not bound to pay any obligations. The court would look behind the wording of the will and regard its implications. The conclusion was that it was a disposition by singular title - a specific object being left in usufruct and therefore, the court considered the person to be a legatee despite the wording of the will calling Person X an heir.

We note that **Article 683** has two conditions: however the designation of the clause appointing an heir or a legatee is made, this will be given effect and considered valid taking into account:

1. The intention of the person making the will
2. The disposition itself to ensure that it isn't against the law. We note that no matter the circumstances, the courts won't endorse or give effect to something which is illegal as this doesn't create any rights. While this is true for succession it is also applicable to every transaction: the court will not give effect to an illegal agreement.

For example, should someone draw up a contract of sale and within it include a clause that upon their death the property being bought will be inherited by Person B, this would still be valid despite it not being included in a will. This is because nonetheless, in principle it is valid considering it satisfies the conditions of a will incuding

- A Public Deed before a notary
- Witnesses. Here, we ignore the controversy surrounding whether or not a witness is required to a will and consider that they are valid.
- The wishes of the testator can be ascertained

In the case **Ursola Dimech v. Count Giovanni Barone Cassia (1881)** it was noted that a will is the last wish of the testator and is thus the supreme law to be followed. The principle of validity is so strong that anyone who wishes to challenge it must bring sufficient evidence to dispute it, whatever the ground. If the words are clear and unambiguous giving a clear meaning, then such a wish must be respected and enforced, provided that it is legal. Only for cogency reasons would the court attempt to give a different interpretation to the literal meaning of the word used.

In the case of **Mallia v. Mamo (2021)** it was noted that if the writing is clear then it should be executed and that the only reason why it shouldn't is if the written words deviate or conflict

with the actual wishes of the testator as stated in the will. Except in this situation and in situations of illegality, the will must be enforced as otherwise effectively, one would be replacing the testator's wishes with someone else's.

> *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.*

> *When the provision is clear it must receive its execution as expressing the law that the testator wanted to impose. The letter of the deed must therefore be omitted only when it is certain that it is in opposition to the will of the testator, since when this will is clearly and formally expressed, it is not permitted to interpret the terms used by the testator to make his will known, since otherwise there would be the risk of making an always dubious intention prevail. to the certain letter.*

In **Mifsud v. Pullicino (1888)** the court confirmed that if the words of the will were clear, one could not resort to extraneous evidence to give it 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.*

> *Where the words of the will are clear in themselves, it is not permissible with extrinsic evidence to narrow or broaden their meaning, the provision must remain that which the words of the will mean.*

Ribault v. Sciculuna and **Grima v. Borg (1962)** argued that the intention of the testator is contextualised in the entire content of the will. This means in order to establish the clear intention of the testator, one needs to look at the entire will and how the will is written, and not just the individual clause. This is because the will is the declaration of the testator outlining all his wishes. It must be questioned whether the clause fits in the context of the will and if doubts persist whether the clause makes sense in the context of previous wills. If all else fails, evidence is heard including from the notary and witnesses. Nonetheless, to move away from the wording of the law, there must be a very strong reason.

If what is written is clear, then there is no need to examine the intention of the testator, as highlighted in **Zammit v. Degabriele (2012)**.

The current position in this regard was elucidated in **Axiak v. Axiak (1945)** confirmed in **Gera De Petri v. Testaferrata Morini Viani (2012)** where 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.*
>
> ---
>
> *In a matter of testamentary interpretation, when the provision is clear, it must receive its execution as the law that the testator wanted to impose, and it is not allowed to interpret his will. The intention of the testator must be drawn from the disposition of the same testament, confronted also with the disposition of his other testaments, previous or subsequent, and not from matter extraneous to the testament. And there needs to be a good motive for one to believe that the words used by the testator were intended by him in a sense different from their natural sense.*

Errors and Mistakes in the Will

Yet, it is possible that there exist mistakes or errors in the will. These can be of three kinds:

1. Mistakes as a result of the wrongful designation of the person, i.e. the wrong name is mentioned in the will.

   In such a scenario, the court will look at the will where the mistake was made to try and analyse the circumstances to gather what the testator intended in relation to the facts of the testator's life.

   This arose in **Fenech v. Fenech (2021)** where the Court of Appeal was categoric on how a will should be interpreted. In this case, the testator appointed as his heirs as to 1/6th each of his estate his 3 surviving siblings and as to 1/6th of his estate each for the children of 3 of his pre-deceased sibling: "*lit-tfal ta' ħuħ mejjet Michele***"**. However, in actual fact he did not have a brother named Michele but he did have a pre-deceased brother Nazzareno who had a child named Michele. The question that arose was whether the children of Nazzareno were entitled to the 1/6th of the estate or only to the Reserved Portion.

   Both 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 which ought to have been Nazzareno as opposed to Michele. It was evident that he wanted to appoint as heirs the

children of his predeceased brother and thus, the court saved the will by noting that the intention behind the will was valid since the person can be identified.

2. Mistake as a result of the wrongful description of the object.

   In this regard, the same rules apply depending on whether the object can be identified.

   In **Buttigieg noe v. Cauchi pro et noe (2003)** it was argued that:

   > *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.*

   > *i) when the words in the will are clear and do not admit of doubts there is no room for any interpretation and one can only examine whether that provision from its normal meaning goes against the law or not;*
   >
   > *ii) when there is a doubt about the meaning of the words then there is room for interpretation so that one arrives at the intention of the testator;*
   >
   > *iii) in the case of such an interpretation one must always assume that the intention of the testator was in accordance with the law;*
   >
   > *iv) as a norm one must arrive at the intention of the testator from the words of the will itself and other proofs are not admissible.*

   An issue arises when the property cannot be identified. It could be that in certain cases, the mistake will not be saved - it will only be so if the intention of the testator can be proved without ambiguity.

3. Mistake if the reason why the gift was given is false. This refers to a situation of false inducement which isn't tantamount to fraud but refers to an incorrect impression the testator has which results in him giving a gift.

   In this regard, we take into account **Article 685**:

   > *Any testamentary disposition founded on a reason which constituted the sole inducement of the testator, and which is false, shall have no effect.*

> *If the testator has stated a reason, and the indication 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.*

This article indicates that the key consideration is the mistake being the "*sole inducement*". Therefore, it isn't simply an inducement that will suffice but it must be the only reason as to why the testator decided to include such a testamentary disposition in his will for it to be considered invalid. If a testamentary disposition has been solely induced on the basis of a falsity, such disposition will have no effect, however, this is difficult to prove and requires one going into the mind of the testator to see what pushed them to include such a clause.

If it can be proven, it is only that particular disposition which loses effect. But, 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.

However, this has been the fruit of much litigation. The court have reasoned that:

- There is a presumption of validity and the court will try to save the will when such a mistake is alleged.

  Anyone who alleges the invalidity of the disposition on this basis must bring proof to the contrary to show that the inducement was false and that such inducement was the only reason why the clause was written into the will.

  > *e necessario riconoscerla nelle stesse parole e non immaginarla, or crearla, e quindi non si deve indagare quale sarebbe state la migliore disposizione in astratto, ma limitarsi all'esame della volonta espressa.*
  >
  > ---
  >
  > *it is necessary to recognise it in the words themselves and not imagine it, or create it, and therefore one must not investigate what the best arrangement would have been in the abstract, but limit oneself to the examination of the expressed will.*

  As noted, if it is one of many reasons, then the disposition will continue to be valid, especially if it is shown that the testator knew of such falsity and made the bequest regardless.

  In **Cilia v. Scicluna (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 didn't believe the person challenging it. It noted that in such circumstances it is the claimant who must prove that the testamentary dispositions have no effect due to false reasons. The principle is that *onus probanti*

incumbit ei qui dicit non ei qui negat - it is the plaintiff who must prove the facts stated and alleged by him in the act by which he brings the case:

> *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.*
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> *That in this case it is the claimant who must prove that the testamentary dispositions have no effect due to false reasons. The principle is that "onus probanti incumbit ei qui dicit non ei qui negat". It is the plaintiff who must prove the facts stated and alleged by him in the act by which he brings the case.*

- To determine whether the falsity is the sole inducement which could lead to invalidity, the way the clause is written and the way the testator expresses his wishes are vital and must be taken into account. These are the most important bits of evidence. If the will says nothing and no inducement is mentioned in the will, then the clause cannot be challenged on this ground. However, if a reason is given as to why something was left to a particular person, then there is an inducement that can be challenged. Only inducements written in the will can be considered valid, otherwise inducements cannot be assumed, even if in real life the inducement was mentioned.

  If it is in the will, the inducement must be read carefully to see whether that was the reason why the person was left something and to judge whether it was the sole inducement for the purposes of determining falsity.

  In the case of **Formosa Gauci v. Lanfranco (2003)**, a situation arose regarding a large inheritance going into millions. A sister ended up challenging the will of her predeceased twin wherein she left legacies to her husband and appointed her lawyer and friend as universal heir, arguing that this was being done because she didn't want her sister and husband to have to deal with the hassle of dealing with the inheritance and taxes. The sister challenged the will arguing that the inducement (i.e. saving on taxes) was not a valid inducement since nonetheless heirs would have to pay the tax from the estate, meaning there would be no difference as to who inherited. The court noted it had issues with the validity of this argument but didn't go into it very deeply considering that it determined the sister plaintiff lacked the necessary juridical interest to institute such an action. This was because she had no benefit to gain from the will since as a result of intestate succession the surviving husband would be the heir and he didn't contest the inheritance.

> *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.*
>
> ---
>
> *As a relative of the testator, the claimant has any right that does not agree with what her sister disposed of after her death. She also has every right to feel aggrieved by the laxities allowed, but all this per se does not amount to that actual juridical interest as explained above in the body of this sentence. This is apart from the consideration from the other side that every capable person is free to dispose of her estate as she wishes and not as someone else would like, even if it is her sister.*

Therefore, if there is a reason given in the bequest, it is the only reason and it is proven to be false the gift will not be given as it will be considered to be invalid.

The judgement **Xerri v. Xerri (1948)** is an elaborate one that looks into the origins of this part of the law and distinguishes between:

a. Inducements which are final and determinate in nature done after careful thought and consideration.
b. Inducements which are impulsive done in the spur of the moment.

The court said it is only the former which can be considered as being false inducements under this section of the law. If one pondered the problem and after significant consideration and thought, a gift was given on the basis of an inducement and later it is shown that such an inducement is false, then the clause will be null - "*without [such inducement] there can be no will or consent, and therefore, if false, render the legacy void"*. If, on the other hand, one gives a gift in the spur of the moment impulsively, even if it is false, the clause will not be null - "*although false, at the same time [such inducement] do not annul the legacy nor revoke it*".

This is because 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.*
>
> *There is no need to say that in the case of determination for impulsive causes there can be a will independently of them in the testator who benefits "qua legato non cohaeret", while in the case of a disposition derived from the final and determining causes, these are so inherent in the disposition, that if they are false they cannot but destroy that disposition.*

In relation to the appreciation and eventual dercision ont he 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 matters 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.*
>
> *In practice, it is too difficult for the magistrate to distinguish one case from another; and although some jurisconsults tried and tried to give and set down some rules for this purpose, just as Merlin says, they are far from certain rules that a person can he stands on them with his eyes closed. It was for this reason that this discernment was left to the doctrine and prudence of the judges.*

Therefore, it is argued that this distinction between a spontaneous and a though-out inducement in practise doesn't make sense. This is because in both instances, the inducement gave rise to a gift being given. If the inducement was false and without such, the gift would not have been given, it should not make a difference whether it was impulsive or done after consideration as in both situations the testator was induced to do something under false pretences.

In this regard, we also highlight the difference that exists between fraud and a genuine mistake of the testator, or a wrong impression. The conclusion that the judgement came to was that no distinction ought to be made in practise and that ultimately it would be up to the discretion of the court to evaluate the circumstances and for the judge to use their discretion to evaluate how strong the inducement was and its effect, irrespective of it being impulsive or not.

Where only a portion of the inheritance is disposed of

Here, we take into account **Article 684**:

> *If the testator has disposed only of a portion of the inheritance, the residue thereof shall best in his heirs-at-law, according to the order established in the case of intestate succession.*
>
> *The same rule shall apply if the testator has only made singular legacies.*

As noted, dispositions in a will may be by singular title (legacies or pre-legacies) or universal title (heirs). The law provides that a will may have any or both of these types of disposition.

This consideration arises when no heirs are appointed or the testator doesn't provide for the entire estate to be disposed of. In such a case, by default, the rules of intestate succession will apply to the part of the inheritance not provided for and shall be considered *ab intestato*. Therefore, it is succession partly by testate and partly by intestate succession.

While under Roman law prior to Justinian, wills catering for only portions of the estate were not considered to be valid because they needed to cater for the entire estate/patrimony, today, such wills are allowed. This was changed under Justinian with **Article 684** deriving from this change as noted by **Borg v. Borg (1936)**.

One of the main questions that arises is who will give effect to the will, settle liabilities and give out legacies as such usually falls under the remit of heirs. As noted, rules of intestate succession apply with the heirs at law being considered to be the heirs that must handle such obligations.

However, sometimes situations may arise where a legacy contains a bequeath of a universal nature. Here, such a clause is dressed up as a legacy but is in fact, in actuality, the appointment of an heir. For example following assigning specific legacies, a testator notes:

> *I bequeath by title of legacy the rest of my estate to Person X.*

This is also known as a *legato di residuo* and the issue is whether the term "rest of my estate" is considered to bequeath a disposition of singular title as required for it to be deemed a legacy or since it pertains to whatever remains, it constitutes a disposition by universal title. Here, the testator has made provisions 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. Ultimately, regardless of its nomenclature, the designated individual or beneficiary through such a clause is effectively an heir as in practical terms, they inherit a universality along with all associated rights and obligations, irrespective of how the will designates them. This was also considered in the case **Apap Bologna v. Delicata (1897)** which noted it is the appointment of an heir *a contrariu sensu*.

This raises many complications and uncertain consequences:

- Is the beneficiary is bound to implement the other legacies in the will?
- Is the beneficiary bound to make good for the liabilities of the estate?
- If the beneficiary is a spouse in a unica charata will, will such person still be considered as an heir and will they suffer the same consequences if they change the will?
- If the beneficiary claims the reserve portion, can such a person also receive the legacy as payment on account?
- Would the beneficiary be allowed to collect the goods forming part of the legacy?

To answer many of these questions, it is best to plat it safe and file a *rikors* before the Court of Voluntary Jurisdiction, even though this can create many problems in and of itself, especially since situations of oppositions will result in litigation.

Of Persons and Things Forming the Subject of a Disposition

First we consider the fact that as per **Article 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.*

🌿 Privileged Wills

Next we turn to **Article 686** which notes the following in conjunction with privileged wills which can be done verbally:

> *Any testamentary disposition made, by what is commonly known as implied nuncupation, or per relationem ad schedulam is void.*

This generally occurs when a will is verbally outlined by a person who is on the point of death or in imminent danger. These were very common prior to 1868 before the codification of the Civil Code. No matter the situation, a will done verbally is no longer valid and has no legal effect. Therefore, a will must be done in accordance by disposition of the law or has no effect at all.

These must be compared with privileged wills when the testator is unable to write.

🌿 Identifiable Beneficiary

We also take into consideration **Article 687** which notes that:

> *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.*

In line with what was noted earlier in relation to mistake of person, problems arise when one cannot identify who the beneficiary is in the will. If the beneficiary cannot be identified or found, then the will is void. It is null and has no legal effect. This is because it is a condition for the beneficiary to be a certain identifiable legal or natural person.

For example, in the following scenario the will would be null because it is not possible to leave a disposition to a person through a vague description:

> *I leave X to the coolest runner in the marathon*.

This is a subjective criteria that cannot be concretely determined.

Yet, if one were to leave *X* to the winner of the marathon then the person is identifiable.

🌿 Disposition to a Body Corporate

It is also possible to create a disposition in favour of a person or body corporate to be designated by an heir or a third party so long as this doesn't violate the rule that the disposition is made to an unidentifiable beneficiary. This is outlined through **Article 688**:

> *Any testamentary disposition made in favour of an uncertain person to be designated by the heir or by a third party is likewise void.*
>
> *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.*
>
> *It shall likewise be lawful to make 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.*

Therefore, according to this article, a testator is unable to leave anything to the heir to give to whoever they want as this will invalidate the will considering its a disposition being made to an unidentifiable beneficiary. However, what is possible is for the testator to provide options that the heir can choose between to be the beneficiary of a specified object. This would then be valid.

In accordance with sub-article 2 and 3 in relation to dispositions by singular title we note that one is able to leave an object by singular title for an heir to give to someone else as long as such someone else is identifiable. In fact, the law says "*to be selected…*"

For example, one can say that they will leave anyone who completes the Malta marathon €10,000 for the heir to decide. Since the finishers are identifiable persons, such group of persons are all qualified to be chosen by the heir to be left the money. This disposition is valid because it is a gift of a specific item by singular title from persons specified by the testator that can be identified.

This also applies to a body corporate where the testators tells the heirs or legatees that this gift has to go to a company. This is valid as long as the companies from which the heirs can choose are listed. For example, the clause could read that the ultimate benefits must go to a specific type of charity which is a choice made after the testator dies. At this point the issue is closed. When the person passes away, the heir or legatee will have to make the choice and pick the company to be the beneficiary.

🌿 Dispositions in favour of the Next of Kin

Article 689 notes that:

> *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.*

To ensure there is no doubt, a disposition leaving everything to one's next of kin or all descendants is valid as per **Article 689** so long as such persons would have nonetheless inherited under the rules of intestate succession. Therefore, this is interpreted to mean that the rules of intestate succession apply.

Take the following example:

Person X is married with children and leave such a disposition in their will. Then the surviving spouse and children will inherit, or grandchildren if the children have predeceased Person X. If the person has neither a spouse nor children or other descendants, then the sibings will inherit by virtue of the notion of "*nearest relation*". This is the person who inherits under the rules of intestate succession.

Here, the testator is able to make the disposition slightly more specific by noting that it can be the nearest male relative who inherits, for example. This will still be valid and those who are excluded will be entitled to claim the Reserved Portion, if they qualify.

This is a clause that tries to save a will rather than rendering it null by giving it protection at law.

🌿 Dispositions to the Poor

This is contained in **Article 690** and notes that:

> *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 in favour of the Testator's Soul

This is outlined by virtue of **Article 691** and notes that:

> *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.*

Therefore, the law notes that specificity is required in this regard in order for the disposition to be valid. For example, if one leaves €50 every year for a mass to be said at Floriana for the repose of their soul, then such a disposition is valid because the pious use has been designated. Otherwise it is not valid.

🌿 Fiduciary Dispositions

This is contained in **Article 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.*

🌿 Erroneous Designation of Heir, Legatee or Thing Disposed Of

Article 694 states the following:

> *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.*

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.

This section of the law deals with a genuine mistake in 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. To cover situations where the testator made a genuine mistake in the name of a beneficiary or object bequeathed, the legislator enacted this provision whereby it is possible to rectify the mistake and give full effect to the wishes of the testator as expressed in the will.

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 as well. This ties in with the rule that a will must be in writing:

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.

However, it is to be borne in mind that when interpreting a will, jurisprudence has constantly emphasised that the wishes of the testator are supreme as seen in **Fenech v. Fenech (2016)**:

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 ta' ċertezza 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: 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.

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*That **Article 694** of our Civil Code is similar to Article 625 of the Italian Civil Code:*

"(1) If the person of the heir or legatee is wrongly indicated, the provision has effect, as long as one is otherwise sure which person the testator wanted to appoint...".

> *That the words "otherwise" indicate that in the case of a lack of certainty about the identity of the heir or legatee, reference can be made to extraneous proofs and evidence outside the will itself. However, in the opinion of this Court, the referral to extraneous evidence should only be made after examining the will as a whole. In the opinion of this Court, the first Court could reasonably have reached for the conclusion reached and this Court finds nothing to censure in the interpretive exercise carried out by the first Court. From a re-examination of the evidence in the acts, it clearly results that this was a case of a mistake in the testamentary disposition which by law can and should be corrected. The correction authorised by the first Court is not considered a change in the person of the heir, as the appellant contends, but a logical interpretation of what the testator wanted to dispose of through his will. In the context of the article in examination, this Court is not convinced that the testator mentioned the name Michele, with the intention of excluding the appellants, as claimed by the appellant.*

This logic was similarly employed in other cases including **Mallia v. Mamo et (1921)** and **Galea v. Gauci (2002)**.

Similarly, if the thing or object of the testamentary disposition has been erroneously indicated, such a disposition will still be considered as valid so long as the thing can be ascertained.

In the judgement **Muscat v. Dr Porsella Flores et noe (2014)** there had been a mistake with reference to a plot number: the number was listed as Plot 50 when in reality it ought to have been Plot 50A. Here it was further emphasised that using evidence extraneous to the will can be reasonably admitted only to understand the content of the will.

🌿 Disposition left entirely to the Discretion of the Heir

This is contained in **Article 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.

This notes that a testator can leave a singular object to be given to a person from a list of names selected by the testator to be decided by the heir. However, this amount must be quantified. If such an amount is not quantified and the testator essentially leaves it up to the heir to decide how much to bequeath, then the disposition is not valid. Thus, specificity is key.

🌿 Legacy of things belonging to others - *Legato di cosa altrui*

This is contained in **Article 696**, **Article 697** and **Article 698**:

> *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.*
>
> *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.*

> *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, 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 of right, unless it is stated in the will that the testator knew that the thing did not wholly belong to him.*

This has given rise to a significant amount of litigation and Dr Borg Costanzi is of the opinion that it should be removed entirely from the law owing to the problems and injustices that it creates.

The origins of this concept can be traced as far back as Justinian who envisaged the *legatum per damnatum* where a testator was able to leave anything, even that which didn't belong to him.

There are four main scenarios to take into consideration:

1. Legacy of a thing belonging to others and testator declares such in the will.

   Here, we are confronted with the possibility of being able to give something in the will that doesn't belong to the testator either in whole or in part. Funnily, the law says that it is valid so long as the testator knows that the thing being bequeath isn't his and that such fact is acknowledged in the will. This is the most important bit of evidence for the validity of such a disposition and can only be proved by the will itself. 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.

Here, what must happen is that the heirs are required to try and buy the thing for the legatee. If the owner says yes, then the heirs must buy it and give ownership to the legatee. Otherwise, the heirs must give the legatee the value thereof. This relates to 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.

By accepting the inheritance, they are bound to fulfil this obligation, even if they don't benefit in any way since the beneficiary is the legatee. In such a scenario, it is important to examine the costs in relation to the entire estate - if the sum left in the estate isn't large enough to cover the cost of the purchase, then one would be ill advised to accept the inheritance as anything over would have to be paid from the pockets of the heirs. Alternatively, the heirs could renounce the inheritance and claim the Reserved Portion, or, if the option is available, the inheritance can be accepted with the benefit of inventory. This limits the heir's obligation to implement the legacy to the value of the estate: the heir will not need to spend their own money to pay for the legacy if there isn't enough money in the estate to satisfy it.

We question what arises when the burden of implementing the legacy isn't shared equally on paper: Say there exists Property D, owned as follows: 1/3rd to Sibling A, 1/2 by Sibling B and the remainder by Parent C who just passed away. If Parent C named Siblings A and B in his will as heirs but gave Property D to a third party as a legacy, when it comes to actually effecting this legacy, it is clear that Sibling B carries a heavier burden in terms of distribution. Therefore, the law makes it so that the Siblings would have to split the burden equally amongst them. In such a case, Sibling B would be entitled to a refund from Sibling A. This indicates that implementing the legacy is a burden split equally between all heirs. It can get slightly technical at times. This was outlined in **Galea v. Mizzi (2015)**.

Put into practise that would mean the following:

> Example A - There are three children: Child A, Child B and Child C that each own 1/3rd of 1/2 in House H after the death of Parent X. In their will, Parent Y leaves House H to Child A, declaring that it is not entirely theirs since the other half it is divided between the three children. The 1/2 of Parent Y goes straight to Child A who has 1/3rd of 1/2 from Parent X and 1/2 from Parent Y. All three children are appointed as heirs to give Child A House H. Since Child A is equally an heir that must relinquish the 1/3rd of 1/2 from Parent X to fulfil the legacy, then all children are paying equally and no refund is due between them.
>
> Example B - There are three children: Child A, Child B and Child C. House H was 1/2 owned by Parent Y with Children A and C owning 1/8th and Child B owning 2/8ths. Child A is named the beneficiary by Parent Y. When it comes to transferring

the property, the obligation to transfer is equal between the three children. Say House H is worth €60,000, the half they own between them amounts to €30,000. Hypothetically speaking, each child must fork out €10,000 to ensure the burden is split equally: since Children A and C have 1/8th, this amounts to €7,500 and therefore, they must contribute a further €2,500 to ensure that they all contribute equally. Child B, having a 2/8th interest, is entitled to a refund of the difference between the 2/8ths and the 1/8th. If there is money in the inheritance, this will be paid first.

Thus, as can be seen, apportionment as an adjustment mechanism to ensure the burden is spread equally on all is very complex. An easier way of effecting this could be to imagine the situation as though the inheritance is buying the property from the heirs fictitiously. First one pays from the chequebook of the inheritance, paying the beneficiaries the shares they own and such amount is deducted from the totality of the inheritance according to the share they own.

2. Legacy of a thing belonging to others and testator does not declare as such in the will.

   If it isn't written, then the clause has no effect. Therefore, the law distinguishes between whether the testator is aware and declares himself as not being the sole owner of the item in question and scenarios where the testator doesn't acknowledge himself as such.

3. Legacy of a thing which belongs to an heir or legatee.

   One of the major issues arises when that which is being left to Person A as a legacy already belongs to Person A, therefore, they are being left something that is already theirs. This becomes an issue when a sibling, for example, is then given further gifts.

   Take the following example into account:

   Person X and Person Y are married with three children: A, B and C. Person X passes away without making a will. Person Y as the spouse and Persons A, B and C are named heirs who inherit an undivided share in the house in accordance with the rules of intestate succession.

   Person Y made a will and when they died they left the house to Person A as a legacy and named Persons A, B and C as heirs. Person A who was left the house already has a share in the house which they inherited from Person X when they passed away. The same applies to Persons B and C who by virtue of Person X's death were co-owners of the rest of the house. However, by virtue of Person Y's will, they have to give up the share they inherited from Person X without any compensation as they have been named heirs with the obligation to pay out the legatees. The only way out of this situation is to renounce to the inheritance, otherwise they are bound to give up their share. This is therefore based

on the supremacy of a will - if the heirs accept the inheritance unconditionally, the testator's word is law and binds them, as outlined previously.

This example is similar to the **Camilleri v. Camilleri (2000)** case.

This is therefore, an intrusion into the absolute right to ownership under **Article 320**, a concept that applies across the board in this regard.

4. Legacy of a thing which at the time of will was not the testator's but was his at the time of opening of succession.

   In dealing with the *legato di cosa altrui*, the law is dealing with the legacy of a *res aliena,* i.e. a thing which doesn't belong to the testator at the moment of death.

   A point to keep in mind is at what time does one look to see whether the thing remains a *legato di cosa altrui*, meaning at what point does one look to check whether the item was actually owned by the testator. In this regard, we consider the moment of opening of succession. If at this moment, the thing in question is fully owned by the testator, then 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 the thing was his at the moment of death which renders this clause inapplicable.

   In relation to a situation where the item is not fully owned at the moment of opening of succession, then the legacy will only be valid if the testator states in the will that the item doesn't fully belong to him. Otherwise, the part which doesn't belong to him is ignored and the succession is only valid in terms of the part belonging to him. This is because with respect to his own share, there is no need to state that the rest doesn't belong to him: If Person A owns 1/4th of Item P and nothing is said about not owning the remaining 3/4ths, then the legatee will inherit the 1/4th. In such a scenario it can never be a valid *legato di cosa altrui* because the testator didn't acknowledge the fact that the remaining 3/4ths didn't belong to him.

There are still many questions left as a result of this institute and injustices created:

- Is it fair that the heirs are not compensated?
- How is it worked out if the item belongs to one of many heirs?
- What is the legatee is not an heir?
- What if there are cross-legatees?

Inadmissibility of Evidence to show that the Words of the Will are Contrary to the Intention of the Testator

This is contained in **Article 692**:

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.

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.

Here, we remind ourselves that the wording of the will signifies and establishes the intention of the testator. One cannot bring evidence to prove that the testator wanted something other than that which is specified in the law. If the words are clear then the wording will apply. If the testator made a will and left their house to one of his children, even if during the person's lifetime he promised the house to five other children, that has no value and only the will will apply.

Evidence to the contrary cannot be brought unless the validity of the will is being challenged.

Issues Concerning Legacies

These sections cater for very particular situations and rights. Therefore. they don't cover general situations or apply as general rules but apply in select circumstances.

Legacies of an Indeterminate Thing

Here, we take into account **Article 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.

This refers to situations where one is left something which cannot be determined. An example here, would be if a farmer who owns a herd of cows leaves a legacy of one of the cows in the herd without specifying which one. Alternatively, a testator leaves a legacy of one stamp which forms part of their broader collection without specifying which one. This article highlights that, as a rule, even though the particular item has not been specifically identified by the testator, the legacy is valid indicating how the testator is empowered to leave an indeterminate thing as a legacy.

What is quite interesting to analyse is the remainder of the article which considers that the legacy of an indeterminate thing is valid "*even though no thing pertaining to such genus or species existed in the estate*". This is qualified by noting validity would persist if the broader collection from which the indeterminate legacy would be taken did not exist in the estate:

- At the time of the will; nor
- At the time of death of the testator.

Firstly, we comment on the strange choice of wording of the testator through the use of the terms "*genus*" and "*species*". This is important, however, as it demonstrates how the item forms part of a broader collection and distinguishes this procedure from that outlined in **Article 700** dealing with what happens when the thing bequeathed is not found to exist in the estate of the testator.

Secondly we examine the qualification made and note that there exist some difficulties in operation.

The first qualification that the legacy of the indeterminate thing is valid even when it wasn't part of the estate when the will was drafted makes sense. Take the following into account: In a situation where the testator drafts the will and includes an indeterminate legacy from a broader collection that does not exist in the estate at the time when the will was drafted but existed in the estate at the time of death, such a legacy is valid. This could also cater to a situation where a testator includes an indeterminate legacy, for example a cow from a herd, and in between the drafting of the will and the death of the testator, a number of cows pass away and are replaced. The new cows were not part of the patrimony of the testator when drafting the will, nevertheless, the indeterminate disposition is valid.

However, what raises difficult is the second qualification. This highlights that the indeterminate thing bequeathed remains a valid bequest even when, at the time of death, it wasn't part of the estate, despite it being part of the estate when the will was being drafted. Even though at the time of death, the cow in question, to use the same example, does not exist in the estate, despite it having existed previously, the legacy is valid.

Therefore, the conceptual validity of a legacy subsists if at the time when the will was made there was an indeterminate thing forming part of a *genus* or *species* which was either:

- Not owned at the time of the making of the will but is acquired later on; or
- Already owned at the time by the testator but subsequently lost.

The legacy will be given effect in some way or another, either with teh object itself or its value depending on the situation.

Where the Thing Bequeathed is Not Found to Exist in the Estate of the Testator

This is contained in **Article 700**:

> *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 death.*
>
> *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.*

Here, we are referring to the bequest of a determinate thing or any determinate thing in a given genus or species.

We note that in such cases, when such items are left as legacies and the determinate thing is not found in the estate of the testator at the time of death, the legacy is not valid.

The difference between this and the previous section is the characteristic of determinate or indeterminate. Since in **Article 699**, the testator would have left a cow from the herd, without specifying which one, even if such a cow is not found in the estate at the time of death, the legacy remains valid. However, in **Article 700**, the testator is leaving as a legacy a determinate and specified thing. If when the testator passes away the specified, determinate thing is not owned anymore, then the legacy is invalid.

Sub-article 2 deals with the issue of quantity. Take the following situation into account. A testator leaves one hundred determinate cows to Person A in their will but at the time of death, only 50 cows remain. In such case, the law outlines that the legacy is only valid in relation to what actually exists.

Legacy of Thing or Quantity to be Taken from a Specified Place

This is outlined in **Article 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 is 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.*

This has sometimes presented some difficulties.

Normally, this consideration would arise when someone leaves the contents of their house in testate, referred to as *in liminus*. In this regard, the question is whether such a disposition

actually includes all the contents and raises quite a few specific issues :

- What happens if something was removed temporarily, for example a painting to be repaired. Is this included?
- What happens if the testator borrowed something with the intention to return it. Is such an object included just because it was in the house at the moment or death?

The answer in this regard is that it depends on the circumstances of the case and the intention behind what has happened to the contentious object in such a question. The court will enter into an examination of several issues and the situation surrounding them to consider also the intention of the testator. For example, when considering whether an object should be included in a legacy when it had been recently taken out of the house, the court will check to see if the person who removed the thing did so on purpose to remove the thing, in which case it wouldn't count as part of the legacy, or if the removal was of a temporary nature with the intention being for it to return. In the latter case the situation would be different. The same would apply when checking whether there existed the intention for the object borrowed to be in the house permanently or on a temporary basis.

The court engaged in such analysis in the case of **Mallia v. Mamo (1921)** where it concluded that since the testator removed the things and put them elsewhere, the bequest lapsed seeing as from the circumstances, the testator could have easily put the things back or made a new will. The fact that she did not do so rendered the bequest unenforceable.

Another interesting case on this point is that of **Miller v. Rev Farrugia (1939)**. Here, the defendant priest drew up a will in which he left as a legacy the contents of his home. He lived in a house which had a garage and a garden and an issue arose as to whether the items in the garage and garden where to be considered in the disposition, i.e., whether they formed part of the house for the purposes of inheritance. The court noted that since the priest lived in the house and enjoyed the garage and garden, all items contained therein ought to be counted for the purposes of succession. It also noted that the disposition extended to those objects which were normally in the house but which had temporarily been held elsewhere, depending on the intention of the testator. In this case, this included money and certain objects that were temporarily being kept by a third party for safe keeping but that were normally held in the house. This was an issue decided on the basis of facts.

In **Micallef v. Zammit (1951)**, the deceased had some sheep and honeycombs in his garden. The court noted that these were included since the word 'house' had to b interpreted to include the adjacent annexed property and the property accessory to it, including a garage and a garden Here, in interpreting the will, the court highlighted that:

> *ghandu jippenetra l-intenzzjoni legittima tat-testatur, li hija l-ligi li tirregolaha*.

it must be interpreted in line with the legitimate interests of the testator which is the law that regulates it.

The validity of this type of legacy is dependent on the possibility of its execution.

Legacy of a Thing Belonging to a Legatee

Article 702 states that:

> *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.*
>
> *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.*
>
> *Where the legatee shall have acquired the thing from the testator under a gratuitous title, the legacy shall be considered to be adeemed.*

If at the time the will was made the legacy was already owned by the legatee, the legacy has no effect. Therefore, it is ignored as it has no value.

If the legatee acquired the property after the making of the will by onerous title, that legacy is valid. In such a situation, the legatee is entitled to its value. This arose in the case of **Dr Lorenzo Cauchi v. Alfredo Vella (1948)**. In this case, the deceased, Teresa Bugeja, whom **Dr Cauchi** was helping, owned an undivided half share of a property in Bugibba. She left it to the plaintiff in her will as a legacy as compensations for services he had rendered. However, because she had other liabilities, her creditors seised the property resulting in it being sold by judicial auction. Ultimately, the plaintiff himself acquired it in the *subbasta*. Therefore, before Bugeja passed away and at the time of her death, he was already the owner of the legacy. The question arose as to how he could get the legacy of the house when he was already the owner thereof and when the it was no longer owned by the defendant. Ultimately, after Bugeja passed away, he claimed the value of the legacy because the thing did not belong to the deceased at the moment of her death. The court noted that the sale of the property was a forced sale that happened against Bugeja's will and therefore, the legacy was valid. Eventually, the lawyer got compensation as to the amount that it cost to buy the house.

The court affirmed his right to claim highlighting that:

- This was not a *legato di cosa altrui* as considered under **Article 696**. This refers to the leaving of a legacy of something which doesn't belong to the testator. Under such

circumstances, the legacy is only valid if the testator declares that the object doesn't belong to them.

While the defendants argued that this disposition was in fact a *legato di cosa altrui* and considering that she didn't highlight that it no longer belonged to her in the will it was an invalid disposition, the court disagreed with the assessment. It was noted that Bugeja didn't specify that the property was not hers in the will considering that at the time the will was drafted, the property did in fact belong to her.

Ultimately, the court highlighted the incompatibility of the application of **Article 696** with **Article 702(2)** with the former being explicitly excluded. Therefore, the requirements of the *legato di cosa altrui* (the specification in the will that the thing being left doesn't belong or doesn't belong entirely to the testator) is not necessary in the case of **Article 702**.

- **Article 702(2)** applies.
- **Article 743** doesn't apply. This article outlines the case of a legacy of a thing that doesn't belong to the deceased. As a rule, in this case, the legacy isn't valid and only becomes valid once it is highlighted in the will that the item being left as a legacy does not belong to the testator. This transforms it into a *legato di cosa altrui* which is valid and which the heirs are bound to execute, either by buying the item left as a legacy or by giving the legatee its value.

Therefore, if **Article 696** doesn't apply, the legacy of an object which doesn't form part of the estate of the deceased is null, save for in the circumstances under **Article 702** which is an exception. The exception is if the legacy in question is acquired by the legatee by onerous title after the making of the will, then it will be valid. If the acquisition is done by gratuitous title, it is presumed that the legacy has been satisfied and complete.

Legacy of a Debt Due to a Testator

Here, we consider **Article 703**:

> *Where the subject of the legacy is a sum owing to the testator, or consist 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.*

In this regard, we question what arises when someone owes money to the deceased and the deceased leaves the credit as a legacy. This basically refers to the right to collect a debt. When dealing with such scenarios, the way the legacy is written is fundamental - it is the way the legacy is written that will determine how it is implemented (self-explanatory), with the law applying only when there is doubt.

Take the following example:

> X owes Y money.
> In Y's will, he leaves X the credit. In other words, Y forgives X's liability.
> In this case, if the clause is not more amplified, it has the effect of cancelling the liability and that's it, regardless of the amount of the debt. This is because the legacy is not for the amount as it stood at the time of making the will but just serves to cancel the resultant balance.

This was the case in **Vassallo v. Tanti (1911)**. This clarified that one needs to look at the liability, not when the person made the will, but when the person passed away, i.e. the balance as it stood at time of death and not as it stood when the will was being drafted. If the will is clear, there is no room for interpretation.

Legacy of a Thing or Sum as Due by the Testator to the Legatee

This is outlined in **Article 704**:

> *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.*
>
> *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.*
>
> *The legacy, however, shall be ineffectual if the testator shall pay the debt at any time after the will.*

Here, the situation is similar to that outlined in the case **Dr Lorenzo Cauchi v. Alfredo Vella (1948)** whereby the woman Bugeja owed Dr Cauchi a sum of money.

In this case, what is important is that in the wording of the legacy, it is clarified that the legacy is by way of compensation for the debt. It must be absolutely stated that the amount is being left as a legacy in order to compensate for the services rendered. This is because the general principle is that a legacy is given as a liberality, as a gift. This is the presumption. Therefore, if it is not as a gift but rather is in settlement of a liability, the fact that it is a payment of what is due needs to be clearly outlined. If it is not written that the legacy is in virtue of a payment due, no matter what witnesses may state, it is going to be a gift.

Interestingly, in sub-section 2, we are dealing with prescription. When there is a legacy in recognition of a liability, there is an interruption of prescription, even if the will is

subsequently revoked. So, one can have a situation where one compensates their daughter by leaving them their house for looking after them for twenty years. This is a recognition of liability that subsists even when the will is revoked. In such a case, while the revocation of the will renders the legacy inapplicable, the fact remains that the services rendered were acknowledged in a public deed which interrupts prescription. The law goes on to say that the legatee acquires a new action for the recovery of the thing in question - no matter how much time has passed, even if the claim is time barred, once the testator passes away, the time starts running again. The will and the person passing away recommence the time allotted.

Sometimes, there will be a delay in payment, for example, there is a loan and the person was given the faculty to pay it over ten-years. In such a case, the legatee doesn't have to wait for the time period to pass. Even if it is dependent on the fulfilment of a condition, the time doesn't have to be waited for.

Of course, if in the period between the drafting of the will and the death of the testator the liability has been paid off, then a legacy left to compensate for debts owed is no longer effective.

When analysing the particular context of this legacy, we also take into account how it affects the calculation of the Reserved Portion. When looking at the Reserved Portion, we remember that people tend to use devious methods to see how to reduce the value of the estate in order to reduce the compensation payable to someone who claims such Reserved Portion, including resorting to creating fake liabilities or inflating existing liabilities. While the legacy being in the will renders it valid, in such a scenario, the court has the power to look into the circumstances surrounding it to see if it is truly a payment of liability or gift in a way to deviously avoid the payment of the Reserved Portion. If the court feels that the legacy is inflated, the court will calculated the inflated value as a gift rather than a remuneratory legacy which is deducted from the estate.

This is also the case when dealing with forfeiture vis-a-vis unica charta wills.

In this regard, we take into account the judgement of **Attard v. Agius (1952)**.

What has been outlined is also reinforced through **Article 705(1)** which states that:

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.

This confirms that a legacy is deemed to be a gift unless otherwise stated. For it to be considered as a payment of a debt, this must be expressly outlined in the will.

This was outlined in the case of **Buegja v. Farrugia Souchet (1916)**.

Legacy to Servant

Here, we take into consideration **Article 705(2)**. Once again, we preliminarily note that a legacy without conditions is a gratuitous one that enables a gift to be left to the legatee. This article highlights that in order for a legacy to be considered as a set-off of wages owed to the employee, such must be expressly stated:

> *A legacy made in favour of a servant, shall not be deemed to have been made in satisfaction of his wages.*

We note the fact that just because the will says it is in set-off doesn't mean it actually sets it off, however. This goes agains the normal rules. Take the following example: Person A owes €10,000 to Person B. A sends a letter to B with an enclosed cheque of €8,000 which he notes is in full and final settlement. Even though it is not for the full amount, if Person B cashes the cheque, he does so accepting the condition of it being "*in full and final settlement.*" In order to rebuke this condition, the cheque must be sent back or not cashed to protest the missing additional €2,000. Once it is accepted, the liability is closed.

Nevertheless, if the testator leaves a legacy to the servant and leaves a item in settlement of the service, the court has the power to see how much the gift is worth and how much was actually owed. If more is owed, the servant is entitled to payment of the difference. Here, the law is protecting someone in a weak situation, especially following the Second World War.

Therefore, 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. If it is mentioned that it is in satisfaction of a debt, then the court has the power to examine that to ensure the fair compensation. Here , we consider that if the will does not state that the legacy is remuneratory, the beneficiary is entitled to both the legacy as well as to get paid his credit for services rendered, as noted in **Bianco v. Valenzia (1983)**.

In the case of **Pirotta v. Preca (1939)**, it was once again highlighted that the court has the power to ascertain if such services were actually rendered to see if the legacy should be considered as a liability on the estate or not for the purposes of calculating the Reserved Portion. It was noted that if the services were in fact not rendered, the legacy in itself is still valid but it is deemed to have been made as a gift.

Legatum Libertionis to include Debts Due at the Time of the Will

This refers to legacies left to liberate the debtor from the liability. Therefore, Person A owes Person B money and a legacy is left by the latter to free them from the obligation to pay.

Article 706 elucidates that this is only valid up to the extent of the liability which was contracted at the time the will was made.

> *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.*

Unless explicitly stated otherwise in the will, the presumption is that the obligations and deriving liability entered into after the will if drawn up is not included in this legacy left to liberate and such is only applicable to liabilities coming into being before the will was made. However, this is very dependent on the wording of the law. Say the testator includes in his will a clause stating: "*I discharge Person A from all debts which may be due to me at the moment of my death*", then this logically includes those debts that were entered into after the will was drawn up.

This is generally applicable in relation to children with the testator freeing the children from the liabilities they entered into.

Legacy of Maintenance

This involves the testator leaving a legacy for the person to be maintained. **Article 707** stipulates what maintenance is considered to include:

> *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.*

Like with any issue with maintenance, two levels must be looked at:

1. The bare necessities required for life;
2. One's social standing

This must be considered in relation to the assets held by the deceased, i.e., one has to examine the circumstances of the legatee in cross relation to the extent of the estate. Take into consideration the difference in lifestyle between a family living on bread and butter, struggling to make ends meat, and a family that lives in luxury. The maintenance needs will be vastly different and such differences result in a change in benchmark. This indicates how it is a very subjective evaluation. In fact, this emerges from the phrase "*according to circumstances*" which indicates that the necessities change depending on the situation at hand.

These situations don't arise quite often.

Legacy of Immovable Increased by Subsequent Acquisitions

Take the following scenario into account:

What if Person X buys a plot of land, makes a will and after, buys an adjoining plot of land and builds a house. At the time the will was made, Person X only owned a part of the property when compared to at time of death. This begs the question as to whether the legacy includes the entire property or the part mentioned in the will. The moment to take into consideration in this regard is the moment of the drafting of the will. Therefore, unless the wording of the law indicates otherwise, the legatee is entitled to that which was owned at the time the will was made.

This is outlined in **Article 708**:

> *Where the testator who has bequeathed the ownership of an immovable property, has subsequently increased such property by further acquisitions, such acquistions, even though contiguous, shall not be deemed to form part of the legacy, unless a fresh bequest is made.*

This was considered in the judgement **Said v. Nutar Dr Cauchi (1958)** whereby the court noted that acquisitions made after the will was drafted are not included.

Pre-legacy to Heir

This is contained in **Article 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.*

This article envisages the following scenario: In Person A's will, he leaves his house to Child B and appoints him as a co-heir to the rest of the estate.

We must question, however, what happens when the legatee, in this case Child B, is already a partial owner of the thing left as a legacy, in this case the house. In such a case, who will pay out the legacy? We note that a legacy is a liability on the heirs that they must pay out but in such a situation, the unfolding of events is not very clear. This is why we must consider the following in relation to assets and liabilities in inheritance:

In relation to assets, we analyse **Articles 495(3)** and **495A** of the Civil Code dealing with co-ownership. The former article, in particular, outlines how property which has been co-inherited will be owned by the heirs only after three years. Therefore, until such time lapses, the heirs are unaware of what their share in the estate will be and what belongs to them, each having a share in everything, not knowing what the everything is. After three years, they enjoy a determinate or specified share of every thing/in each property.

In relation to liabilities, we firstly note that this three year period doesn't apply. When considering **Article 939**, we note it states that each heir is liable for his own share. Thus, if there is a liability of €10,000 and there are five co-heirs, each heir must pay 1/5th of the €10,000 from day one, since the with liabilities the share is identified immediately on the opening of succession, as opposed to assets that require the three year period.

According to these rules since, as established, a legacy is a liability on the heirs, each heir must pay the liability according to their own share. Yet, it seems that through **Article 709** the law is trying to avoid having the pre-legacy contributing to pay out the liability of the gift he has been left. This is because the presumption is that a legacy is being given as a gift and one should not be expected to contribute to be able to enjoy their gift. Therefore, the law fictitiously states that as far as the legacy is concerned, the beneficiary is considered as a legatee as opposed to an heir, enabling such beneficiary to receive it as a gift without needing to contribute.

However, this is open to interpretation as there exists case law giving dissenting opinions:

Carabott v. Caraboot (1947) saw the court argue that a pre-legacy is nonetheless paid by the heirs in their respective share with the beneficiary in this case needing to pay the burden to the extent of his share as an heir.

A very important case in this regard is **Agius v. Agius (2021)** through which the court stated and concluded that the legatee is not bound to pay the burden of the legacy and gets it for free.

In terms of interpreting a legacy for such purposes, we look to the case of **Borg v. Borg (1998)** through which the court stated that when in doubt as to the existence of a legacy, the interpretation must be in favour of the legacy. However, when there's doubt as to the extent of the legacy, the interpretation must be in favour of the heirs.

Making use of the reasoning employed in **Agius v. Agius (2021)**, in such situations, a contradiction exists since on the one hand a legacy is a burden on the estate which means that if the legacy is due to a third party, all the heirs must contribute whilst at the same time, if the legacy is due to one of the heirs themselves as a pre-legacy, that heir doesn't contribute with the other heirs having to pay. This seems to be what the law is arguing in favour of also. Thus, when calculating the legacy, it must be forgotten that the pre-legacy is also an heir and the pay-out must be divided between however many other heirs there are.

Of Conditional or Limited Dispositions

This section of the law considered conditions that testators can include in the will through which they can impose their wishes on the heir or legatee. Such are considered to constitute a

slight interference in the rights of an heir or legatee but because they are unusual the law has catered for them. This is especially so because they complicate a will and in practise, the more complicated the will, the more subject it is to litigation.

Article 710 highlights how any disposition, be it of universal or singular title, can be subject to conditions. Therefore, conditions can be imposed on heirs and legatees alike and can validly apply in both circumstances and when a will disposes by both forms of title. This article distinguishes between a pure disposition of universal or singular title, which refers to a disposition made without any conditions and a conditional disposition.

However, we note that not all conditions will be considered valid. Here, we make reference to impossible conditions, conditions which are against the law and conditions which are against morals. These are reflected in **Article 711**:

> *Where the condition is impossible, or contrary to law or morals, it shall vitiate the disposition to which it is attached.*
>
> *Where the condition is unintelligible it shall be considered as if it had not been attached.*

Firstly, this notes that when a condition is impossible, it is as though such a condition doesn't exist. This is in line with the maxim *ad impossibilia nemo tenetur* which means that 'nobody will be held to the impossible'. If the condition is illegal, it is as though it is not written. If the condition is immoral, it is ignored.

This takes us back to the first clause dealing with testate succession, namely **Article 588** which highlights that a will is valid when it is made according to "*the rules laid down by law*". Through **Article 711** the idea of according to law is being amplifying again in respect with conditions: a condition which is impossible, illegal or immoral then it will not be carried out.

Furthermore, considering that the inclusion of conditions in a will is an exception and not the rule, the law specifies the importance of intelligible conditions, meaning the condition outlined in the will must be clear and easily well understood on pain of exclusion from application. In fact, if there is a doubt as to what a condition in the will is trying to signify, it means the condition will be deemed unintelligible, and will not be enforced. This is in line with the idea that the will must speak for itself as the court will not imbue meaning onto the condition on the basis of inference or thanks to extraneous circumstances.

These are general rules applicable to conditions.

Condition in Restraint of Marriage

This is outlined in **Article 712**:

A condition prohibiting a first or a subsequent marriage shall be considered as if it had not been attached.

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.

A condition in restraint of remarriage, attached to a

In general, the condition prohibiting marriage doesn't apply. Take for example, Person A leaving his daughter Child B a house on the condition that she doesn't get married, here the legacy is valid but the condition is not, so Child B will be able to inherit the house whether or not she gets married.

However, as outlined in sub-article 2, there is an exception to this when the inheritance consists in a legacy of the right of usufruct, use, or habitation, or in a pension or other periodical payment. In this regard, the testator can validly include a clause restricting marriage, stating for example, that their surviving spouse would only be entitled to such a legacy if and only if they don't remarry. This conceptually makes sense because if a spouse remarries they can be supporting by their new spouse.

Along the same lines, the law further clarifies that a condition in restraint of marriage attached in a disposition of one spouse in favour of another will apply validly as an exception to the rule in sub-article 1. This clause has given rise to litigation but it has been justified by the court that felt a testator was able to impose such a condition as through a spouse remarrying it would go against the decorum and dignity of the *de cujus*. Thus, the court confirmed it on this basis, even though in the present day it is hard to see this reasoning still being upheld. We note that such a condition can be present in any type of will and not only in an unica charta will .

In **Camilleri v. Bugeja (1944)** the condition that the beneficiary does not marry a person of a certain class is a valid condition and is done in the interest of the "*vanta, interess, dekor u dinjita' tal-gatifikat stess*". Additionally, in another judgement it was found that the condition stipulating a person can only get married from a certain village and that the marriage take place in that village is valid. This was not seen to be a condition in restraint of marriage since it is not stopping a person from marrying but is a means to say one will only benefit from the testator's estate if the marriage takes place under such conditions. In and of itself, such a condition is nothing new.

Condition Restraining Heir from Availing Himself of Benefit of Inventory

This is outlined through **Article 713**:

> *Any condition restraining the heir from availing himself of the benefit of inventory shall be considered as if it had not been attached.*

This relates to the notion of benefit of inventory dealt with under **Article 877 et seq**. We note that when availed of, generally it is because the estate has more liabilities than assets or the heirs strongly suspect that to be the situation. In accepting the inheritance with the benefit of inventory, the heirs play it safe, inheriting and assuming the responsibility of heirs whilst keeping the inherited assets as a separate patrimony. This enables them to only make good the liability of the estate from the inherited property, without jeopardising their own estate in the process. **Article 713** highlights that any inclusion of a clause denying heirs this possibility is an invalid condition and it will be treated as though it doesn't exist because the benefit of inventory is an inderogable right bestowed upon heirs by law.

Limitation of Commencement or Cessation of Institution of Heir | Condition Suspending the Execution of the Disposition

These are outlined in **Article 714** and **Article 717** respectively but can be read together:

> *If, in any testamentary disposition by universal title, the testator shall fix a day on or from which the institution of heir shall commence or cease, such limitation shall be considered as if it had not been attached.*

> *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.*

Taking the former, we first note that it only pertains to dispositions by universal title, i.e., to the appointment of heirs. It relates to the following kind of situation: Person A, in their will, appoints Person B as their heir, stating that they will actually become an heir six months after the moment of death. In Malta, this is not how it works, however, this is quite a common condition in foreign jurisdictions and is included especially to overcome headache-inducing situations where there are commorientes, i.e., people dying in the same instance.

In such jurisdictions what is done is the law enables the possibility of putting a condition in the will that an heir will only be appointed after a certain number of days. Therefore, if the

heir doesn't survive for a certain number of days as stipulated in the will, they are no longer considered to be an heir. In Malta this is not needed because of the clarity of the law in such scenarios and the law's outright prohibition of the postponement of this benefit.

In Malta, the appointment of an heir or a legacy is effected from the moment of opening of succession - the heir immediately steps into the shoes of the deceased through the universal title for the sake of continuity. For such purposes, it is unimportant whether the heir lives for five years or five minutes after they inherit.

However, as a result of the different jurisdictional rules in this regard, it is likely that when it comes to cross-border successions, issues of this nature will arise in relation to the late appointment of an heir. In such a case, the court will be faced with a conflict between **Article 714** and the foreign law. If the estate is regulated by a foreign law than it will apply and override **Article 714** but if Maltese law applies then the postponement of someone inheriting by universal title is not allow.

Article 717 on the other hand, suspends the execution of the testamentary disposition. Here, the heir is appointed at the moment of opening of succession but they must wait to actually inheritance and assume the rights and obligation associated with such inheritance. Take the following as an example: "*Person A will inherit my house, but they cannot access the property until they are eighteen-years old."* This is a valid condition because such a condition doesn't prevent the heirs or legatee from inheriting the property but merely delays such until a particular condition has been satisfied. This is reinforced by the law outlining the "*vested rights*" enjoyed in this situation by the heir or legatee. This means that such person has the right to the inheritance and by virtue of the right can act to protect the property. The fact that such a vested right exists also means that if the heir or legatee stipulated in the will passes away before the condition stipulated in the will is realised, then the disposition becomes part of the person's inheritance. As a result of the vested right, the disposition is already theirs simply pending the physical execution. Therefore, as noted, it is not actually postponing the appointment of an heir, with such appointment and the effects thereof being operative at the moment of opening of succession, but is the suspension of the execution of the disposition until a certain condition has been fulfilled.

This was explained clearly in the case of **Cauchi v. Tabone (2008)**. By way of background, Spouse A and Spouse B co-owned a house. At some point in their marriage, they drew up an unica charta will and stipulated that the house in common would be sold and the proceeds given to Dar tal-Providenza upon the death of the surviving spouse should they have no children, which ended up being the case.

Spouse A passed away first and following this death, Spouse B befriended the defendant and gave the house on perpetual emphyteusis to him. Later, he redeemed the ground rent and owned it freehold. When Spouse B passed away, Dar tal-Providenza sued the defendant

stating that they had a legacy in the form of the value of the house that was suspended until the death of Spouse B (such death fulfilled the condition of the death of the surviving spouse) and claimed the proceeds.

Firstly, considering the spouses made an unica charta will, it was looked into to see if the Spouse B was within their rights to change the will or whether they suffered forfeiture. Considering in the will the spouses granted each other the permission to change the will there was no breach in the amendment made through the transfer to the defendant. However, the court maintained the validity of the testamentary disposition of Spouse A in favour of Dar tal-Providenza, whose execution was suspended. Therefore, the court confirmed that Dar tal-Providenza had a vested right over the share belonging to the Spouse A at the moment of their death, but given the condition in the will, needed to wait for the death of Spouse B for it to be executed and their vested right satisfied.

Because of this vested right, the court maintained that the house ought to have been sold after the death of the surviving spouse but acknowledged the impossibility thereof considering it had been sold prior to their death. However, the court considered that since the heir was the owner of the house, such heir was bound to pay Dar tal-Providenza hald the value of the house based on their entitlement vis-a-vis Spouse A's estate. In so doing, the court also made it clear that the correct defendant and person answerable to the claim was in fact the defendant heir Tabone.

Indirectly, through this judgement, the court also answered the question as to what would have happened if the surviving spouse sold the house to a third party prior to their death. It was argued that in such a case, the sale would have been valid and that would not have been the responsibility of the extraneous third party in possession to must pay to make good the testamentary disposition. Rather, such a responsibility was found to vest in the heirs nonetheless. In this situation, the heirs would have had to compensate Dar tal-Providenza in satisfaction of their vested right that was created and vested therein the moment of the opening of succession of the husband but suspended until the condition was satisfied.

Nullity of Disposition on Condition of Mutual Benefit

Here, we look to **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.*

A situation emulating this would be Person A leaves Person B as an heir on the condition that Person B leaves Person C as their heir.

Interestingly, this renders the will null and not annulable, but is only a condition discoverable following the passing of the testator.

One can aruge that the closest that the law allows is in relation to the reciprocity clause between spouses in the *unica charta* wills. However, this is something which the law allows for and has specific rules guiding to ensure that there isn't abuse.

Nullity of Dispositions Depending Upon An Uncertain Event

Under **Article 716** it is argued that:

> *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.*

Therefore, this arises when a condition is placed in the will regarding an uncertain event. While this remains valid so long as the beneficiary is alive, once such as passed away, the legacy is no longer valid. We also note that upon the non-fulfilment of the condition, the legacy is also ineffectual. Here, we take into account the case of **Dr Said v. Galea (2015)**.

Where the Heir or Legatee is Bound to Give Security for Fulfilment of the Condition

This stems from **Article 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.*

Here, the testator is including in the will that the heir or legatee shall not do something in order to receive their disposition. Take the following example into account: Person A will inherit the car, so long as Person A does not take it out of the country. The moment that Person A takes the car out of the country, there is a breach and the gift can be challenged. In this case, it isn't only up to the good faith of the beneficiary to meet the conditions stipulated, the heirs as ultimate beneficiaries, can ask the other heir or legacy to whom the disposition was made to provide security in the case that the condition is breached in the form of either a hypothecation or pledge. The request must be made by the person who stands to benefit in the case a breach arises. Therefore, no third party is entitled to challenge the bequest and such bequest remains valid insofar as the heir or legatee doesn't breach the condition which can either be an obligation to do or one that forbids the heir or legacy from doing something. This is similar to the **Formosa Gauci v. Lanfranco (2003) Case** whereby a sister challenged the inheritance left but the court determined that she had no juridical interest to do so, resulting in

a situation where even if she was proved right, she would stand to gain nothing as she was in no way a beneficiary.

Person Charged with Delivery of Conditional Legacy Must Give Security

As outlined in **Article 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.*

This applies both to conditions dependent on an uncertain event and conditions which suspend the execution of the legacy (**Article 716** and **Article 717**). When there is such a condition, the legatee can ask the heir to provide security, i.e., a suitable guarantee that the legacy will be paid once the condition is fulfilled. In such a situation, we see a reversal of the state of play as observed under **Article 718** whereby it was the heir or legatee that received the disposition on a certain condition that had to provide security. Now, it is the heir who is charged with distributing the legacies that has to provide security to that legacy who will only receive the legacy on the fulfilment of a condition set out in the law - a legacy that has a suspensive condition over it.

The reason why this is provided for is to avoid a situation whereby upon the fulfilment of the condition, there would be nothing left in the estate. Thus, the law gives this right of protection of the legacy. If the condition is uncertain, there is no juridical interest and no vested right. This only arises if and when the condition is fulfilled. Notwithstanding, the law offers protection via security given by the heir to be granted to make sure that the condition is fulfilled, the gift is secured.

We note that this protective measure is more important in relation to the situation contained under **Article 716** because in **Article 717**, where there is a certain condition, there is a vested right transmissible to the heirs. In this case, there is juridical interest and a prohibitory injunction can be filed in court.

The Appointment of Administrators

This is outlined through **Article 720**:

> *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.*

> *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****.*
>
> *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.*

If there is doubt and the guarantees are not given, one can ask for an administrator to be appointed to ensure the protection of the legacy, especially in those situations considered under **Article 716**. This is a very important article as there are many situations where the condition placed in a will is dependent on something very uncertain which means the beneficiary will need to wait and it is important that their gift be protected in the interim. Thus, a request can be made for an estate administrator to be appointed.

Such a request can be made in the following circumstances:

- When the legacy contingent on the happening of an event (**Article 716**)
- Where the heir/legatee fails to give security (**Articles 718 and 719**)
- Where the instituted heir is as yet not conceived at the time (**Article 600**)

This happened in the case of **Marquis Sciculna**. Presumably, he had doubts as to whether his own children would look after his estate and thus, instead of leaving it to them, he left it to the children born or yet to be born of his children. This was an uncertain event and there was no guarantee in place, thus, the court appointed an administrator to take care of the estate.

When there is an administrator, there has to be control as provided under this article. When someone fails to provide security, one can also ask the court to appoint an administrator. There can be instances where the testator makes a will with conditions that controls the heirs and legacies with respect to their dispositions after death, but upon his death, the heirs and legatees disagree on the conditions and are all in agreement to waive such conditions. Normally, the law says the heirs are bound by the wishes of the testator but there is no provision in the law which says anything when all the beneficiaries collectively agree to waive the conditions. Under UK law, in fact, it is possible to do a deed of variation where the beneficiaries vary the will. This is not a renunciation, but variation which is acceptable. Under Maltese law, nothing caters for this scenario.

From a practical point of view, if this agreement is made, the question arises in relation to who has the right to challenge it. The answer would be no one. If everyone signs a public deed which establishes a variation to the will, there is nothing to stop them from doing so because there would be no one who has the judicial interest to challenge the variation.

Nonetheless, appropriate guarantees have to be ascertained in this will so that if in the future, one of the heirs or legatees changes their mind, the guarantee acts as a safeguard.

Thus, with variations and removal of conditions, it is important that every single beneficiary is a signatory because otherwise it could be challenged.

Effects of a Legacy and Payments

These are contained from **Article 721** to **Article 736**.

The General Rule

In relation to the general rule, we keep in mind **Article 721**:

> *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.*
>
> *Where the legacy is made conditionally, such right shall not vest in the legatee before the fulfilment of the condition.*

Therefore, if there is a general simple legacy with no conditions there attached, such legacy belongs to the legatee from the moment of opening of succession. Moreover, an heir has a right to claim inheritance as soon as the testator passes away *ex nunc.*

This is important because of the question with regards to who can inherit. If a child is born viable, the child can inherit. Imaging a situation where a mother dies during childbirth and the child passes away some days later. The child would have inherited the mother, either as an heir or legatee because pure and simple legacies have effect immediately upon the opening of succession. One need not wait for a person to claim the legacy to make it theirs.

On the other hand, where the legacy is conditionally made, such right shall not vest in the legatee before the fulfilment of the condition. The law says that when there is a condition, until it arises, the legacy is not someone's. However, if we go back to **Article 717**, the notion of the vested right attributed to the legatee contradicts this. Here, it seems that the legacy remains the legatee's with the only thing missing being the actual possession of the thing in question. The only way to reconcile these provisions is to distinguish between a condition where one has to wait until the fulfilment of an uncertain event and a condition whereby the gift belongs to the legatee already but until the condition materialises, one has to wait to benefit from it. As we understood through **Article 717**, the legacy is valid and effective but the execution thereof is suspended and thus, is not a legacy falling under **Article 721(2)**.

This situation was briefly discussed in **Abela v. Cassar (2023)**. The condition in question was an obligation to forbear from doing something. The testator appointed an individual as their heir providing that the will was not contested. Any instance of contestation would result in this person getting solely the Reserved Portion. Someone diid challenge the will and the court went into the nature of the challenge. It was alleged that there was a technical invalidity, therefore, no reservations whatsoever were put forward in relation to the testator's intention. The court concluded that the person challenging the will was entitled to do so but in so doing, wasn't challenging the will *per se*, but exercising a right according to law. The court maintained that the will was valid and therefore, the condition as to no contestations hadn't been breached. Had the court invalidated the will, the condition would have had no bearing.

Executing a Legacy of an Indeterminate Thing

This is contained under **Article 722** which states that:

> *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.*
>
> *The same rule shall apply where the right of selection is left to a third party.*
>
> *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).*

Therefore, when dealing with the legacy of an indeterminate thing included in a genus or species, the choice is generally left to the heir who is bound not to give the worst thing but is free in all other respects. Here, the right of selection could also be left to a third party who is similarly bound not to give the worst thing in such genus or species. If it was specified that a third party ought to execute this legacy and such is unable to do so, the right to select will vest in the courts.

Article 723 provides for further options:

> *When 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.*

Therefore, the law also provides for a situation where the legatee can select the item in the case of a legacy of an indeterminate thing. Here, such a legatee is free to choose with total discretion, including choosing the best. If none exist, then the choice falls unto the heir.

Alternative Legacies

Article 724 states that:

> *In the case of alternative legacies, the right of selection shall be deemed to be given to the heir.*

In such cases, unless the will specifies otherwise, the choice is left to the heirs. However, once the decision of the heir is made, such decision is irrevocable, as stated by the law. This decision can only be altered if the parties agree, otherwise, the decision is final.

When the Right of Selection Passes to an Heir of the Heir or Legatee

Here, we deal with **Article 725:**

> *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.*
>
> *The selection, once made, shall be irrevocable.*
>
> *Even when 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.*

We note that if the heir or legatee was unable to make a selection, such decision will fall to their heirs with such being final.

If the object being left forms part of a genus or species, one can only choose from those objects forming part of estate at the time of opening of succession, not at the time of the making of the will. The object has to be something forming part of the estate as it stands wen the person dies.

Legatee to Demand of Heir Delivery of Thing Bequeathed

This is specified in **Article 726** and constitutes one of the main rights of the legatee and one of the main obligations incumbent upon the heir:

> *The legatee must demand of the heir possession of the thing bequeathed.*
>
> *In the case of immovable property the legatee may demand the grant of such possession be made by means of a public deed.*
>
> *Unless the testator shall have otherwise provided the expenses relative to the deed shall be borne by the legatee.*

However, while it is a right, we also note that the legatee must ask for the legatee to be bestowed upon him.

If it is movable, the heirs would probably give it to the person with the right to possessing it and a document is generally required to signify that the transfer has taken place. If it is immovable on the other hand, possession of the legatee must be signified by a public deed, known as *immissjoni fil-pussess*. The legatee can force heirs to carry out this contract. This serves as proof that the legatee has accepted the legacy and and that the object has been duly delivered. It is also proof that the heirs are willing to do it and that there are no issues, especially considering issues can arise vis-a-vis legacies and a claim for the Reserved Portion if the non-disposable portion has been exceeded. The contract with show that even if a claim is made, the legacy is not abated.

The contract of *immissjoni fil-pussess* is not a transfer of ownership, the transfer in and of itself takes place at the date of opening of succession or upon the fulfilment of any condition contained therein. Legatees are owners of the property from the day of opening of succession, unless this is time barred. This is a mere declaratory deed transferring legal possession. In **Cini v. Cini (2016)**, the distinction between ownership and possession was made clear. Through this contract, no taxes are payable.. The deed *causa mortis* contains taxes which are paid by the heirs. If the legatee asks for an *immissjoni fil-pussess*, the legatee will only pay for the costs of the contract. This was a change to the law done in 2004. Therefore, as far as this contract is concerned, it is paid for by the legatee but the taxes are paid for by the estate by the heirs.

We keep in mind that the right to claim a legacy is ten years. If unclaimed, the legacy will not be obtained. If claimed ownership transfers from the day of opening of succession or when the conditioning barring such is fulfilled. This contracts slightly with **Article 721** considering that such argues that the transfer of ownership occurs immediately upon the opening of succession but in reality for that to occur, a claim must be made for the property.

Fruits and Interests

This is spoken of under **Article 727**:

> *It shall not be lawful for the legatee to claim the fruits of, or interest on the legacy, except from the fay 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.*

The general rule of legacies is that it rest’s in favour of the legatee from day one. Presumably, this would also be the case with its fruits. However, **Article 727** highlights that technically, such fruits and interests run from the date the legacy is claimed or from the date when it is

promised. Not in the context of inheritance, interests of a civil nature do not run automatically, but run from the date when a judicial letter or a judicial demand is sent, as noted in **Psaila v. Ellul (1957)**. In the case of inheritances, this is also the case, i.e., when the claim for the legacy is made, save for:

1. Where the will states otherwise: If the will specifies what to do, then such must be followed.
2. In relation to certain dispositions: One has to look at the nature of the gift. If the gift is already bearing fruits, then fruit is gained immediately. If the gift is not bearing fruits, fruit will only be gained when an official demand is made.

   Take the following example: Person A is gifted a flat but such is currently being rented to people at the time the testator passes away. In this case, the legatee is entitle to collect the rent being paid by the renters. If such a flat was being rented but the tenants moved out before the testator passed away leaving it vacant with no rent coming in, no fruits are gained until the legacy is claimed. If the flat is vacant for only two months after the testator passes away and occupied for five years after that with the tenant paying rent, the legatee is not entitled to the fruits until he claimed.

Legacy of a Life Annuity/Pension

This is catered for under **Article 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 death of the testator.*

Therefore, such runs from the date of death. If the payment of a legacy has been staggered over time, the time starts with the the date of death but is paid in arrears and not in advance unless it is the payment of maintenance.

Legacy of a Thing Including its Accessories And Accessories and Embellishments

Article 730 states that:

> *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.*
>
> *Nevertheless, the legacy unless it is by way of maintenance, cannot be claimed at the commencement of the period.*

In terms of accessories and embellishments, we turn to **Article 731**:

> *The thing forming 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.*
>
> *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.*

A legacy of a thing includes its accessories. If there are embellishments and the property has been improved, the legacy is for the object as it existed at the time when the will was made. When it comes to the increase in property, such increase is only part of the legacy if the will states so. In practise, one has to see if the object is an accessory to the thing gifted or whether it is considered to be an enlargement or an extension.

Burdens on the Thing

Here, we consider that there are consequences if the object forming part of the legacy is already subject to a burden.

1. If the right is a usufruct or an annuity, it stays.
2. If the right is a hypothec, the heir must remove it unless the will states differently.

As always, in this regard, the technicalities specified in the will must be respected.

Usufruct and Pensions

This is adopted, if the beneficiary has liabilities or if the testator has liabilities. It is possible in the will to state that a usufruct or pension cannot be garnisheed by any creditors. It is taken out of the assets that can be seised to enforce a credit. In this case, the usufruct is safeguarded and becomes inalienable. This in essence is an obligation in restraint of trade. It is a very exceptional clause, and typically, the clause is invalid but in such circumstances, it is allowed by law.

Expenses to Deliver the Object

Such are charged to the estate. These charges are not taken into account when calculating the Reserved Portion, as per **Article 735**:

> *Where any one of the heirs has been particularly charged with the payment of the legacy, he alone shall be liable for such payment.*

> *Where the subject of the legacy is a thing belonging to one of the co-heirs, the other co-heirs shall, unless a contrary intention of the testator is shown, compensate such co-heir for its value, either in cash or in hereditary property, each in proportion to his share of the inheritance, provided such legacy is not void, in whole or in part, under* ***articles 696, 697*** *and* ***698****.*

The cost of transferring the legacies is borne by all the heirs, with the exception of a pre-legatee. A pre-legatee, being both an heir and a legatee, would not contribute to the cost of his own legacy.

Accretion

The rules of accretion are dealt with at law through **Article 737** to **Article 742** of the Civil Code, and regulate a situation where two or more people have been appointed the same benefit (appointed conjointly to inherit as heirs or legacies) and one of them dies before the testator. For example: In his will, Testator A appoints his two children, Child B and Child C, as universal heirs. The rules of accretion regulate what were to happen to the share of the estate if Child B predeceased Testator A. Therefore, these rules help determine what happens if a co-heir or co-legatee cannot benefit under the will. We note through the reference to both heirs and legatees that these rules are applicable both to bequests by universal title as well as to bequests by singular title.

The *raison d'etre* behind these rules is the presumed intention of the testator: through these rules, the law fictitiously tries to interpret the wishes of the person interpreting the will. This must be done concurrently with an examination into the actual wording of the law.

NB. Accretion only applies under testate succession. If there is no will, the rules of intestate succession apply including the rules of representation. This operates as follows: taking the same aforementioned scenario, should Child B predecease Testator A and have no children, then their share of the estate would go to the surviving Child C. Should Child B predecease Testator A and have children, such children (the grandchildren) will inherit his share according to the rules of representation.

Applicability of Accretion: Step 1

The notion is introduced through **Article 737** which highlights:

> *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.

This article highlights that prior to considering the rules of accretion, certain preliminary steps must be undertaken:

1. It must be seen whether the rules of representation apply in terms of **Article 745**. The process of representation applies both to testate and to intestate succession and involves a process of following the bloodline of the *de cujus* to find the remaining descendants at the moment of death. Once they are dutifully identified, they can inherit by virtue of representation.

   From a logical interpretation of the law which states "*saving the provisions of [representation]"*, when a situation is regulated under the rules of representation, then the rules of accretion do not apply.

   Therefore, if Testator A appoints his two children, Child B and Child C, as universal heirs and Child B predeceases Testator A, leaving two children of his own, Child D and Child E, the rules of representation apply enabling the division of the estate as to 1/2 to Child C and 1/2 to Child D and Child E (1/4 each).

2. Secondly, **Article 737** draws our attention to **Article 866**. Here we consider that the rules of accretion don't only apply in situations where a child has predeceased the testator. There are other circumstances, including the renunciation of the inheritance, that can trigger such rules. As outlined, it is often the case that an heir renounces to the inheritance in order to avoid paying off debts owed to creditors. **Article 866** speaks about the rights of such creditors when an heir renounces to an inheritance and such renunciation isn't impeached by the *actio pauliana*.

   In this regard, we acknowledge a choice that the creditor has when prejudiced by a renunciation. They can either:

   a. Challenge the renunciation through the *actio pauliana* alleging fraud;

   b. Accept the validity of the renunciation and take through the protective mechanism outlined in **Article 866** exercise their right to step into the inheritance in the place of the heirs. The creditor then becomes one of the heirs up to the value of the credit.

   The creditor cannot do both, the actions are alternative action. If the renunciation is declared invalid through the *actio pauliana* then the person who tried to renounce will be an heir and the creditors can enforce their claim on the assets. If the challenge is not successful and the renunciation is deemed valid, then the heir can take the place of the person who renounced up to the value of their credit.

If neither the the rules of representation not the rules under **Article 866** apply, then the share/thing with all the rights and obligations attached will pass on according to the rules of accretion.

Application of Accretion: Step 2

Once the first step is complete, following it must be ensured that the circumstances enable the rules of accretion to apply, in the sense that two or more persons have to be instituted as heirs or named legatees conjointly.

The term conjointly applies not only to the persons but it can also relate to the object. The qualification of conjoint application is met when either there is:

1. One clause naming two or more people as heirs or legatees in the same section - In [Article 3] Testator A appoints their two children as heirs. This satisfies the requirement of it being a conjoint appointment.

   This is manifested through **Article 738**:

   > *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 the thing bequeathed.*
   >
   > *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' along shall not operate so as to bar the right of accretion.*

   As highlighted, conjoint appointment cannot include a specificity of the share to be inherited, i.e. the will cannot define a share to be inherited as it implies that the wishes of the testator were to leave no more and no less than that share. Thus, if another heir or legacy is unable to receive the bequest, it would go against the wishes of the testator to leave more to the other nominated heirs or legatees.

   - *I bequeath by title of legacy to my children, Child B and Child C as to one-third each, and my grandchildren, Child D and Child E, as to one-third share between them.*

     This bequest would remove the option for accretion to take place as a share is being defined. The definition means the testator wished to give both Child B and Child C no more than one-third of the estate and therefore, they aren't entitled to anymore. The share allotted to the person who can't receive, in such a case, becomes vacant and forms part of the general estate.

   - *I bequeath by title of legacy to my children, Child B and Child C, and my grandchildren, Child D and Child E.*

This would enable accretion to take place as there wasn't the specification of any shares. In such a case, we recognise the presumption that exists that all persons therein mentioned are equals unless stated otherwise.

- *I bequeath mu title of legacy to my children, Child B and Child C, and my grandchildren, Child D and Child E, equally between them*.

  This does not preclude the application of accretion, we noted in **Article 738(2)**. This is because there is no specific definition of a percentage included.

Keeping this in mind, we take the following example:

Testator A leaves a boat to three out of five children, stating that he leaves 1/3rd of a boat each (a specified determinate share) to his children: B, C and D. Child B passes away leaving no children and therefore, without any grandchildren. In this case, the 1/3rd share of the predeceased child will not go to the Child C and D but will form part of the general estate and be split amongst the remaining heirs. Therefore, it depends on how the clause is written.

Or:

2. If in more than one clause, the heirs or legatees are left the same object that cannot be divided - In [Article 3] Testator A leaves 1/2 of the boat to Child B. In [Article 4] Testator A leaves 1/2 of the boat to Child B. While they are included in two separate sections, the boat being left cannot be divided and when the object forming part of the legacy cannot be divided then it is presumed to be a conjoint.

   This is contained in **Article 739** which outlines the presumption as to when an appointment is made conjointly.

   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 persons, even separately.

   Therefore, the presumption arises when one and the same object is left to two or more people in the same will, albeit in different parts, and the object of the legacy cannot be conveniently divided.

Another issue to keep in mind in relation to the conjoint appointment besides representation which operates down the bloodline by operation of law, is the notion of 'substitution'. It could be that in the will itself, a substitute was appointed by the testator in case something were to happen to one of the beneficiaries precluding them from receiving. In the example of Testator A appointing Child B and Child C as universal heirs, Testator A may also have made provisions that if anything were to happen resulting in one of the heirs predeceasing them,

then Sibling F would substitute them. In this case, since a substitute is provided for in the will, the will shall take precedence.

We note that a substitute can be appointed either expressly or tacitly in the will, according to Caruana Galizia. The tacit appointment must be qualified however, as nonetheless, the substitute must clearly emerge from the contents of the will. Thus, while the name of the substitute may not need to be expressly included in the will, the person must remain identifiable from the will itself, and not from extraneous evidence. If the substitute cannot be identified from the will, then it is ignored. If the substitute can be identified, even if not expressly by name, then they shall take the place of the person who cannot receive.

Once again, the point is emphasised that the law is interpreting the wishes of the person making the will and in order to do so effectively, the will must speak for itself as to the testator's intentions.

Application of Accretion: Step 3 - When the Bequest has been Refused or Cannot be Received

Here, the law envisages four scenarios where accretion can occur:

1. If he predeceases the testator
2. If he is incapable of inheriting
3. If he refuses the inheritance of the legacy.
4. If he has no right to receive because the benefit is subject to a condition that has not ben fulfilled.

   When discussing conditions in a will, we highlighted different types of conditions that can arise:

   a. Conditions of an indeterminate nature. These are conditions dependent on an uncertain even and will be considered to not be fulfilled if the event doesn't take place.

   b. Conditions that result in the suspension of execution. In these situations, the bequest is valid but the beneficiary is precluded from taking the object immediately due to a suspension of the right.

   When considering under which type of condition accretion can apply, we note that it can only apply in relation to the former: when a person has no right to inherit because a condition which is dependent on an uncertain event exists and such event did not occur rendering the condition unfulfilled. In such a situation, the rules of accretion kick in.

> These rules don’t apply to the latter scenario considering that accretion is the mechanism through which the person who inherits instead of the nominated person when they are unable to is sought. In the latter scenario, the right to receive exists but is simply suspended. Resultantly, the right is vested and it is a matter of waiting for the condition to manifest. Thus, there is no impossibility or preclusion from inheriting.

The consequences of one of these situations arising is that the vacant share passes on to the other heirs or the debtor of the legacy as the case may be as per **Article 741**.

Application of Accretion: Step 4 - Entitlement

As briefly outlined, the process of accretion is considered in depth through **Article 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.*

1. When dealing with heirs, in the example of Testator A leaving as heirs Child B and Child C, if Child B were to predecease Testator A and had no children of their own, their share would pass to Child C. The share increases/accures in favour of the other heirs.
2. When dealing with legacies we note that firstly it must be established who would have paid the legacy had it been payable and the gift will go to them. This operates in the same manner if there are multiple people responsible for paying out the legacy with the gift being split between them.

Application of Accretion: Step 5A - Accepting the Accretion

If in a particular scenario accretion takes place and one’s share increases as a result of this, that person is unable to refuse the increased accrued share unless they refuse the entire share, i.e., renounce to the entire inheritance.

This is enunciated in **Article 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.

We question why a person would refuse a greater share of inheritance and note mainly because of certain liability implications that it has: getting a greater share of inheritance means greater obligations and liabilities as a result of the increase burden.

This situation could create problems: There are five children in an inheritance. Four of them renounce the inheritance leaving everything to the one remaining one, with the other four shares accruing in the one's favour. In this case, the one child is saddled with increase responsibilities and liabilities, including increased taxes and interests and the obligation to pay the Reserved Portion to the other four children. It could be that at the end of the process, the one ears less than the other four who renounced. While the one could argued that they are happy with the 1/5th they would have received before the other's renounced, it isn't possible for them to reject the 4/5th of the estate that accrued in their favour to keep what they were originally entitled to. One either accepts everything or renounce to everything.

Application of Accretion: Step 5B - Where Accretion Does Not Take Place

As mentioned, where the accretion is not accepted, the vacant share goes to the rest of the heirs on a *pro rata* basis.

Alternatively, if any one of them was charged with the payment of such legacy , such benefit will vest in such heir or legatee.

Accretion in Practise

Person A and Person B are married and own a house. They have 3 children. Person A dies intestate in 2021.

Person B remarries and has another child.

> Option 1: In his will he left the house to his second wife and 4th child as to 1/2 declaring that it is a *legato di cosa altrui* and appointed his 4 children as universal heirs.
>
> Option 2: In his will he left the house to his second wife and 4th child each declaring that it is a *legato di cosa altrui* and appointed his 4 children as heirs?

- What happens if the 2nd wife predeceased B in terms of who gets the house?
    - Under Option 1: Because he has given a specific share (1/2), with the wife predeceasing the 4th child, the 4th child is not entitled to have the 2nd wife's share accrue in his favour. Instead, the 1/2 goes back to the general estate.
    - Under Option 2: Since he didn't identify the share, the 2nd wife's share accrues in his favour.

The Right of Usufruct and Accretion

Here, we consider situation where a right of usufruct has been given to two or more people conjointly and how that right is enjoyed.

Take the following example: Testator A states in their will that they give the right of usufruct over the matrimonial home to all their children who are unmarried. At the moment of his death, three of their children are unmarried. This usufruct is enjoyed by all three.

What is of interest here is what happens to the enjoyment of the right if one of the three children predecease the testator. Here, we take into account **Article 742**:

> *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.*
>
> *Where the usufruct is not bequeathed to such persons conjointly, the vacant portion shall merge in ownership.*

Therefore, if the appointment is conjoint, either made in favour of two or more people in the same clause or made in respect of an object that cannot be conveniently divided, the right will vest in favour of the surviving beneficiaries. In the aforementioned example, instead of being divided between three, it is divided between two.

This section has to be read in conjunction with **Article 382** that is contained in the section of the Civil Code dealing with usufruct:

> *Where the usufruct is constituted in favour of two or more persons conjointly, in terms of **articles 738** and **739**, it shall only terminate at the death of the person last surviving, and the portion of any predeceased person shall by accretion vest in the persons surviving.*

We note that usufruct terminated upon death. If three people are appointed for the enjoyment of the right to usufruct then it will vest in all three. If the appointment was a conjoint appointment and one of the three predeceased the testator, then the right will vest in the remaining two. If subsequently another one dies, then the final one enjoys the right until the they pass away and the usufruct finishes. Therefore, usufruct only terminates on the death of the survivor and when such final beneficiary dies, it consolidates with bare ownership.

If it is not given conjointly, then the vacant usufruct merges with ownership and does not accrue in favour of the surviving usufructuaries. A joint benefit is not conjoint in two scenarios:

1. If the beneficiaries are not appointed in the same clause, as long as the object cannot be divided.
2. If the beneficiaries are appointed in different clauses and the object can be divided.

In practical terms this would follow this example:

- In [Article 1] Testator A appoints Child B as the usufructuary of the house. In [Article 2] Testator A appoints Child C as the co-usufructuary of the house. Therefore, the appointment is done in two separate clauses and the object cannot be divided.

  This is a conjoint usufruct and it will terminate upon the death of the last surviving child.

- In [Article 1] Testator A appoints Child B as the usufructuary of a bank account containing a €1,000,000 (1/2 share). In [Article 2] Testator A appoints Child C as the co-usufructuary of a bank account containing a €1,000,000 (1/2 share). Therefore, the appointment is done in two separate clauses and the object can be divided.

  In this case, it is not a conjoint appointment of a usufruct because the account can be easily divided. In this case, if one of the children dies before the testator, the half will go to the heirs, free of any usufruct.

  Had the two children been appointed in the same clause, it would be a conjoined usufruct. Then if one child were to predecease them, the survivor would have the usufruct over the entire account.

In relation to analysing whether an appointment was made conjointly, we must keep in mind:

1. Whether or not they were appointed in the same clause.
   a. If they were appointed in the same clause it is a conjoint appointment.
   b. If they were not appointed in the same clause we look at (2).
2. Whether or not the object can be conveniently divided.
   a. If they were not appointed in the same clause and the object cannot be conveniently divided it is a conjoint appointment due to the nature of the object.
   b. If they were not appointed in the same clause and the object can be conveniently divided, it is not a conjoint appointment.

Revocation and Lapse of Testamentary Dispositions

Here, we question when a will is revoked, which will be outlined subsequently in more detail.

In most instances, revocation is clear and is contained in a subsequent will drawn up by the parties or a public deed:

- In most wills, the first article tends to be a clause where the party thereby revokes all previous wills and claims the current will as their last will and testament.
- In relation to a revocation by public deed we can take the example of a married couple going through a process of separation. This would involve them entering into a contract of legal separation which is a public deed. Therein, they would state that they are no longer entitled to benefit from and inherit each other and such a clause would be binding, having the power to revoke previous wills insofar as they are inconsistent with it. Generally, the advice given to clients when entering into such contracts, besides to have a clause dealing with the revocation of previous wills, is to expressly state that spouses are no longer entitled to inherit each other or to claim the Reserved Portion notwithstanding any subsequent supervening act. Following, clients are encouraged to actually draft a new will which will apply but nonetheless, the contents of the public deed suffice to revoke the will to the extent of the inconsistencies.

When this process is done in such a manner, it constitutes a clear revocation and is known as an express revocation of the will. Having outlined situations whereby a will is revoked expressly, we consider that there are cases where revocation is presumed, despite the silence of the testator. Not all cases of revocation are clear and express, yet, there are other circumstances in which a will is considered to be revoked without there being an indication of such in a subsequent will or public deed. Therefore, from **Article 743** to **Article 750**, the law caters for situations where a will has not been expressly revoked yet there exists doubt in this regard. Some of the most common issues include: Can this will be considered to be revoked in whole or in part?; Is the appointment of the heir still binding?; Is the legacy still valid?

NB. Some cases of revocation are general and apply across the board, for example the inclusion of a clause to revoke all previous wills, whilst others are specific.

The following include non-express ways for a will to be revoked:

- Person A makes a will in England, appointing three people as beneficiaries. A few years later, Person A comes to Malta and decides to leave his Maltese estate to Dar tal-Providenza. The English will continues to apply with general application, however the Maltese will outlines what should happen to the Maltese estate. This doesn’t constitute a revocation of the previous will but an amendment. To test which will amends which, analysing which will was the last one drafted is essential. The conclusion here is that all the estate is divided according to the English will, with an exception made insofar as the Maltese estate is concerned because the English will was revoked and no longer applied to the Maltese estate since there was a new will which overrode it.

> This demonstrates how a subsequent will generally has the effect revoking all previous wills and it not revoking to amend them, with the later versions amending and overriding the previous versions to reflect the testator's last will and testament.

Alienation of the Thing

The latter scenario is elucidated in **Article 743**:

> *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.*
>
> *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.*

This is best explained through the following example: In his will, Person A leaves a legacy, therefore, a disposition by singular title, to Person X. However, if by any means, the testator voluntarily did something to take the object out of his patrimony, for example, by sale, then it is tantamount to a silent revocation of the legacy. This subsists even if later on the testator reacquires it. So long as the action/alienation is voluntary, then it signifies that the testator changed their mind about the disposition. Therefore, Person X is no longer entitled to the house by way of legacy despite what is written in the will.

If it is a forced alienation, either because Person A's creditors have taken action or because the State has appropriated it, it could be that the testator reacquires it. This reacquisition validates the legacy, however, if it is not reacquired it is lost.

NB. In this regard we keep in mind the fact that the law subjects **Article 743** to the application of **Article 702(2)** which discusses what occurs when the legacy already belongs to the legatee. For example, a father leaves a son something already belonging to him which invalidates the legacy. However, we also note that the legatee is able to claim the equivalent value of the legacy if it was bought by the son from the father under onerous title or if the object did not belong to the father and the son bought it from someone else. In both situations, the legacy would be valid. Therefore, **Article 702(2)** is the exception to **Article 743**.

Thus, when analysing whether this alienation constitutes a revocation of the legacy we must analyse the nature of the alienation (*Voluntas Adinuendi*)

> Was the alienation voluntary? In such a case it is tantamount to a revocation, even upon the reacquisition of the property, rendering the legacy without value.

> Was the alienation forced? In such a case the legacy is lost unless the testator manages to reacquire it, in which case the legacy is validated and will stand.

If it was the former, whether it was done in whole or in part and even if done with the power of redemption, it is tantamount to a revocation. This subsists even if the property returns to the testator for any reason, including because it is deemed the alienation is void or simulated. Additionally, the same applies if the testator converts the thing so it has lost its previous form or designation.

While sale was explicitly mentioned in the example given, our law also mentions exchange as one of the means of alienation that results in the revocation of a legacy. Under Italian law, the relative clause doesn't include exchange and highlights only sale, yet case law has deemed exchange to be equivalent. In the Maltese jurisdiction, exchange is expressly included in the law with the legislator eliminating doubt. Therefore, when there is an exchange, the legacy is invalid unless the will states otherwise. Once again, we note how the will always prevails and resultantly, if there includes a provision therein that highlights the legacy will be valid withstanding any exchanges, the will is the supreme law governing the situation and will apply.

There has been case law on this point of exchange in the form of **Hili v. Saliba (1925)** which considers the legacy of a boat. Here, the testator had a boat and left it to his child. After making the will, the boat was damaged and the testator sold it to acquire a new one. The court stated that the legacy did not apply to the new boat as no provision had been made for the validity of the legacy despite any exchanges:

> *Atteso che, pertanto, di fronte a tale disposizione non e' dato al giudicante indagar l'intenzione del testatore perdecider secondole circostanze, ma provato il-fatto della alienazione della cosa legata da parte del testatore,deve ritenere revocato il legato.*

> *Given that, therefore, in the face of this provision it is not up to the judge to investigate the testator's intention in order to decide according to the circumstances, but having proven the fact of the alienation of the bequest by the testator, he must consider the bequest revoked.*

We also consider the case of **Dr Farrugia v. Profs Dr Micallef (1985)**. Here, there was a deed of exchange and the court said that this had the effect of revoking the will. Reference to Italian law was made to prove the revocation, despite Italian law, unlike Maltese law, not expressly mentioning exchanges as a means through which a legacy can be revoked. The court stated that the reason the legacy was revoked was that by alienating the object, the testator was indicating a change of mind that the court had no way of proving otherwise.

The Thing Perishes

Here, we take into account **Article 744**:

> *The legacy shall lapse if the thing bequeathed has entirely perished during the lifetime of the testator.*
>
> *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.*
>
> *Where several things have been alternatively bequeathed, the legacy shall subsist, even though there shall remain one only of such things.*

There are three scenarios outlined with reference to legacies as individual gifts and thus, heirs are not considered.

🌿 If the Thing Bequeathed Lapses During the Lifetime of the Testator

Take for example: Testator A disposed by singular title of a boat to Person B. During Testator A's lifetime, the boat catches on fire and is destroyed. At that moment, the legacy is finished.

If the thing forming the object of the legacy doesn't exist anymore, and so perished during the testator's lifetime, the legacy is no longer valid.

🌿 If the Thing Bequeathed Perishes After the Testator's Death but Before Delivery

Take for example: Testator A disposed by singular title of a grandfather clock to Person B. Following the death of Testator A, Person B didn't taken the clock and a fire broke out in the home where it was being stored and it was destroyed. The law states that it depends on how it was destroyed.

This results in a further sub-division:

- If the thing would have been destroyed even if it was in the possession of the legatee, then the legacy is no longer valid. In this regard, we take into account the fact that normally, when there is an obligation to deliver an object and it hasn't been executed, the individual is entitled to place those under the obligation in legal default through the sending of a judicial letter. As soon as such is received, the recipient is bound to carry out the obligation and make good for damages. Say, for example, the heirs delay in the delivery of the legacy, in the case where the legacy would have been destroyed

nonetheless, whether it was in the possession of the heirs or the legacy, no action for damages arises, even when the heirs have been placed in default through this process.

- If not, then the legatee is entitled to the value.

 If Several Things Have Been Bequeathed Alternatively

In such a scenario, the testator would leave the legatee a choice of, for example, one of three items and leaves the choice in the discretion of the legatee. If two of the items perish or an item perishes and another was alienated but one remains, the legacy is valid in respect of the remaining one because there is an alternative. This represents the position that one ought to save that which they can save.

The Beneficiary Predeceases the Testator

This is outlined under **Article 745**:

> *A testamentary disposition shall lapse, if the person in whose favour it is made shall not survive the testator.*
>
> *Nevertheless, the descendants of the heir or legatees 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.*

This article applies both to heirs and to legatees and outlines the presumption that if the beneficiary predeceases the testator, the benefit lapses. Here, we must consider the rules of accretion and if such don't apply, we acknowledge that such lapse is conditional upon the rules of representation not applying. Therefore, only if the beneficiary has no children down the bloodline that could inherit under the rules of intestate succession will the benefit be lost.

Take into account the following two examples:

1. Person A leaves Friend B their law book collection in their will. Friend B is in no way related to Person A. Friend B predeceases Person A but has children. Such children, as Friend B's heirs, have no right to claim the benefit by virtue of the faculty of representation because under the rules of intestate succession, the children have no right to inherit Person A. Therefore, the benefit is lost.
2. Person A leaves Child B their law book collection in their will. Child B passes away leaving children. Such children are Person A's grandchildren and thus, would be entitled

to claim the benefits instead of their parent. This is because representation applies given that the children of Child B would nonetheless inherit according to the rules of intestate succession.

Thus, one must see whether the named beneficiary's heirs would have been an heir of the testator at law, had the person died intestate. The descendants of the beneficiary would benefit by representation under the rules of intestacy. This is important to remember especially in relation to legacies and individual gifts. A gift can only be accepted when the person it is left to dies before the person who is leaving it if it is left to someone who would have been the testator's heir and who has successors by representation. Then such would be entitled.

There are two important provisos to this rule:

1. Even though through representation and the rules of intestacy someone may be entitled to inherit, they will not if the will states otherwise as the will is the supreme law.
2. In respect of use, usufruct and habitation, or any other right which is personal in its nature, this rule doesn't apply. This is funny considering that while the law qualifies this condition in relation to "*personal rights*", use, usufruct and habitation are in and of themselves real rights. Nevertheless they have a strong personal nature, exemplified by the fact that they terminate on death.

Summarily, the situation is as follows:

If a beneficiary predeceases a testator, if there is accretion it accrues in favour of the other conjoint named persons, if there is no one who is co-appointed and there is no representation then the share goes to the heirs at law or the named heir in the will. It doesn't go to the successor of the heir or the legatee when representation doesn't apply.

This has been the subject to litigation where the primary consideration is: if the legatee predeceases the testator, which representatives are considered - the representatives of the legatee or the representatives of the testator. The answer found is that we look at the people who inherit by representation in relation to the testator and do not look to the legatee's heirs. It is possible that the legatee could have their own heirs but since the legatee is not related to the testator in a way that the laws of intestate succession would have allowed him to inherit, his children cannot benefit from the will. This was clearly stated in **Abela v. Dr Portanier et noe (1959)**.

Furthermore, we note that in the case of **Buhagiar v. Cassar et (1948)** it was stated that:

> *L-indaġini 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 investigation that should be done is that if the words "if the succession were ab intestato" should refer to being correlated to the succession of the testator ... Or to the succession of the grantee.

The Heir/Legatee Renounces or is Incapable

This is considered under **Article 846**:

A testamentary disposition shall lapse with regard to the heir or legatee who renounces it, or who is incapable of taking it.

In this case, if the heir or legatee renounces, that disposition is no longer binding and lapses in respect of such heir or legatee.

There are two exceptions to this:

1. If the heir renounces to the inheritance and claims the Reserved Portion, he is bound to take the legacy as payment on account of the Reserved Portion. There is no choice in this regard.
2. If the heir or legatee renounces, the creditors of the heir or legatee cannot be prejudiced and creditors therefore, have a right to step in.

A testamentary disposition lapses if the heir or legatee renounces it, but if he renounces the inheritance and claims the reserved portion, any legacies must be accepted on account of such claimed and their creditors cannot be prejudiced.

Here, we consider **Article 864** which highlights that "*no person may take as the representative of an heir who has renounced."* Here, we take into account the rules of representation.If the person has renounced, his children cannot claim the inheritance instead of him. If Person A's father passes away and renounces to his inheritance, the children of Person A cannot take their and accept the inheritance instead of them. Person A's renunciation has full effect and their descendants cannot claim it once such a renunciation has been made; meaning, the renunciation has the effect of conditioning that the disposition has lapsed. In fact, to make it clearer, **Article 865** highlights that in situations of testate succession, the share of the person renouncing shall "*devolve upon the co-heirs or the heirs-at-law*". However, we must keep in mind the following example: Person A and Person B have one child, Child C, who also has children of their own. Person A and Person pass away and upon the death of the second spouse, Child C renounced to the inheritance. According to **Article 864**, the children of Child C cannot accept the inheritance in their stead through representation. However, since Child C is an only child, according to the laws of intestate succession, their children are considered to be the heirs-at-law, and therefore, can inherit so

long as the will does not disallow this. Here, Child C's children will inherit in their own right and not through representation, on the basis of **Article 865**.

On the other hand, when talking about a person who is incapable of receiving then the disposition ceases to exist. In this regard we consider the grounds for incapacity and remember that there exist certain grounds that are temporary/suspended and others which are perpetual. There is a clear cross-relation tying the rules of incapacity and the lapsing of the will - two parts of the law agreeing with and corroborating each other. Therefore, the law outlines that one is incapable and then states that the will has lapsed, i.e., that the disposition is no longer valid. This convergence is important.

Children or Descendants Subsequent to Making A Will

Normally in a will, especially if the couple are still young, they will say they are appointing their children "*born or to be born*" as heirs. They could even make a will before they have children and state that they leave everything to any children that they may have. Such dispositions are valid. This means that any children that are born or to be born will inherit, but only because the will states so and makes provision for those children yet to be born. This is stipulated in **Article 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.*

However, we question what the situation is if future children aren't mentioned. We note that any will that leaves to one's children is valid, even if subsequently new children are born. This wasn't the case until 2004. Prior to this, if a subsequent child was born, the birth would revoke the will *ipso jure* and the rules of intestate succession would apply to the inheritance. This is no longer the case. Now, if a subsequent child is born and no provision has been made, that child is only entitled to the Reserved Portion and nothing else. This is because we operate based on the intention of the testator. Once the child was born, the testator would have had the opportunity to vary and amend the will to include the new child. Since the testator did not do so and omitted the child, such child is only entitled to the Reserved Portion. This applies even in situations where the testator didn't know about the existence of the child.

Here, we consider that even if the child was born at the time of the will, if they are not mentioned explicitly, i.e., if no provision has been made for future children or descendants yet to be born, they are only entitled to the Reserved Portion.

We take into account **Article 748** in this regard:

*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.*

Substitution and Entails

Firstly, we consider that when dealing with substitution and entails, we are dealing with old institutions. In testate succession, when dealing with substitution, we note that the law is catering for a situation where the testator provides for a substitute to either inherit as an heir or to receive as a single gift as a legacy, therefore, it applies to both heirs and legacies.

The first question is what do substitution and entails have in common and why they are dealt with together under the law. This will be seen more prominently when dealing with entails. Briefly, entails were a means of disposing inheritance and leaving it to successive generations, either for a specified period of time or in perpetuity. These are no longer allowed and have been prohibited since the Civil Code was enacted. A clear example of an entail is the inheritance of the crown in situations of royalty. Going back in history, there would have been some rule stating how the crown was to be inherited, stipulating that current kings or queens would be the holder of the crown until they die but in essence were holding it in trust for future generations. This would come with the stipulation that the holder cannot regulate who is to get the crown after as the rules have already been set.

With substitution, the testator actually appoints a substitute so if were something happens to the original beneficiary of a disposition, the substitute can inherit in their stead. This makes then a kind of entail and thus, the similarity: one is appointing what is to happen one after the other in various situations - if A doesn't happen, then B, and so on.

Substitutio Vulgaris

This law is restrictive in order to ensure that the faculty of substitution isn't being used to cover up for an entail since such aren't allowed. In fact, the law, beginning with **Article 751** outlining the *substitutio vulgaris*, highlights that in a will, a testator can substitute an heir or a legatee, with such substitution only applicable in two eventualities:

1. If the heir or legatee is unwilling to accept the disposition, i.e., if there is a renunciation.
2. If the beneficiary is unable to accept the disposition. Here, "*unable*" is a wide term and includes someone who is incapable of inheriting but is not limited to situations of

incapacity. For example, if there is a suspensive condition or if the benefit is subject to the fulfilment of a condition, and such condition is not fulfilled, the beneficiary is incapable and substitution will take place. Ultimately, it is immaterial as to why the named beneficiary is unable or incapable of accepting the disposition.

Article 751 reads as follows:

> *It shall be lawful for the testator to substitute another person for the heir-institute or for the legatee, in the event of such heir or legatee not being able or willing to accept the inheritance or the legacy.*

When dealing with testate succession, the rule of substitution must be actually stated in the will. It cannot be implied but must be outright written. However, representation might apply.

Representation is a situation which arises where there is a benefit in favour of a person, either a legacy or the appointment of an heir, and that beneficiary dies before the testator. In such a case, if that beneficiary had descendants that also were entitled to inherit under intestate succession by operation of law, the descendants will step into the shoes of he beneficiary automatically. This rule of representation also applies in intestate succession.

Sometimes, substitution and representation go hand in hand. Owing to the requirement that it be explicitly stated, substitution as a concept only applies if it is actually written in the will, while representation takes place by operation of the law, regardless of whether something to its effect is written in the will. Yet, representation only operates in restricted situations, i.e., down the bloodline.

A question arises as to what happens when a testator appoints as a substitute someone who is different from the person who would have benefitted under the rules of representation:

Person A appoints Child B as their heir and highlights that should Child B predecease them, the benefit they would have inherited would go to the maid. If Child B were to predecease Person A, despite him having children of his own that would be entitled to inherit under the rules of representation, since substitution is explicitly mentioned in the will, then the children of Child B, i.e., the grandchildren of Person A, would not inherit but rather the vacant share would go to the maid. Therefore, substitution overrides representation: if there is a clause in the will providing for substitution, the substitution will operate even if it is contrary to the rules of representation. However, we also keep in mind that if the disposition of Person A relates to the appointment of the heir, the children of Child B would have the right to claim the Reserved Portion. Should the disposition be by singular title, then there are no further consequences for the grandchildren: they have simply lost the legacy.

The appointment of a substitute does not conflict with the stipulation of **Article 864** which states that:

No person may take as the representative of an heir who has renounced.

If the person renouncing is the sole heir in his degree, or if all the co-heirs renounce, the children shall take in their own right and shall succeed per capita.

In order to emphasise that this rules of substitution is not tantamount to the creation of an entail, it must be borne in mind that the substitute inherits directly from the testator. The substitute does not inherit from the person who is unwilling or unable to inherit.

In the case that the original beneficiary predeceases the testator or is unwilling or unable to inherit and similarly the substitute is not in a position to inherit for these reasons, the benefit goes to the other named heirs by reforming part of the bulk of the estate and accruing in favour of the other heirs. This is the default case when the will is silent.

Substiutio Pupillaris

This is another form of substitution to consider contained under **Article 752**:

It shall be lawful for any one of the spouses, the other ascendants, the uncle or aunt, brother or sister, to substitute a third party in the place of a minor in the event of the latter dying without issue, before attaining the age of eighteen years, but only with regard to the property in which such minor shall have been instituted heir or appointed legatee.

It shall also be lawful for any of the said persons to substitute a third party in the place of any person with a mental disorder or other condition, which renders him incapable of managing his own affairs or insane person, in regard to such property only as they shall have devised to him, in the event of his dying with the mental disorder or other condition, whilst still incapable of managing his own affairs, or in a state of insanity, without issue.

Any substitution referred to in this article, if made by any one of the parents or any other ascendant by whom a share of the reserved portion is due to the heir-institute or legatee, may only include such portion of the property as the minor, on attaining majority, or the insane person, or person with a mental disorder or other condition, if of sound mind at the
time of his death, could dispose of.

This relates to substitution in relation to minor children and those who have a mental disorder. The law here is allowing the employment of a substitute in respect of these people but limits the persons capable of engaging in this manner to:

1. The spouses - The husband in respect of the wife and the wife in respect of the husband.
2. The parents - The parents in respect of their children.
3. The ascendants

Therefore, these are the only people who can make a clause of substitution in respect of those who die before the age of eighteen or those who have a mental disorder.

🌿 Substitution in relation to Minors

This clause is only operative and effective until the minor reaches the age of eighteen and so long as such minor has no children. Therefore, the qualifications are very specific.

For example: Person A appoints their child as an heir so long as such child lives to the age of eighteen, saving which and saving such child having children of their own, Person B will substitute him. In this scenario, if the son survives the testator, but doesn't live to eighteen and doesn't have children, the estate will not go to the child's heirs at law but will be substituted by the person named in the will.

Realistically, this means that a benefit is being given to a minor which is held in trust until the child reaches the age of eighteen, saving which (and assuming such child has no children of his own), the rules of substitution laid out in the will apply and the child doesn't benefit.

This was considered in the case of **Agius v. Dolores (1922)**.

🌿 Substitution in relation to persons with Mental Disorders

This clause is included in the law to cater for those situations where a parent or relative of a person with a mental disorder want to make sure that such person is well taken care of after they pass away.

We highlight that a person with the mental disorder cannot make a will and therefore, if they inherit the parent or relative, once they die their inheritance will go to their heirs-at-law. This might not be favourable to the testator and thus, such may provide for a situation where the person with the mental disorder, who can't look after their own affairs, is substituted by a trusted person who will look after them and manage the estate.

As opposed to the situation with minors, where checking if such minors had children of their own was a requirement for the substitution to apply, whether a person with a mental disorder has or doesn't have children is of no consequence and of no legal relevance. The law is silent on the condition of children, and therefore, this condition isn't something which is looked for. The only criteria necessary for this substitution to apply is that the person has a mental disorder.

This was outlined in the case of **Trapani Galea v. Apap Bologna (1936)**.

In both situations, this only applies to the property indicated/inherited and which they could have disposed of. For example: Person A leaves their minor son the house at 15, Zebbug Road, Marsalforn with the right of substitution in favour of their nephew Robert should their son die childless before reaching the age of majority. This substitution is only effective in relation to that particular property.

Additionally, we note that these rules also apply to the Reserved Portion.

Rules of Substitution

As per **Article 753**, we note that:

> *It shall be lawful to substitute under the provisions of the preceding articles, several persons in the place of one, or one in the place of several.*

Therefore, when dealing with substitution a person can substitute one person for more than one person: I appoint my son A and if they aer unwilling or unable to accept the inheritance it will go to Person B and Person C. It doesn't have to be one is substituted for one.

Additionally, a person can substitute multiple people for just one person: I appoint my five children and if they are unwilling or unable to accept the inheritance it will go to Person B.

How many people are appointed as original beneficiaris and how many are appointed as substitutes in either situation can be more than one.

When considering the applicability of substitution, we take note of the two contingencies outlined at law for it to apply. The heir or legatee must be either: 'unwilling' or 'unable' to accept the disposition. The former relates to a renunciation and the latter includes incapacity or non-fulfilment of a condition.

In such case that the will only mentions one ground (either unwillingness or inability), unless the other ground is outright excluded, the other is automatically included. Therefore, if a testator provides for substitution in the case the named heir or legatee is unable to inherit, it automatically includes substitution in the case the heir or legatee is unwilling to inherit also and vice-versa, unless stated otherwise, as per **Article 754**:

> *Where in the substitution clause only one of the two contingencies is stated, that is, either that the institute should be unable, or that he should be unwilling to receive the inheritance or legacy, the other contingency shall, unless the disponer shall have stated the contrary, be deemed to be included.*

Another rule is that the substitute must step into the shoes of the original beneficiary and take the inheritance as it would have devolved onto the original beneficiary. Therefore, if there

were rights, obligations or conditions attached to the disposition, such will pass onto the substitute.

In this regard, the wording of the law is important as it can exclude this from application. For example, if the will is clear and the conditions are clear, then the will will speak for itself and such will apply to the substitute. If there is uncertainty, the presumption is that any rights, obligations or conditions are also applicable to the substitute. However, the will may state that the original beneficiary would only inherit subject to condition X but that such a condition is not applicable for the substitute to inherit in his stead should the original beneficiary be unable or unwilling to inherit . Therefore, for such not to apply:

1. The will must explicitly state that the condition is inapplicable to the substitute.
2. The condition must be personal to the nominee, i.e. only the original named beneficiary could have fulfilled the condition in question.

This is outlined in **Article 755**:

> *The substitute shall be bound to perform all such obligations as may have been imposed on the party for whom he shall have been substituted, unless it shall appear that the testator wished to impose such obligations solely on the party called in the first place.*
>
> *Nevertheless, such obligations as particularly affect the person of the heir or legatee shall not, in the absence of an express declaration to the contrary, be deemed to be operative in regard to the substitution.*

We further consider reciprocal substitution in the case of unequal shares. Generally, unless specified in the will otherwise, if instead of one person, three are appointed as substitutes, the three will get an equal share - division *pro rata*. However, the substitutes can also inherit in a different portion if such is outlined. This is permitted under **Article 756**:

> *Where two or more co-heirs or legatees in unequal shares shall have been reciprocally substituted, the proportion of shares fixed by the first disposition shall be deemed to be operative in regard to the substitution.*
>
> *Where the substitution includes another person in addition to the persons called in the first place, the evacuated portion shall vest in all the substitutes in equal shares.*

Take the following example into account: Person A leaves a benefit to Person B, noting that if Person B is unwilling or unable to accept the benefit then it goes to Persons C, D and E with Person C getting 1/2, Person D getting 1/4th and Person E getting 1/4th.

The default is that they benefit equally but if the will provides otherwise, this can be altered and varied.

Entails

In Malta there are no more entails. Before the Civil Code was enacted, it was possible for an entail to be created either by public deed or through a will and such would create a rule outlining how inheritance of property was to occur in favour of future generations. For example: Person A would leave their inheritance to their first born child, to be succeeded by their first born child in perpetuity. In such a case, the inheritance would pass down to the first born through generations.

However, once the Civil Code was enacted, it included an express provision that outlawed entails created after 1864. Therefore, no new entails could be created after 1864. This arose primarily because of the headache created vis-a-vis entailed property, namely whether one was actually the owner of the property or whether they enjoyed it in trust for future generations. This created difficulties as to whether:

1. The holder of the entailed property could sell or alienate it or whether they were only able to enjoy its fruits;
2. Creditors could seise the asset and sell it by licitation. In this regard, a defence would be raised whereby the beneficiary would argue that they were not really the owner but were holding the thing in trust, i.e. *fede commesse*: something entrusted to them as a holder and not the owner. Thus, creditors were being faced with the situation that they lent money to holders or holders entered into a debt with creditors with no assets to make good the debt seeing as that which they held was not theirs but held in trust on which the creditors could not exercise their claim.

In the late 1800s, as a result of these issues, the law was changed allowing for entailed property to be disposed or seised to enable creditors to satisfy the debts owed to them (i.e. when there existed a liability, it was enforceable on entailed property) and even for the holder to sell the property should they need money to live. The latter required the authorisation of the Court of Voluntary Jurisdiction, however, and thus, could not be done capriciously and required justified grounds. Thus, we see a relaxation of the rules in the 1870s.

A further change arose in the early 1900s when the law dealing with Succession Duty was enacted. An issue arose in this regard as to whether succession duty was payable on entailed property given the question previously outlined: Does the entailed property belong to the holder with it forming part of their inheritance or is it actually an inheritance that took place a long time before that is being subjected to a successive condition which is perpetual, making it not the estate of the holder that is being inherited but the estate of many previous generations? The conclusion was that regardless of the denomination, taxation was owed and payable on entailed property.

To ensure clarity on the issue, another change arose in 1952, four years after our Income Tax Act was passed. In 1952, a law was passed giving rise to the first phase of the termination of entails. The law stated that if there were any entailed properties that were still in force, i.e., entailed properties created before 1864 that were still operative, the property was no longer to be covered by the entail and in the subsequent succession that was to take place, 1/2 would be inherited by the rules of inheritance and 1/2 would pass by entail. To finish the prohibition, in the 1970s, the law changed to stipulate that in the subsequent inheritance, the remaining 1/2 that was to pass by entail would also be inherited through the rules of inheritance. Thus, in the 1970s, the holders of entailed properties became their owners and from there on out, the estate was inherited either to the owners heirs at law or according to the person's will.

The law does not like entailed property. In fact, any attempt to set up an entail under some different nomenclature or format will not be possible or successful and will be considered as null.

Right off the bat, **Article 757** outlines the prohibition that exists in relation to entails:

> *Entails are prohibited:*
>
> > *Provided that entails created before the date of the commencement of Ordinance No. IV of 1864, hereby repealed, shall continue to be regulated by the provisions of the law in force before that date including the provisions contained in Chapter II of Book IV of the Municipal Code of Malta, commonly called "Code De Rohan", saving the provisions of Title I of Part II of Book Second of the Code of Organisation and Civil Procedure.*
>
> *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.*

Legacy of a Usufruct

Here, we note that one can leave the usufruct to one person and the bare ownership to another. In this regard, the law does allow a minimal possibility of a succession of a usufruct in the case of spouses. This is contained in **Article 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.*

Here, Person A would make a will and leave their inheritance to their spouse. If Person A stopped there, when the spouse passes away, anything they owned or inherited from Person A would pass to their heirs, according to their will or at law. In order words, anything they

inherited from Person A would then form part of their inheritance moving forward. However, through this article, the law envisages a situation where Person A leaves their estate or legacy to their spouse, but then they pass away, such estate or legacy would not go to the spouse's heirs according to their will or at law, but would go to the Person named by Person A. This is known as a bequest of residue and tackles that which is left of Person A when the spouse passes away - such will not go according to the wishes of the surviving spouse, but to the beneficiaries according to Person A's wishes. This excludes bank accounts and monies which lose their identity and can be dealt with by the surviving spouse in any manner. In this regard, we take into consideration the case of **Dr Zammit Tabona v. Professor Cremona et (1999)**:

> *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. 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 tal-Qorti, il-volonta` tat-testaturi li ma jorbtux idejn xulxin ghall-uzu li setghu jaghmlu mill-flus vita durante.*

> *As the legacy is drafted, it can be said that the legacy was one de residuo, and this since the third parties benefit from the legacy "after their death both", with the fact that then survivors were not limited in the use of the money, because the legacy was only for what "remains". This Court does not see that, in the particular facts of the case, it was the intention of the testators that the last survivor could not dispose of the money as he wanted and according to his needs. This is not a case of a legacy that, for a share of the predeceased, was devolved in favour of legatees immediately after his death, but a legacy that is distributed after the death of both. It was for the residue that testators provided in favour of third parties in this legacy, and once that is the case the survivor has the unlimited faculty to dispose of the same money with an 'inter vivos' deed.*

If Person A includes this form of clause in their will, then the spouse is allowed to alienate the object or part of the inheritance so long as such is done by onerous title. However, alienation by gratuitous title (donation) or making stipulations about how the estate or legacy will be inheritance in the will is not allowed. This is because the object or share of the estate is regulated by Person A's will.

Say for example, Person A leaves a pre-legacy to their spouse of a paraphernal house, with the condition that when the spouse passes away, the house will go to Person A's best friend Person B. As mentioned, Person A's spouse is able to dispose of the property through onerous title, however, if the property is still with the spouse when they pass away, Person B will inherit the property in accordance with Person A's will.

We question what happens if the spouse nonetheless donates the property despite not being allowed to. Say Person A's spouse donates the house left to Person C when Person A's will stipulated it would go to B. In this case, the law states that the donation is null. Normally, when this qualification is made, the will would be null *ab inizio* and would be invalidated *ipso jure*, i.e., a court pronouncement isn't needed. This differs from an annullable agreement wherein a contract or agreement is considered to be valid until it is annulled by a court pronouncement, where from the effects of nullify are retrospective and it is as though the contract never existed. However, even though the law speaks of the nullity of the contract, the law nonetheless grants a five year period within which an action of annullment must be filed. *Prima facie*, this seems contradictory

In this regard, we also make a distinction between movables and immovables. In the case of the latter, as outlined, there exists a five year time bar. In the case of the former, there is only nullity if there is bad faith. This begs the question as to how such is proved. Here, the intention of the parties must be clearly demonstrated as to whether there was an ulterior motive behind the transactions or whether the donation or disposition was justified. The court will look at all the relevant circumstances surrounding either the donation or the clause in the will and determine whether it is to be considered null. However, if the benefit is not null and no bad faith is proved, one is still entitled to claim damages. This is because the beneficiary in a *legato di residuo* has a vested right: the beneficiary is allowed by law to contest the donation or to challenge the transfer made and claim damages even during the lifetime of the surviving spouse, even though the person has to wait until such spouse passes away to get the benefit. Therefore, there exists the right to challenge the transaction in question.

Here, we also take into consideration what arises in the case of a simulated sale and in the case of fraud. Since the law talks about donations, if the spouse wants to give the object away, she will be advised that any donation made will be challenged. There are situations where the spouse could try to go around this through a simulated contract of sale (one that appears to be a sale but in reality is a donation). Taking the aforementioned example, Person A's surviving spouse could sell the Property to C, which is permitted at law, and then donate the proceeds of the sale back to Person C. Initially, one might believe this to be accepted at law considering that money was noted to be exempt from consideration as residue. However, the money in question is money received from the sale and not money that formed part of the inheritance of

Person A and therefore, not money that strictly speaking were part of their assets. Therefore, in such a scenario, the court will look behind appearances to see if:

1. The contract of sale was a simulated one, i.e., a donation and not a sale.
2. The contract of sale was fraudulent. This arises when Person C was concurrent with the deception of the transaction and engaged in the contract in order to purposefully stop Person B from getting the house and to stop them from benefitting.

These are two separate grounds which sometimes contradict one another and sometimes go hand-in-hand.

This is an example of how the law avoids or restricts the possibility of successive transfers of property.

Legacy with Condition to be Fulfilled After the Testator Passes Away

This is dealt with in **Article 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.*

The law outlines that it is possible to have a legacy with a condition that can only be fulfilled after the testator has passed away, i.e., the beneficiary must wait for a condition to be fulfilled/something to happen after the testator dies. This clause must have been written because at some point in time there was an issue whether the possibility of the fulfilment of the condition had to occur during the testator's lifetime or whether it can occur after the testator passes away. If there is a successive appointment of a beneficiary, it can be subject to a condition after the testator passes away.

For example, Person A leaves their property in Naxxar to all or any children their Child B may bear with the right of substitution in favour of all or any children their Child C may bear should Child B die without issue. This is valid.

In **Cauchi vs Professor Dr Vassallo (1937)**, it was stipulated that **Article 760** overrides the previous rule that one is only capable of inheriting if born or conceived at the time of opening of succession.

Burdens of Successive Usufructs

As a rule, we note that if there is usufruct, no burden, be it perpetual or limited, can be placed thereon if the burden relates to two or more people benefitting from the usufruct successively. Such will be rendered unenforceable.

Therefore, if Person A were to appoint Person B to benefit from the usufruct of a property and also appoint a substitute for Person B in Person C such that when Person B dies, Person C would be able to enjoy the right of usufruct over the property, this would be rendered unenforceable.

This is contained in **Article 761**:

> *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.*
>
> *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.*
>
> *Sub-article (1) shall not apply to dispositions in favour of persons called to benefit under a trust or a foundation.*

We recall that when dealing with usufruct, we deal with the bare owner, the person who has ownership over the property in question but not the enjoyment, and the usufructuary, the person who is able to enjoy the property. The existence of a usufruct imposes a burden on the bare owner. Thus, the bare ownership cannot be conditioned with a successive usufruct.

In this regard, special attention must be paid not to confuse the law's rejection of successive usufructs with a prohibition of conjoint usufructs. The latter is allowed by law, with dedicated sections stipulating what is to occur in various scenarios. The former, through which successive usufructuaries are named, are not allowed. In fact, they have no legal value and are ignored and the original usufructuary will continue their enjoyment thereof so long as the beneficiary is alive and if a company for the remainder of the thirty years allotted time period for enjoyment. Therefore:

- If Person A were to leave their house to Child B subject to the right of usufruct enjoyed by Child C, it is accepted at law.
- If Person A were to leave their house to Child A, subject to the right of usufruct enjoyed by Child C and Child D, it is accepted at law. Because the two are appointed at the same time, the conjoint nature of their appointment makes then co-usufructuaries which is allowed.
- If Person A were to leave their house to Child A, subject to the right of usufruct enjoyed by Child C to be succeeded upon their death by Child D, the successive usufruct is not

valid. It will be treated as though it has never been written to ensure the bare owner is not subjected to this excessive burden.

There are exceptions in this regard:

1. Split into:
    a. The payment of an annuity whether in perpetuity or for a limited time: if there is a recurrent payment, then the payment in favour of A and the subsequent payment in favour of B is allowed.
    b. 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.

       For example, Person A makes a will and provides for a scholarship for the student who comes first in class in the law course. There is a course every year and in the will it is outlined that the person will get a benefit equivalent to one year's wages to do a benefit at a University abroad. This is an annuity - a periodic payment in perpetuity. This is done in award for virtue or merit. Thus, it is possible to set up the scholarship in the will. There is a situation where the law is regulating a very specific occurrence.

       Another example is the giving of a benefit to a religious institute. Even a sacred patrimony is allowed. Yet another example in relation to public utility is the setting up of an annuity for the creation and maintenance of a playground.
2. Trusts and Foundations: These have taken the place of what used to be entailed property and if not for this exception, trusts would be illegal.

Testamentary Executors

A testamentary executor is a person who has been entrusted to administer and give effect to the wishes of the testator as laid out in the will. Therefore, this is a role limited to situations of testate succession. This person is entrusted to figure out what the testator ordered in their will, including who the heirs and legatees are, and has control of the assets in order to distribute them in line with what is stipulated in the will.

This resembles to a certain extent the a portion of the mechanism of probate that exists under common law inheritance. Through this procedure, the court will verify which is the last will and testament regulating the testator's estate and will give grants of administration, i.e., will

appoint an administrator for the estate. Such administrator will organise and give effect to what needs to be done in order to distribute the assets to the correct beneficiaries. Under this system, the person who has administrative powers, has the ability to sell property, collect funds from bank accounts, appear on public deeds etc.

Appointment of the Testamentary Executor

Firstly, we note that for a testamentary executor to be appointed, such a request or wish must be specifically expressed in the will. The testator must explicitly state that they are appointing Person A as a testamentary executor or include criteria in order that the person intended is identifiable, i.e., "*I appoint the Dean of the Faculty of Laws as my testamentary executor.*" Without such a mention, no executor may be appointed.

We note that there are several requirements necessary in order for a person to be appointed as an executor:

1. The person must have legal capacity, in the sense that they cannot be interdicted or incapacity or be an adjudged bankrupt. This is contained in **Article 763**:

   No person who is under a disability to contract obligations, may be a testamentary executor.

2. The person must be over eighteen years old. This is contained in **Article 764**:

   A minor may not hold the office of testamentary executor even though with the authority of the parent to whose authority he is subject, or of his tutor or curator.

   When dealing with age, we note that in other areas, the law allows minors to engage in certain acts. For example, if a person is over sixteen, they can be emancipated to trade. However, for such purposes, even if a child has been emancipated to trade, they cannot be a testamentary executor until they are eighteen.

Initiation of a Testamentary Executor's Role

The executor cannot start their work until the role has been confirmed by the court. This was confirmed in **Article 765**:

> *It shall not be lawful for any testamentary executor to intermeddle with the administration of the estate before he is confirmed by the court of voluntary jurisdiction of the island in which the testator resided at the time of his death.*

Until such time, an executor has no power save to engage in acts to conserve the estate. For example, say Person A has died and in the will that was found Person B was named the executor. At such a moment in time, Person B has the power to seise any items of value belonging to Person A, including gold, jewellery and collections to conserve and protect the

estate. This could also extend to changing the lock to the testator's property to limit access. These acts can be performed immediately without the need to wait for court authorisation, yet it is as far as is allowed without it, as per **Article 769**:

> *The executor may, pending the procedure in confirmation, perform such acts as cannot without prejudice be delayed, and take such measures as are necessary for the preservation of the estate.*

In order to begin the fulfilment of their duties, the executor would need to file an application before the Court of Voluntary Jurisdiction providing:

- Their personal information;
- The fact that Person A passed away on a specified date as indicated by their death certificate - Doc. A
- The fact that Person A's estate was regulated by this will (Doc. B) as shown in the certificate for searches of public wills (Doc. C) and the certificate for search of secret wills (Doc. D);
- The fact that the applicant is named executor therein;
- The fact that the executor is a capable person (not interdicted, incapacitated or adjudged bankrupt) and is over the age of eighteen.
- An inventory of the assets and liabilities of the deceased with their corresponding values. While sometimes a formal inventory in the form of a public deed is given, more often than not, the more common way to satisfy this requirement is to present a descriptive note which lists the assets and liabilities and which is confirmed on oath. This is because this is both simpler and cheaper but may not be allowed in all circumstances, for example, large estates with a lot of property generally will require a formal inventory in the form of a public deed.

Once this information is given to the judge, the judge will grant the request. However, before, as per **Article 766**, the judge shall order the executor to enrol a general hypothec over all his property, present and future, up to the value of the estate. Until this is done, the executor cannot start his work. This is to guarantee the "*faithful carry[ing] into effect [of] the will of the testator and to render an account of his administration.*"

The Role and Obligations of the Testamentary Executor

Once the executor is confirmed by the court, they are able to begin their work which includes liquidating the estate, collecting money from bank accounts, paying taxes, making the deed *causa mortis*, distributinf the legacies and dividing the property between the heirs.

Additionally, if there are any liabilities it is incumbent on him to pay them through the estate of the deceases.

Basically, the executor has total control over the estate in accordance with the wishes set out in the will. The will is his ultimate guiding principle in this regard which he cannot deviate from.

One of the main obligations of the executor that needs to be done once a year or when his work is finished is the rendering of accounts. As noted, part of the reason why a general hypotech is placed on the property of the executor is to guarantee the rendering of accounts of his administration. These accounts must be in great detail and must also provide for any expenses encountered by the executor including the receipts thereof. The court will engage someone to review these accounts, usually a lawyer but depending on their nature possible an accountant, and if any irregularities are found, the executor is personally liable. The procedure of rendering accounts is provided for through **Article 767** and **Article 768** highlights that nothing can be included in the will that exempts the executor's obligation to render accounts:

> *Any disposition calculated to exempt the testamentary executor from the obligation of rendering an account shall be inoperative.*

Generally, the court will find that the administration is correct and will calculate the fees due to him, which will be paid out of the funds of the estate. This is considered in **Article 770**:

> *It shall be in the power of the said court, at any time, to grant to the testamentary executor a moderate fee, regard being had to the value of the estate to be administered by him, unless the testator himself shall have made provision as to such fee, or the executor shall have waived his right thereto.*

🌿 Ability to Sell Property

The executor is able to sell assets of the estate through sale by licitation, unless agreed otherwise by the heirs or court, either to pay debts of the estate or to discharge a legacy if there aren't sufficient funds according to **Article 771**. This article also authorises the executor to collect debts owed to the estate to fulfil the aforesaid purposes.

However, this cannot be a unilateral decision. In order to do so, the executor must seek the permission of the court by filing a request outlining:

- The fact that he is the executor of Person A's estate;

- The fact that the amount left in the estate is not sufficient to pay debts or to discharge a legacy;
- The fact that Person A owned Property I;
- The fact that he would like to sell the house for the price and under the conditions agreed upon in the promise of sale agreement.
- The request of the court to empower him to enter into a final deed of sale based on the promise of sale agreement.

The court will then appoint an architect who will go on site and examine the property, submitting a report as to whether the price agreed in the promise of sale agreement is satisfactory of not. The architect will then get paid by the estate. If the architect has recommended that the sale goes through, then the court will invariably authorise such. If the architect thinks the price is too low, the court will ask the executor whether the buyer is prepared to increase the bid:

> If the buyer isn't prepared to meet the new price, then the deal goes through.
>
> If the buyer is prepared to meet the new price, then the court will authorise the executor to enter into the final deed.

Yet, if the heirs are not satisfied with the sale, they can intervene and contest. This right is granted to them through **Article 772**. Here, the heirs must give a good reason for such objection, such as difficulties with the price being too low or the heirs wanting to purchase it themselves. In such a situation, the sale will be subject to a hearing.

This highlights the strange dynamic at play here: there is a situation where a person has been appointed as an executor when there are named heirs, whose rights and responsibilities include the execution of the estate. Heirs have a right to inherit and enjoy their inheritance from the moment of opening of succession and from that moment *ex officio* are granted administration over the estate. This results in a situation where there are two people having power over the estate: the heirs and the executor. In this regard, we consider that generally, the role of a executor is called upon when the testator envisages that a certain problem is going to arise. For example:

- There are going to be problems discharging a legacy.

  Person A gives a number of gifts to their children and Person A knows that one of the children who is also an heir will be a pain in this regard and not cooperate. In this case, an executor is appointed who doesn't need the power of the heir to give out the legacy to the legatee because he operates on the strength of the will and can execute it despite the protests of the heir, so long as he has the proper authorisation.

- There is conflict between the heirs.

  There exists property belonging to Person A that needs to be sold. Heir B wants to sell it and Heir C does not, resulting in a conflict. In such a case the executor can take the decision themself as to what is best.

Therefore, the appointment of an executor is a practical solution when it seems likely that heirs will create problems. More often than not, the role of an executor is included in a will in the midst of significant tension existing between family members and his role will be to get things done.

Another circumstance where it is beneficial to have an executor that doesn't relate to conflict amongst heirs is when the testator doesn't appoint any heirs. We recall that a testator is not obliged to name an heir in their will and can instead leave only legacies, disposing of all his property through dispositions by singular title. This is allowed, but is hardly effective when there is no executor to give effect thereto. Buy appointing an executor, a situation where all the legatees need to go to court in order to be satisfied is avoided.

Particulars of the Role of the Testamentary Executor

Firstly, we consider that the role of the executor is a personal one that is not inherited. Therefore, if Person B is the executor, and either predeceases the testator or refuses to accept the position, the children of Person B don't inherit the role and the associated obligations. Only the person mentioned in the will or the person identifiable through the will can be named executors. This is provided for in **Article 773**:

> *The office of the testamentary executor shall not descend to his heirs.*

We note the importance of this considering that a person named as an executor is not obliged to accept and in fact, it is not unusual for an executor to refuse this appointment because of how strenuous the burdens are and considering appointments are usually done when there is a lot of fighting between the members of the family.

Secondly, it is interesting to note, that even though one doesn't become an executor *ipso jure* upon the death of the testator, if the executor has not agreed, the banks and notaries will invariably ask for a deed or note through which the executor has renounced, i.e. for proof of renunciation. This is despite the fact that to actually be confirmed as an executor, the law outlines a lengthy process - one needs to accept the position and have it be confirmed by court via a court decree.

One can renounce at any time, even after acceptance. Additionally, for a good cause, one can be removed. Grounds on the basis of which an executor can be removed by the court of voluntary jurisdiction include inefficiency and dishonesty.

Thirdly, through **Article 777**, we recognise the ability of the testator to appoint more than one executor. There are different options here:

1. There may be a situation where more than one person is named as the executor and in such a case, the individuals will act as co-executors;
2. There may be a situation where an alternate is appointed. For example, Testator A appoints Person B as the executor of their estate and if Person B is unable to, is removed, or refuses to occupy such a role, Person C will take over.

   The alternate person will only be appointed if the will allows for such an appointment. Thus, if only one executor is appointed at law and they refuse, no other executor will be appointed and the role is no longer available.

Finally, we highlight that as a result of **Article 778**, in the case of "*death, absence, renunciation, or illness of the only executor,*" it is the responsibility of the heirs to execute the estate, or else, they can ask the Court of Voluntary Jurisdiction to nominate another person to take up the role, either in the interim if the inability relates to an illness or perpetually if the absence is resulting from death. The caveat in this regard is that the decision to appoint a replacement must be unanimous. Otherwise, the situation must go before the First Hall of the Civil Court which then has the power to appoint someone else to act as the executor should the situation warrant it.

In relation to this, we note that generally, the executor cannot delegate his responsibilities under the maxim *delegatus non potest delegare*, however, the appointment of an interim executor is allowed.

Opening and Publication Of Wills

Here, we refer exclusively to secret wills and not to public wills. In the case of a secret will, one can only find out if there is a secret will if the person has died or is presumed to be dead, i.e. is an absentee or has taken vows and becomes legally dead. In such a case, the will can be opened. Firstly, we take into consideration **Article 779**:

> *Any person claiming to have any interest in a secret will may, upon the death of the testator being ascertained, demand the opening of such will in the manner laid down in the Code of Organization and Civil Procedure.*

To begin the procedure, one must file a request before the Court of Voluntary Jurisdiction, mentioning the facts on the basis of which the request is being made, either a death certificate to prove death, a judgement of the court that presumes the person dead or proof that the individual took solemn vows. Following the Court of Voluntary Jurisdiction will order the opening of any secret wills.

Firstly a search is carried out and a certificate is issued that indicates whether or not there is or isn't a secret will. If the certificate indicates that there is a secret will, a *rikors* is filed and the court will publish the date and time when the secret will is going to be made public. For the complete promulgation, a notice with this information must be published in the newspapers, posted on the notice board of court and included in the government gazette.

On the day specified by the notice, the staff of the Court of Voluntary Jurisdiction will open the safe, take out the secret will and give it to the judge. In turn the judge will open it and hand it over to a notary they chose, generally, the same notary that would have delivered the secret will in the first place.

The secret will is then published and a notice to this effect is enrolled in the Public Registry, just like a contract of sale. This will not be kept in the volume of wills finalised by the notary in question but will be kept with the volume of public deeds done by the notary as the secret will has become such. In fact, if one goes to look for a published secret will in the volumes of the wills of that notary it won't be found as it must be kept with their volume of contracts.

Revocation of Wills

This section of the law begins with **Article 781** which notes that "*no person may waive the power of revoking or altering any testamentary disposition made by him.*" This means that no matter what, one is always entitled to change their mind regarding their will and no one is able to enter into a contract binding themselves not to change their mind. If a contract to that effect is actually signed it is treated as though it is not written as it is without value.

Therefore, if Person A signs a contract with Person B stating that they will leave them Property X when they die, this is equivalent to a binding will if done in the property format. Otherwise it is null and void. However, the existence of this contract does not preclude Person A from at a later date selling the boat or alienating it in some other way. The consequence of this is that the contract entered into with Person B originally loses its effect since Person A took subsequent actions contradictory to that which was stated in the contract in question. In this regard, Person B would have no right to stop Person A from engaging in such a way by, for example, filing an injunction.

As noted when previously considering revocation, a will is revoked wholly or in party:

1. By a subsequent will

   Generally, when a person wants to revoke a will, it is clearly achieved through the creation of a new will in which the first clause tends to be "*I hereby revoke all previous wills.*" This is clear indication that the testator wants their inheritance to be regulating only by the latest will.

This might not always be clear, however, since subsequent wills may not always revoke previous wills. In such a case, should there be a conflict between the latest wish of the testator and previous wishes outlined in an old will, the latest wish prevails and is deemed to have revoked the previous one. Thus, if there is an inconsistency, the previous will gives way to the latest one.

2. By a public deed.

   A clear example is in a contract of legal separation. Contained therein, there tends to be a clause through which the parties revoke all previous wills. However, this is not always the case. When such is included however, it will be interpreted that a previous will or parts of a previous will have been revoked. We keep in mind in this regard, that revocation can happen more in a more subtle manner than an outright statement, for example, by stating that "*the parties agree not to inherit each other*".

This is contained in **Article 782**.

Article 783 provides for the process of revocation of a secret will:

> *The mere withdrawal of a secret will from the notary, or, in any of the cases referred to in **articles 673** and **676** from the person to whom the will shall have been delivered, or from the registry of the court, or from the office of the consul wherein it shall have been deposited, shall operate as an implied revocation of the will.*

Successive Wills

Considering the faculty that a testator enjoys to change their mind, one can have a succession of wills. As outlined, generally, the last will drafted will include the clause that revokes all previous wills. In that instance, no problems arise.

However, for example, if the latest will is deemed to be null because it was done as a result of fraud or was finalised when the testator was not in the right frame of mind, we question whether the previous wills acquire validity since the latest will in question annulled all previous ones. In this regard we consider that since the last will is void, it has no effect and this extends to the clause revoking all previous wills. In such a situation, the will prior will come into force. This follows from the legal maxim *quod nullum est nullum effectum producit*. This signifies that a will which has been revoked by a void will shall become effectual. This is also mirrored through **Article 784**:

> *A will which is void cannot have the effect of a notarial act so as to revoke a previous will.*

In this regard it is important to keep in mind the necessity of looking at previous wills when deciding to challenge a will currently in forced. In so doing, one can compare whether the clauses are almost the same and compare and contrast the position the client will be left in

and what they stand to gain or lose if the current will is voided and the previous one comes into force. This is because it has often happened that a person challenges the last will of the testator when the issue being complained about that is disadvantageous to them is also present in the previous will. In such a case, it is as though the contester won the case but lost in practise. To find previous wills one must ensure the search is thorough.

> In relation to secret wills, once a certificate is asked for to outlining all secret wills, the staff of the Court of Voluntary Jurisdiction will present the requester with a certificate that is complete including all secret wills.
>
> In relation to public wills, one must give the staff at the Public Registry the correct start and end date to make sure the search is comprehensive. The start date ought to be on the person's eighteenth birthday (the day the person is legally capable of making a will) and the end date ought to be one month after their death. This is because the notary has three weeks in which to deposit a will after it is drawn up and thus, one month plays it safe.

The law also caters for the situation where a different disposition is made in two successive wills and the process the testator must go through in order to revert the disposition back. Take the following example:

Testator A leaves his house to Child B in Will I. Subsequently, Testator A changes his will to leave his house to his maid in Will II.
Unfortunately, the maid predeceases the testator and therefore, the legacy left in Will II is without effect.

Firstly, we note that just because the legacy left in Will II is rendered without effect because the maid predeceased the testator, doesn't mean that the previous legacy n the old will comes into force. Child B still doesn't get the house through a disposition by singular title because the will in which that was catered for was revoked. Once a will is revoked it will remain forever revoked.

Secondly, we take into account that if Testator A wished once again to leave the house to Child B following the death of the maid, thereby renewing the legacy in favour of Child B, such testator would have to go back and make a new will to do so. This is contained in **Article 785**:

> *Any testamentary disposition which has been revoked, can only revive by a fresh will.*

An interesting case to take into account is that of **Lewis v. Scarrow (2010)**.

A wealthy woman passed away, leaving behind a daughter who lived in the Southern Hemisphere. While the daughter visited often, over time, the daughter became increasingly focused on her inheritance, which strained her relationship with her mother. Despite her mother's warnings against greediness, the daughter persisted in asking about the estate.

Eventually, the woman drafted a will in the presence of her daughter and her second husband. Initially, the daughter seemed content with this arrangement. However, after returning home, the woman promptly changed her will to leave everything to her second husband, prompting a legal battle in relation to the validity of the will.

The court investigated whether the woman had been coerced into changing her will. The testimony of the notary, who confirmed the woman's intentions, played a crucial role in this regard. The notary was clear in articulating that the last will was done exactly as the wealthy woman wanted it. Ultimately, the court held the latest will as being valid and against the claim made by the daughter actually outlined the reservations it suffered about the first will made.

Another dispute arose over the ownership of the woman's jewellery. Since the step-father was the heir, he took the jewellery initially. The daughter claimed that her mother had gifted it to her during her lifetime and that as proof, such jewellery was kept in her bedroom which the court considered to be in her possession. The court ruled in favour of the daughter, citing the presumption of ownership based on possession: *possesso vale titolo*.

Regarding the promised Picasso paintings, we note that in the previous will, the painting were promised to the daughter. However, such a will was revoked and since in the latter will, they were not mentioned since the woman only appointed by universal title, there was no binding statement that would entitle her to the paintings. Although, the court did speak about the moral value that such a disposition had had noting that the decision to grant her the paintings would be up to the step-father but that the court couldn’t force him in one way or another considering he was not obliged to honour the promise unless it was explicitly stated in the will:

> *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 drawings be given to plaintiff .*

Renunciation of an Inheritance

The law also caters for the technicalities of the renunciation of inheritance from **Article 860** to **Article 876** of the Civil Code.

Form of Renunciation

The first thing to note is that the renunciation of an inheritance cannot be presumed. This is stipulated in **Article 860(1)** . If one opts to take no further action in relation to an inheritance, this cannot be construed as tacit renunciation. For renunciation to be effective, there must be an act to that effect that is registered at the Public Registry, as per **Article 860(2)**:

> *It may only be made by a declaration filed in the registry of teh court of voluntary jurisdiction of the island in which the deceased resided at the time of his death or by a declaration made by an act of a notary public.*

Therefore, to renounce to an inheritance, a person has two options:

1. Filing a note in the Court of Voluntary Jurisdiction duly recorded in the Public Registry
2. Engaging in a Public Deed to that effect duly recorded in the Public Registry

In so doing, the renunciation must include the full particulars of the deceased and also the information of the person renouncing.

The importance of the recording in the Public Registry arises because in the past the renunciation was only operative through a note filed in the Court of Voluntary Jurisdiction with such not being recorded in the Registry. This led to a situation where to find out of a person has renounced to a legacy, one would have had to physically go to the Court of Voluntary Jurisdiction and ask the employees whether a note of renunciation had been filed by said person. However, as a result of significant failings with the court registry system, there remained a lot of uncertainties with regards to the validity of the information being received: often, the searches would be conducted with it noted that no such note had been filed when one had. Over time, the legislator felt it was important to have a system that enables better recording to take place. The law did so by introducing the facility of renouncing by public deed which necessarily has to be enrolled in the Registry and by requiring all notes filed with the Court of Voluntary Jurisdiction to be enrolled as well.

This enables a person to easily found out if there has been a renunciation as any public deed, public will or act will be recorded and accessible.

The registration in the Public Registry also has another dimension in relation to the validity of a renunciation vis-a-vis a third party. While the note of renunciation or the public deed is valid as from the moment it is made, as far as third parties are concerned it is only valid the moment it is enrolled in the Public Registry. This means that there generally exists a two to three week gap between the two stages (conclusion of the deed/submission of the note) and the enrolment thereof in the Public Registry. This is stipulated through **Article 860(3)**:

> *The declaration of renunciation referred to in this article shall not be operative with regard to third parties except from the time when it is registered in the Public Registry according to **article 330(2)**.*

Consequences of Renunciation

Here, we observe that both an heir and a legacy is able to renounce the the inheritance in respect of both dispositions by universal and singular title. This renunciation only affects the heirs or legatees personally but rules out the application of representation.

In relation to heirs, we consider that if an heir renounces to the inheritance without any conditions then that person gets no benefit from the estate in their capacity as an heir and nor will the person's descendants be entitled to claim from the inheritance - the children will not be able to claim a benefit from the inheritance in the renouncer's stead. However, we remember that an heir is able to reserve their right to the reserved portion.

> *The heir who renounces a testate succession forfeits all rights to the intestate succession:*
>
> > *Provided that it shall be lawful for such heir to make, in the act of renunciation, a reservation in respect of the reserved portion of the property to which he may be entitled under any provisions of* ***articles 614*** *to* ***653****.*

Anything that would have gone to the renouncer will accrue in favour of the other heirs. However, the law says that one can renounce to an inheritance as an heir but nonetheless accept the legacy, as pre **Article 862**:

> *The heir who renounces is considered as if he had never been an heir.*
>
> *Nevertheless, his renunciation shall not operate so as to deprive him of the right to demand any legacy bequeathed to him.*

There are implications to this decision. Take the following example into account: Person A's parents left him a pre-legacy of a villa and named him co-heir along with five of his siblings. Person A can renounce his right to inherit but can reserve the right to the legacy. This is not associated with the Reserved Portion and is a gift. The person renouncing to the inheritance isn't bound to pay any liabilities of the estate but nonetheless has inherited the villa by legacy.

Logically, this situation could be prejudicial to creditors. If a person renounces their inheritance, meaning they aren't bound to pay liabilities of the estate, yet inherit something through a legacy, it could mean that there is nothing substantive left in the estate and thus, no more assets upon which to ensure the creditor's claim. Here, the law protects creditors giving them a right to accept the inheritance instead of the person renouncing to the extent of their claim. In this way, creditors will be able to get some form of satisfaction for their credit because when liquidating an estate, before one pays out any legacies, one is obliged to pay out creditors. Additionally, we note that if there aer insufficient funds to pay the creditors, the legacies are reduced. In so doing, the creditor steps into the shoes of the inheritance, i.e. into the shoes of the heir, and eats into the legacy up to the value of the credit. This is outlined through **Article 866**:

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.

In the case referred to in sub-article 1 of this article the renunciation is annulled not in favour of the renouncing heir, but in favour of the creditors, and only to the extent of the rights of such creditors.

It shall be lawful for any of the co-heirs of the person renouncing to oppose the actions of the creditors by paying the sums due to them, and the co-heir effecting payment shall ipso jure be subrogated to the rights of the creditors whose claims he has satisfied.

Article 866(3) outlines that the other heirs may chose to pay the creditors off and such will be automatically subrogated.

In this regard, we also need to take into account the Reserved Portion. When a person claims the Reserved Portion, we note that such person must renounce to the inheritance and reserve their right to such a Reserved Portion. In such a case, if they have been left a legacy, such must be accepted and its value is deemed to be a payment on account of the Reserved Portion. Therefore, following the calculations as to what the Reserved Portion will be, a credit owed to the claimant is established and such a credit note is used to acquire the legacy. If the legacy is worth more than the credit note, then the legacy is reduced. IF the legacy s worth less than the credit note, the person claiming the Reserved Portion will get the legacy, plus a balance in money.

In terms of intestate renunciation, we turn to **Article 863** which argues:

In intestate succession, the share of the person renouncing accrues to his co-heirs.

If the person renouncing is the sole heir, the succession devolves upon the person to the next degree.

Therefore, the default situation is that the share belonging to person who renounced to the inheritance is accrued in favour of the other heirs according to the law of intestate succession. However, this is made slightly more complicated when there is only one heir. Here, we acknowledge the general rule that regardless of whether it is a situation of of testate or intestate succession, if there is no provision as to what will happen to the inheritance in a particular situation, the laws of intestate succession apply. The share will then devolve upon the closest relative according to such rules: if there are no children, one looks to deceased siblings or parents and then to the extended family tree until there is someone related to that person to inherit. Take the following example:

Person A dies and his universal heir is his only child, Child B. Child B has no children of his own and renounces to the inheritance.

Since there are no further provisions as to who the inheritance goes to, we check to see if Person A has siblings. In this case, since Person A has three siblings (Sibling C, Sibling D and Sibling E), the estate will go in favour of such siblings in equal shares, therefore 1/3rd of the estate to each.

Suppose Sibling C predeceased Person A, but had two children of their own, Child F and Child G, then the share that would have gone to Sibling C goes in favour of such children. Thus, the 1/3rd share that would have gone to Sibling C must be divided equally between Child F and Child G.

In the case that Sibling C had no children, their share would accrue in favour of the other siblings.

If all the siblings predeceased Person A, but there are nephews and nieces, the number of nephews and nieces are counted and the estate is divided according to how many there are standing *per capita*. This is outlined in **Article 864**:

> *No person may take as the representative of an heir who has renounced.*
>
> *If the person renouncing is the sole heir in his degree, or if all the co-heirs renounce, the children shall take in their own right and shall succeed per capita.*

In the case of testate succession, **Article 865** highlights that "*the share of the person renouncing shall devolve upon the co-heirs or the heirs-at-law as provided in **articles 737** and **741**.*"

Reversing a Renunciation

We question whether one is eligible to change their mind after a renunciation, especially when circumstances change. Generally, one is able to so long as the following two conditions are satisfied as per **Article 867(1)**:

> *(a) The right of acceptance shall not, in his regard, have lapsed by prescription; and*
>
> *(b) The inheritance shall not have been already accepted by other heirs.*

Therefore, we note that the right to change one's mind is time barred by ten years and can only be effected if no one else has accepted the inheritance. If someone else has accepted it then one is unable to change their mind.

This is an important factor to keep in mind as this faculty to change one's mind can be used genuinely or with ulterior motive as an act of trickery. For example, a co-heir decides to renounce to their share of the inheritance citing the liabilities of the estate as the reason for making such a decision. This may trigger the co-heirs also to renounce their share of the inheritance. The first heir could then change their mind and accept the inheritance from which moment on, the other siblings are unable to change their mind and accept.

In the case that one is still able to accept because the inheritance has not been accepted, we question what happens to it in the interim. When there is a vacant inheritance, there is the possibility of a curator being appointed to represent the estate. Anything the curator has validly done with the estate, such as sold property, and the resultant rights third parties acquire over the property formerly in the estate cannot be challenged by an heir who later changes their mind to accept the inheritance. Additionally, should third parties acquire rights over the property by prescription, these cannot be challenged either. This is one of the consequences to someone renouncing at first as per **Article 867(2)**:

> *Nevertheless, such acceptance shall not operate so as to prejudice any right which may have been acquired by third parties over the property of the inheritance by either prescription, or by virtue of acts validly made with the curator of the vacant inheritance.*

Generally, this operates in the following manner:

When there is an inheritance with a lot of liabilities that remains vacant after being renounced by the heir, a creditor may file a separate case in the acts of the same case outlining that such is being filed as a result of the vacant inheritance and the debt owed to him and request through the application that the court appoint a curator to accept the inheritance and manage it. Such a call will be published on the banns in court calling on anyone to act as a curator in this case to represent the estate. Once a person files a note in court to accept, they become the curator. If no one accepts, the court will appoint a lawyer and a legal procurator to act on the vacant inheritance's behalf. Following, the court hears a case where the creditor outlines the debts owed to him and the court can pass a judgement calling for the estate to pay. Upon special authorisation, the curators can go to the bak to get money to pay the creditors or else can sell the property: a mandat ta' qbidt is issued on the property which is then sold by court auction. In such a case, the proceeds, after paying off the debt owed to the creditor, are generally kept in court or in a bank account dictated by court.

In such a situation, reverting one's decision to renunciate would often happen because in the court auction the property sells for a higher price than anticipated, which is more than enough to pay the creditor and which leaves aa substantial balance left over. If the person renounced because they were fearful of the liability, such person can change their mind and accept the inheritance, taking the balance. However, they cannot challenge the court auction because the procedure through which they were executed were validly done rendering them with retroactive effects.

Time Limits in Place to Accept the Inheritance

In relation to the time limits imposed to change one's mind regarding renunciation, we note that:

- If the person in question is not in possession of any part of the estate, they have ten years in which to accept the inheritance.
- If the person in question is in possession of any part of the estate, they are presumed to have accepted the inheritance. In such a case, the time limit is in place for renouncing to the inheritance and giving up the items of the estate held in their possession because it is not consistent to renounce and physically hold part of the inheritance. The act of renunciation must be filed expeditiously within three months which is a very short time considering that it takes around one and a half months to obtain a death certificate and to perform a search for wills. This means the heir doesn't have a lot of time. This is considered under **Article 869**:

  … the persons entitled to succeed, having the actual possession of the property of the inheritance, shall, on the lapse of three months from the opening of the succession, or from the day on which they had knowledge of the devolution thereof, forfeit the right to renounce such inheritance, unless they have complied with the provisions relating to the benefit of inventory; and, they shall be deemed to be pure and unconditional heirs, even though they claim to be seized of such property under a different title.

If someone who is not in possession of the estate has not accepted the inheritance and the situation is stuck in a deadlock, the court can provide a remedy. The persons interested can file a court case for a time limit to be imposed during which the person must accept or renounce to the inheritance. This time period is of one-month but can be extended by a further month. If a person takes no action, they are presumed to have renounced, as per **Article 888**.

Take the following situation into account: Say there are three siblings. While two out of three of the siblings have accepted the inheritance, one has not. This results in a situation where the two siblings who have accepted are stuck in a deadlock and are unaware of where they stand - the money of the inheritance is stuck, nothing can be sold and nothing can be divided. Therefore, the two siblings who have accepted can file a case in court requesting the court impose the one-month time limit on the remaining sibling to take a decision on whether they will accept the inheritance or not.

Eligibility to Renounce to an Inheritance

We note that generally, a person renounces to an inheritance because either to claim the Reserved Portion or because of a significant amount of liabilities, i.e. for a justified reason. However, the law outlines several situations where a person is unable to renounce to an inheritance:

Article 870 stipulates that any heir who has misappropriated or concealed any property of the estate forfeits their right to renounce. In such a situation, we consider two options:

1. The person renounces the inheritance to claim the Reserved Portion but has misappropriated assets. Here, the renunciation wouldn't be valid and the the person would not be able to claim the Reserved Portion.
2. There would be a significant number of creditors and one renounces the inheritance to avoid paying them but in doing so, they misappropriate the estate. Once this occurs, such a person loses the benefits of renunciation and not only will face the consequences of misappropriation, but they must also pay the creditor.

NB. When considering the relationship between the Reserved Portion and creditors, we note that when calculating the amount of Reserved Portion, the liabilities and assets are first counted. If there are 100 assets and 50 liabilities, the Reserved Portion is calculated based on 50 (100-50), and 50 go towards the payment of the creditors. Therefore, creditors are protected and will always get paid.

Additionally, if a person has hidden property belonging the the inheritance, they forfeit the right to renounce. For example, if a person breaks into the house of the deceased and steals a jewellery box so creditors won't find it, if he is caught, any deed of renunciation isn't valid.

Renunciation to a Future Inheritance

We note that in general, one is:

- Unable to renounce to a future inheritance

  If Person A's father were to donate a villa to them stating that this donation is being made in satisfaction of their future inheritance and that by virtue of accepting it, Person A is renouncing their right to claim anything more from the estate in the future, it would be invalid. This is because one cannot sign away their right to inheritance.

  There are two exceptions in this regard outlined in **Article 871** and **Article 872**:

  - Renunciation in Contemplation of Marriage -

    This was something that happened often in the past but not in the present day and relates to the idea of a dowry.

    In the past, when a woman got married, she was deemed to become the property of her husband, with the husband taking control of her assets. From that moment onwards, she would leave her parent's house and form part of her husband's household, with the obligation incumbent upon him to look after her. In such a situation, prior to the marriage, the father would give the child his inheritance upfront in the form of a dowry. Therefore, what the woman would inherit would be predetermined at the moment of marriage. Following the receipt of the dowry, such

woman would not inherit again. This is incompatible with situations of marriage as we know them today.

- Renunciation owing to the taking of a Monastic Vow -

  When taking a monastic vow, there exists incapacity to make and receive under a will. Additionally, by taking such a vow, the person renounces to any inheritance that may be due to them for so long as they are bound by that vow as such a person is presumed to be legally dead in that case. They are only eligible to receive a small annuity as a maintenance grant.

  Interestingly, as per **Article 873**, if the life annuity has not been paid and the person under the vow dies, the order can claim it so long as "*he shall have expressly declared the default of payment and [so long as] the debt is not barred by prescription.*"

  Such a renunciation is also operative vis-a-vis minors who are of age to take such religious vows.

  However, we must keep in mind the fact that a person can reacquire personality if the vow is annulled and the community is left. In these circumstances, the person bound by the vow can inherit retrospectively. Yet, should any property have been disposed of validly, such person cannot challenge the transfer and must take the estate as it is found. This is considered in **Article 876**.

Here, we also take into consideration **Article 984:**

> *Future things can form the subject of a contract.*
>
> *Nevertheless, it shall not be lawful to renounce a succession not yet devolved, or to make any stipulation with regard to any such succession, whether with the person whose succession is concerned, or with any other person, even though with the consent of the former; saving any other provision of the law in regard to any renunciation or stipulation made in contemplation of marriage, or upon the taking of religious vows.*

Donations

While donations don't technically in and of themselves fall under succession law, they have a lot of implications thereon. First and foremost we consider the parallel between succession and donation where the former is basically a donation consequent to death.

The section of the law dealing with donation is very similar to the clauses dealing with succession including:

1. The capacity to make a donation

2. The capacity to receive a donation
3. The prohibition of the creation of an entail
4. The necessity of a donation being done by public deed, unless a moderate donation.
5. The existence of special rules regulating the acceptance of a donation.

Normally, when there is a donation agreement, one person gives and the other receives. If a contract is drawn up by a notary, generally, both parties appear. When both parties appear, no questions arise as to the acceptance as it is generally apparent. However, there may be circumstances where someone has given something but the recipient still hasn't signified their acceptance. Say Person A gives Person B a villa, engaging in a contract of donation without Person B being party to the contract. This donation would not be operative unless it is accepted, usually by Person B signing a contract to signify such acceptance.

We question whether a donation can be accepted after the death of the donor. Generally, if less than three months pass from the time the thing was donated to the time the person died, it won't be valid. However, there are other circumstances within which acceptance can be considered to be valid. These are outlined under **Article 1756**:

> *An acceptance made after the death of the donor shall be ineffectual, except in the following cases:*
>
> (*a) When the donor has reserved to himself, during his lifetime, the use or usufruct of the thing given'*
>
> *(b) When the donation is to be carried into execution after the death of the donor*
>
> *(c) When the donor dies within three months from the day of the donation.*
>
> *In each of the aforesaid cases, the donee may, until the expiration of a time to be fixed by court upon the demand of any interested party, validly accept the donation which has not been revoked by the donor; such time may not exceed one month, but may for just cause be extended by the court to another month.*

Therefore, it can only be accepted in the cases outlined at law if less than two months have passed between the time the donation was made and the time of death of the donor.

In relation to the situation elucidated under **Article 1756(1)(a)**, we take into account the case of **Balzan v. Degiorgio (1959)** wherein a gold chain was promised to a woman prior to the woman's death and a dispute arose as to whether it was given to her, with the older woman reserving the right of use until she died, or whether it was promised. From the facts, it emerged that the manner in which the gold necklace was given was tantamount to a promise. Since such a promise was not included in a will or public deed, it wasn't

valid and thus, the woman couldn't accept it. It would have been valid had the woman giving it out said that the chain is hers but that she would keep using it until she died. This would have constituted a donation with the right of use reserved.

In relation to such acceptance, if the heirs agree to the donation, then no problems should arise. If they don't, then the matter goes to court and the court must authorise the recipient to take the object.

Reduction of Donations

We note that when a person claims the Reserved Portion, it is legal for donations given to be reduced, as per **Article 1813**:

> *Donations of any kind, even if made in contemplation of marriage to future spouses and to the children to be born of their marriage, shall, if at the time of the opening of the succession of the donor they are found to exceed the portion of property whereof the donor, according to the rule laid down in **article 614**, could dispose, be reduced to that portion.*

We also take into account **Article 1814** that outlines how the rules articulated in **Article 621** and in **Article 647** shall be reserved in relation to donations also.

Therefore, take the following into account: Person A claims the Reserved Portion and there are doubts as to whether there are enough assets to pay it because during the testator's lifetime through donations and in death, he exceeded the non-disposable portion. This requires consideration as to the process of calculating the Reserved Portion:

The first exercise is to examine whether the testator has given away more than he should have, i.e. exceeded the non-disposable portion by disposing of property that has been reserved. To value the property at this statge, the estate as it stands (i.e. the *relictus*) is valued as at date of opening of succession. Even the donations legacies stated in the will are valued as at date of opening. Thus, this one standard is used across the board. When valuing the estate, one sees who is claiming the Reserved Portion, be it a spouse or child/children, to see the proportion.

In this case, let's say Person A is a child and is one of five. Therefore, the Reserved Portion needs to be worth 1/2 the estate. From there the value of the Reserved Portion is established. From such valuation of the estate, the donations and legacies are removed. Next, one checks to see if the disposable portion has been exceeded. If they have, the rules of abatement come in which result in a reduction to the legacies and maybe even the donations. In this case, let's assume the disposable portion has been exceeded.

The second exercise is to value the Reserved Portion at a different valuation. As far as the inheritance is concerned, what is left in the estate, including the legacies (therefore, the

property that is still there when the testator has passed away), the date at which that must be valued has conflicting case law associated with it. Some cases argue that it is at date of opening of succession, and others argue that it is as of date of liquidation of the estate. Latest judgment, including Court of Appeal judgements tend to favour the second method of evaluation that is done close to the date when the court case is going. tobe decided.

As far as donations are concerned to calculate the Reserved Portion, they are valued as date of opening of succession, though there are judgements that claim that this ought to be as at date of donation. Dr Borg Constanzi believes they are mistaken.

Therefore, the Reserved Portion values what is left at date of liquidation and donations as at date of opening of succession since donations are presumed to never have been given to calculate the minimum right due to someone who is claiming it.

The third exercise involves who is going to pay if there isn't enough in the estate to cover the Reserved Portion. To consider this, we turn to the process of abatement. The rules of abatement determine how legacies and donations are going to be reduced to cover the Reserved Portion when there are insufficient assets to cover the inheritance.

Initially, one looks at the legacies as they are in the will and they are eaten into on a *pro rata* basis. They are valued as at date of opening of succession for this purpose and not as at date of liquidation. Between them, the legatees will reduce the legacy in order to make good and pay the Reserved Portion. In the case that the legacy is indivisible, it must be sold unless the legatee pays from their own pocket.

If after removing the legacies, there is insufficient money to pay the Reserved Portion, we look to the donations made during the person's lifetime. Here, we consider **Article 1815** which stipulates that the reduction of donations can "*only be demanded by those for whose benefit the law has reserved a portion of the property of the deceased and by the heirs or other person claiming under them*."

Furthermore, we take **Article 1818** into account:

> *No reduction of donations can take place until the value of all the property disposed of under the will has been exhausted; and when such reduction takes place, it shall be made commencing with the last donation and so on successively, from the last to the previous donations.*

The rules of abatement state that when it comes to reducing a donation, one starts with the last donation made and work backwards. Therefore, the reduction of donations is not done on a *pro rata* basis. The last donation made will be reversed to pay for the Reserved Portion, reverting as many as necessary to cover the Reserved Portion. The latest donation is taken first considering that when the first donation was made, the testator hadn't eaten into the non-disposable portion and there were still sufficient assets left. However, as a result of

subsequent donations, the benchmark was broken and exceeded and from such a moment, the donations that fictitiously ate into the non-disposable portion will be questioned.

Therefore, there is a danger in donating which in recent years has become more common thanks to a government scheme that allows one to donate with the fiscal benefit of exempting such donation from capital gains tax. Here, there is only the need to pay duty on documents. However, because so many people have taken advantage of this scheme the risk is run that as a result of these donations, there are insufficient assets to pay for the Reserved Portion. In such a case, the donations will become questionable as a result of the strength of the Reserved Portion: any donation infringing on the Reserved Portion will render the donation without effect with the property returning back to the estate to cover the Reserved Portion.

The issue in this regard, is what happens when the donee has already alienated the property, for example by selling it to a third party. This is a real problem. Most of the time, when a donee tries to sell property, notaries and banks insist that the other siblings (as people entitled to claim the Reserved Portion) appear on the deed of sale and give their consent to the sale to guarantee peaceful possession. In so doing, the other heirs cannot renounce to the estate (i.e. guarantee they won't claim the Reserved Portion) but they must guarantee peaceful possession to the purchaser, protecting them.

A further complication with donation is the fact that if the donation must be reduced, any fruits that went with the property are also to be handed it. For example, any rents must be refunded as per **Article 1820**:

> *The donee shall restore the fruits of such part of the donation as exceeds the disposable portion, from the day of the opening of the succession of the donor, if the action for reduction has been brought within the year, otherwise, from the day of the demand.*

Furthermore, if the property donated is reduced, it must be given back in the same state in which it was originally given. This means that if, for example, the property originally had no servitudes or hypotechs on it, it must be reverted back to such a situation when reduced with any obligation or change being put on it reverted, as per **Article 1821**:

> *The immovable property which is to be returned in consequence of the reduction shall be free from any debt or hypothec with which it may have been charged by the donee.*

Generally speaking, reductions of donations are very rare. We also note that in recent case law when such a situation arose, Judge Mangion gave the donees the option to pay the value necessary within a stipulated time period rather than reduce the donation automatically. If the donees were unable to do so, the object donated would go back to the inheritance and if sold by court auction, following the satisfaction of the person claiming the Reserved Portion, the balance would go back to the donees. This is an example of the court using an inherent sense of justice.

Some Provisions Common to Testate and Intestate Succession

The following refers to a list of important principles to keep in mind to frame the law of succession:

> 🌿 **Article 831**
>
> *A succession opens at the time of death, or on the day on which the judgment declaring that the person whose succession is concerned is, by reason of his long absence, to be presumed to have died has become res judicata.*

> 🌿 **Article 836**
>
> *The possession of the property of the deceased is, b operation of law, transferred, by way of continuation, to the heir, whether testamentary or an heir-at-law, subject to his obligation of discharging all the liabilities of the inheritance.*

This section outlines the general principles that define what an heir is and that determine the rights and responsibilities thereof. It highlights how heirs immediately step into the shoes of the deceased in such a way that there is no break in continuity. Therefore, immediately upon succession taking place, the rights and obligations of the heir kick in, irrespective of whether one is made an heir by testamentary disposition or whether one is so by virtue of the law.

The consequence of this qualification is that the rights of the heir cannot be delayed. Therefore, a testator cannot include any provision that argues that a person will be named an heir after a period of time, for example Person B will become an heir if they survive the testator by thirty days. A person becomes an heir immediately without any ability to postpone.

This immediacy is important vis-a-vis the right to possession. If one is an heir they are entitled to possess the property in the same way it was possessed by the testator straight away. This also has consequences in relation to the prescriptive period - it is continued by the heir and is not interrupted. For example, say the testator occupied a property for twenty-five years, if the testator were to die, the prescription is continued by the heir with the twenty-five years counting in the heir’s favour.

Article 837

Where the deceased disposes of a portion only of the inheritance, and the remaining portion devolves upon the heirs-at-law, possession vests, by operation of law, in the testamentary heir and in the heir-at-law, in proportion to their respective shares.

This article stipulates the validity of a will wherein the testator doesn't dispose of all his estate. A testator can dispose solely by singular title without appointing an heir validly. In such a case, the remainder of the estate would go to the person's heir-at-law.

Further, it is possible to appoint an heir in relation to a share of the estate, for example appointing Person A as an heir in a share of 1/4th of the estate. For this to be valid, the testator is not required to stipulate what happens to the remaining 3/4ths of the estate. In such a scenario, the law of intestate succession applies in proportion with the part of the estate that has not been regulated in the will.

Article 838

Where any person claiming rights over the property of the inheritance has taken possession thereof, the heirs in whom possession vests by law shall be deemed to have been dispossessed de facto, and may exercise all the actions competent to a legitimate possessor.

Just in case there was any doubt as to the right of heirs, the law clearly stipulates that once a person becomes an heir, they have *de facto* possession over the estate. Such *de facto* possession enables them to exercise all the rights available to any possessor immediately. For example, if a person were to deprive the heir of possession of the property, the heir would have the right to a remedy immediately.

Article 839

Where under testate or intestate succession a person conceived and born out of wedlock succeeds with adoptive children of the deceased or other children of the deceased who are not so conceived and born or descendants of such children, or with the surviving wife of the deceased, the other heirs of the deceased shall be entitled to pay the share due to the person conceived and born out of wedlock, either in cash or in movable or immovable property of the estate, if latter does not object; and in case of opposition by the latter, the Civil Court – Voluntary Jurisdiction shall, following an application to that effect by any of the other heirs of the deceased, decide whether to allow such payment or assignment, after taking into account personal considerations and those relating to property.

This is a strange article dealing with children who are conceived and born out of wedlock who are not mentioned in the will. This article states that the if the will doesn't cover them, then there is no provision for them at all. Therefore, the children who are conceived or born out of wedlock will not be co-heirs and they will not be entitled to the Reserved Portion, as are those children considered 'legitimate' who are entitled to a credit. However, we note that the heirs can pay off such children by paying the share due to the person conceived and born out of wedlock "*either in cash or in movable or immovable property if the latter doesn't object*".

We question why a person who would otherwise get nothing would object. If the estate primarily comprises immovable property and the heirs instructs their child to take a flat in Portomaso, there is a big difference if in a different scenario the heirs offer them a dilapidated farmhouse in Bidnija. In the latter case, the child may not want to accept and may prefer monetary compensation instead. If there's a disagreement, the child must file a recourse in the Court of Voluntary Jurisdiction, rather than the First Hall Civil Court, which is an uncommon legal recourse.

According to Dr Borg Constanzi, this inclusion contradicts the very first section of the law of inheritance which states that all children born viable have a right to inherit. He argues that the strangeness of this section is exemplified by the fact that our distinction between 'legitimate' and 'illegitimate' children ended in 2004 and thus, if a person is a natural descendant of someone who passes away, they should get the right as any other child if the situation were under intestate succession and if the situation were under testate succession, they should be entitled to the Reserved Portion. It seems that this section was missed out upon when the law was being amended.

Article 845

The action for demanding an inheritance, or a legacy, or the reserved portion, whether in testate or in intestate successions, shall lapse on the expiration of ten years from the day of the opening of the succession.

Nevertheless, with regard to minors, or persons interdicted, the said action shall not lapse except on the expiration of one year from the day on which they shall have attained majority, or the interdiction shall have ceased, as the case may be.

This article outlines the prescription, i.e., time limit, in place at law to accept an inheritance.

In general the law stipulates that a person has ten years to accept an inheritance, with special provisions being in place to protect minors and those interdicted. In relation to minors, we note that the ten years doesn't start running until the minor becomes of age. In terms of interdicted persons, the prescriptive period doesn't begin to lapse until such interdiction shall have ceased. The issue in this regard is that it can create a perpetual period which in practise in't subject to any form of time bar. This is because normally, when someone is interdicted, such an interdiction tends to be permanent. If there is a psychological problem, the chances of a person recovering from the mental illness are slim. Thus, in practice there is no time bar, despite in theory it being ten years after the interdiction is reversed. One of the few examples where an interdiction can be reversed fairly simply is in the case of prodigality which is a temporary cause for interdiction.

Article 846

No person is bound to accept an inheritance devolved upon him.

This article clarifies that no person, be they named in a will or be they heirs or legatees at law, are bound to accept any inheritance. No one can force you to accept.

Article 847

An inheritance may be accepted unconditionally, or under benefit of inventory.

This clarifies that if one decides to accept an inheritance, one either accepts it all or accepts it with the benefit of inventory. One cannot say that they only want either a half of the

inheritance or a quarter of the inheritance. Whatever is given, one has to take either unconditionally or conditioned with the benefit of inventory.

> 🌿 **Article 848**
>
> *Where an inheritance devolves upon a person subject to tutorship or curatorship, or upon a minor, it cannot be accepted by the tutor or curator, or by the parent exercising parental authority except under benefit of inventory.*

Following from the previous article, we note that if an inheritance falls onto someone subject to tutorship or curatorship, i.e., onto minors or interdicted persons, the tutors and curators can accept the inheritance on behalf of their ward but must do so with the benefit of inventory. In order to do so, they must register a general legal hypotech on all his property guaranteeing that he will administer the estate of the ward honestly and that he has the obligation to draw up an inventory, either by public deed or through a descriptive note.

> 🌿 **Article 849**
>
> *The acceptance of an inheritance shall retroact as from the day of the opening of the succession, saving any right which may have been acquired by third parties in virtue of agreements made in good faith with the apparent heir.*

As we said, a person isn’t bound to accept an inheritance immediately. Imagine if one accepts an inheritance after a year, such acceptance is retrospective back to the day of opening of succession without any break in continuation. However, if in the meantime a third party acquired a vested right from an from the apparent heir by means of an agreement in writing and good faith, such agreement is valid. In this regard an ‘apparent heir’ is a person that would have inherited had you not accepted. It cannot be a random person.

Article 850

Acceptance may be either express or implied.

It is express, if the status of heir is assumed either in a public deed or in a private writing.

It is implied, if the heir performs any act which necessarily implies his intention to accept the inheritance, and which he would not be entitled to perform except in his capacity as heir.

This article considers how one proves an acceptance of an inheritance noting such acceptance can either be express by some positive document, or implied.

There have been quite a few issues that arose in relation to implied acceptance of inheritance. If someone wants to claim the Reserved Portion, he cannot be an heir at the same time or hold any object of the inheritance. If a person has physical control of the object forming part of the inheritance, he is presume to accept the inheritance and if such intends to renounce and claim the Reserved Portion, the person must give up the object. Without giving up the object, it is inconsistent for a person to claim the Reserved Portion.

Take the following example into account: Person A gave their father a Mont Blanc pen and when he passes away Person A takes it back upon his death to remember him by. Technically, Person A is not able to keep the pen as they are acting as through they are an heir in retaining part of the estate, despite them being the original owner of the pen. WE must be mindful of these tricks that heirs sometimes play against a person claiming the Reserved Portion: for example, the heirs will invite the person claiming the Reserved Portion to come over and choose a painting in the division of the deceased's collection. Technically speaking, the person who is claiming the Reserved Portion cannot hold onto the painting, despite it being gifted to them by the heirs since such is tantamount to an acceptance of the inheritance.

In relation to renunciation, there was also an interesting confirmation in the case **Cutajar v. Cutajar (2003)**. Here, one of the siblings challenged the will on the basis of coercion alleging that it was concluded as a result of pressure being put on the testator by the other siblings. Eventually, the plaintiff won the case and went on to claim his share of the inheritance as an heir. The interesting fact lies in the trajectory of the descendants in this regard. Since the defendant had been well favoured in the latest will which the court had deemed null, he accepted the inheritance. However, following the will being declared null and the old will coming into force again, he realised that he was in a bad situation. As a result, he said renounced to the inheritance as under the old will and claimed the Reserved Portion. In this regard, the original plaintiff claimed that this was an impossibility stating that just because the

will changed doesn’t mean the heir had a right to change his mind and refuse the inheritance. The court disagreed with this argumentation stating that the original defendant had a right to claim the Reserved Portion as when the decision was made to accept the inheritance it was taken under difference scenarios: the latest will in which he benefitted being revoked by operation of a court judgement didn’t prejudice the original defendant’s right to change his mind and refuse the inheritance.

> 🌿 **Article 851**
>
> *A person who, by a judgment of the competent court, has been declared to be the heir, or has been condemned expressly in such capacity, shall be deemed to be the heir with regard to all the legatees and creditors of the inheritance.*

This outlines that a judgement by a competent court declaring someone an heir or condemning someone from acting in that capacity, makes them so or makes them not so in relation to all the legatees and creditors of the inheritance. The question raises is which is the competent court that can declare someone an heir?

If there are doubts as to who the lawful heir is, one is to file an *appertura ta’successjoni* in the Court of Voluntary Jurisdiction. Within the application, one must state all the fact including:

- The fact that Person A passed away on a specified date as indicated by their death certificate - Doc. A
- The fact that Person A made or didn’t make a will, evidenced by the relevant searches
- The facts surrounding the issue of who the heir is
- A plea to the court to declare in whose favour the succession devolves.

When the court declares and issues its decree, that person is deemed to be an heir and that person has to satsify all the legacies, if they are not abated, and all the liabilities of the inheritance, including the payment of the Reserved Portion.

Article 852

Arrangements made for the funeral, acts of mere preservation, or of provisional administration, shall not, unless the status of heir has also been assumed, imply acceptance of the inheritance.

The provisions of sub-article (1) shall also apply in the case of judicial proceedings in respect of possessory actions, in which case the person entitled to succeed shall be considered as de jure curator of the inheritance in terms of ***article 886(2)****.*

Sub-article (2) shall only apply if the person entitled to succeed states in the action that he is acting in his capacity of de jure curator.

This article delineates that there are some acts which are not acts that imply the acceptance of the inheritance. These include:

1. If one arranges for the funeral, including going to the bank and giving instructions to pay for the funeral from the accounts of the estate.
2. If one engages in acts of provisional administration, i.e., to keep things going until the heirs take over. For example, to accept rents that are coming in from property owned by the testator or filing a declaration *causa mortis*. Such is done without prejudice and doesn't impact the ability to renounce.
3. If one files a lawsuit (even an *att ta' spoll*) or acts as a defendant in a lawsuit against the estate to protect the property. One is not presumed to be an heir who has accepted the inheritance so long as one makes it clear in the nomenclature that they are acting as a curator to the inheritance, i.e. that the inheritance is a separate bubble from the person acting. If a person is acting as a curator of the inheritance, it is not necessary that that person have accepted the inheritance. In so acting, the person in question has not prejudiced their rights or accepted the inheritance.

Article 853

Any donation, sale, or assignment of his rights of succession by one of the co-heirs, whether in favour of a stranger or of all or any of his co-heirs, shall imply his acceptance of the inheritance.

The same applies -

(a) with regard to a renunciation made, even if gratuitously, by one of the heirs in favour of one or more of his co-heirs;

(b) with regard to a renunciation made, even in favour of all his co-heirs indiscriminately, when such renunciation is made under an onerous title.

Here, the law clarifies that any donation, sale or assignment of rights is an acceptance of the inheritance. An issue that can arise here is the following: Person A renounces to the inheritance. If nothing further is stipulated, automatically what the person would have received accrues in favour of the other heirs. However, say in the deed of renunciation, Person A renounces to the inheritance nonetheless in favour the other heirs. While in theory the effect is the same, since it is not the law that mandates the application of accretion but the deed of renunciation is making a proclamation as to who the share should go to, therefore, giving an order, it counts as an acceptance of the inheritance.

The law states that if one gives an order, even if it is given free of charge (ordering something the law mandates anyway), it is deemed to be an act of acceptance of the inheritance. To renounce one must walk away and let the law deal with the situation - by intervening, even minimally, even if the intervention mandates the same thing the law states, then it is tantamount to an acceptance.

Nevertheless, in this regard, we take into account **Article 854** which consider that if the renunciation is made gratuitously by one of the co-heirs in favour of all the co-heirs, then such will not be considered to be an acceptance of the inheritance.

Article 855

If the heirs do not agree as to accepting or renouncing the inheritance, the party accepting shall alone acquire all the rights, and become subject to all the liabilities of the inheritance.

If a situation arises where the heirs can't agree between them whether to agree or renounce and one alone accepts, then such heir is responsible for all the payment of all liabilities. If subsequently within the ten year period mandated at law, someone accepts after, such person must join the original acceptor in the pluses and minuses of the estate. If ten years pass and only one heir has accepted unconditionally, then such person receives all the inheritance and is responsible for all the liabilities which cannot be shared between the other co-heirs.

> 🌿 **Article 856**
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> *Where a person to whom a succession has opened dies without having renounced or accepted it, the right to accept such succession shall vest in his heirs; and in such case the provisions of the last preceding article shall also apply to such heirs.*

The law stated that if a person hasn't renounced or accepted their inheritance and they pass away, the right to accept or renounce goes to such person's heirs who can accept or renounce as they wish. **Article 857** outlines the possibilities that exist in relation to how such heirs can accept. Imagine the following scenario:

There exists a father, son and grandchild.

The father dies.

The son has not accepted or renounced the inheritance.

The son dies.

The right to accept or renounce the inheritance passes to the grandchild who can accept or renounce as they wish. However, such grandchild can:

1. Accept both the inheritance of the grandfather and the father.
2. Accept the inheritance of the father and renounce of the grandfather.

The grandchild is however precluded from renouncing to his father's inheritance and accepting the grandfather's.

Article 858

A person who has accepted an inheritance cannot impeach the acceptance, unless such acceptance was the result of violence, or of fraud practised upon him.

Nevertheless, if a will is discovered which, at the time of acceptance, was unknown to the person accepting, such person acceptance, such person shall not be bound to discharge the legacies bequeathed in such will beyond the value of the inheritance, saving the reserved portion to which such person may be entitled.

This solidifies the fact that once a person has taken a decision to accept an inheritance, it is case in stone and cannot be challenged unless it is a result of violence or fraud practised on him. Take the following example into account:

A parent passes away and all the children go to the notary to see what needs to be done regarding the estate. The notary provides a list of instructions and collectively the children begin working on it together. The notary then starts to look for a will. Until this point, the children believe they are heirs in equal share in the estate and work together as a team to facilitate the process. However, it comes to light that one of the siblings knew about the will drafted under which one of their siblings was going to suffer. Therefore, there was an element of deceit and the person who finds out the truth can change their mind in relation to the acceptance of the inheritance since they didn't know about the new will under which they were disadvantaged. Such person is able to claim the Reserved Portion if they wish.

Article 859

The right of accepting a vacant inheritance is prescribed by the lapse of thirty years.

This article deals with the period of limitation as to the right to accept a vacant inheritance. As already outlined, the prescription to accept an inheritance is ten years. However, when looking at a vacant inheritance, i.e. where no one has claimed the estate, the prescriptive period is thirty years. In such a case, if no one comes forward to claim the estate and it remains vacant, it becomes government owned.

Therefore, if someone has accepted the inheritance, the prescriptive period wherein others can accept, i.e., the ten year period, starts running. If no one has accepted the inheritance, then there is thirty years within which to claim it.